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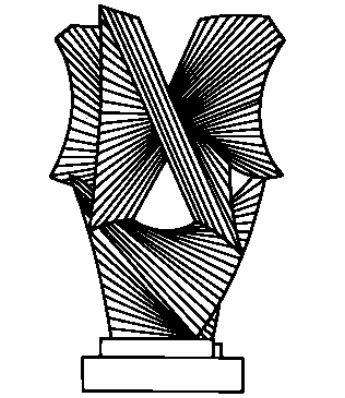

DEADLINES IN ADMINISTRATIVE LAW

Jacob E. Gersen and Anne Joseph O'Connell

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Deadlines in Administrative Law

Jacob E. Gersen[*] and Anne Joseph O'Connell[**]

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

[**] Assistant Professor of Law, Boalt Hall, 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, Tino Cuellar, Dan Farber, Phil Frickey, Dan Ho, 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 of administrative agencies. Restrictions on the appointment and removal of personnel,[1] the specification of requisite procedures for agency decisionmaking,[2] presidential prompt letters,[3] ex ante review of proposed decisions by the Office of Management and Budget,[4] legislative vetoes,[5] and alterations in funding and jurisdiction[6] all constitute potential mechanisms for the control agency behavior. In this paper, we focus on a much more elemental mechanism of control that has surprisingly gone relatively unnoticed in the literature on administrative agencies: control of the timing of administrative action.[7] The use of

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[1] *See* Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 TENN. L. REV. 841 (1994); Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779 (2006); Anne Joseph O'Connell, Qualifications (working paper 2007).

[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); 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, Roger G. Noll, and Barry R. Weingast, *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 outcomes away from the legislative intent).

[3] *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1250, 1278-79 (2006); 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); Robert W. Hahn & Mary Beth Muething, *The Grand Experiment in Regulatory Reporting*, 55 ADMIN. L. REV. 607 (2003); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2290-99 (2001).

[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* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1266-70 (2006).

[5] *See generally* Michael Herz, *The Legislative Veto in Times of Political Reversal: Chadha and the 104th Congress*, 14 CONST. COMMENTARY 319 (1997); Robert F. Nagel, *The Legislative Veto, the Constitution, and the Courts*, 3 CONST. COMMENTARY 61 (1986); Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

[6] *See* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2007).

[7] *But see* Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467 (1987); Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171 (1987); 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. 72 (1997); Eric Biber, *The Importance of Resource Allocation in Administrative Law: A Case Study of Judicial Review of Agency Inaction Under the Administrative Procedure Act* 28-36 (unpublished manuscript 2007, ADMIN. L. REV. (forthcoming). The study of deadlines is related to the study of statutory hammers. *See, e.g.,* M. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149 (1995); George A. Bermann, *Administrative Delay and its Control*, 30 AM. J. COMP. L. 473 (1982).

deadlines that require agency action to commence or complete by a specific date is extremely common in the modern administrative state. For example, statutorily specified deadlines are found throughout much modern environmental legislation.[8] Environmental statutes are hardly an exception in this regard, but even basic descriptive statistics about the frequency and nature of these mechanisms are lacking, much less a fully elaborated theory of regulatory deadlines.[9] This paper offers the beginning of such a theory by providing a doctrinal, theoretical, and empirical analysis of deadlines in administrative law.

Deadlines are important for several reasons. First, notwithstanding the plethora of potential ways for Congress to control the bureaucracy, specifying the content of agency rulemaking or adjudications is often difficult ex ante.[10] A central premise of the administrative state is that agencies have better information and greater expertise than the Congress that initially delegates authority to agencies.[11] Because narrow delegations eliminate agency expertise in policy-making, it is rare that Congress demands specific content of agency decisions. Absent the ability to regulate content directly, the most obvious way of controlling agency behavior is to regulate either the method of agency decisionmaking or the timing of the decision. The former has received exhaustive attention in administrative law. Structure and process scholars have long emphasized the importance of procedural requirements from organic statutes or the Administrative Procedure Act,[12] administrative common law,[13] and the Constitution.[14] Related efforts to regulate the timing of agency decisions have received virtually no attention comparatively.[15]

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[8] *See generally* Environmental and Energy Study Institute & the Environmental Law Institute, *Statutory Deadlines in Environmental Legislation: Necessary But Need Improvement* (Unpublished manuscript 1985).

[9] The available evidence is almost exclusively focused on environmental policy, an 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. (forthcoming 2007).

[11] *See* Kathleen Bawn, *Political Control versus Expertise: Congressional Choices about Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995); Jonathan Bendor and Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293 (2004); Philippe Aghion and Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1 (1997); Steven Callander, *A Theory of Policy Expertise* (unpublished manuscript, 2006); Sean Gailmard, *Discretion Rather than Rules: Choice of Instruments to Constrain Bureaucratic Policy-Making* (unpublished manuscript, 2006); Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise* (John M. Olin Center for Law, Econ & Bus Paper No 553, July 2006), online at http://ssrn.com/abstract=921439 (visited Mar 30, 2007).

[12] *See generally* Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision-Making*, 14 J L. ECON. & ORG. 114 (1998); Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987).

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

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

[15] There is a small literature on the timing of judicial review and its impact on administrative law. *Compare* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 198, 233 (1994); JERRY L. MASHAW & DAVID L. HARFST, THE

Second, delay is an increasingly prominent fixture in administrative law.[16] A recurrent complaint in the 1980s and 1990s about regulatory policy was that agency decisionmaking 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. Virtually the only remedy 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 these justifications emphasize the use of deadlines as a way of controlling agency behavior. A third reason for study concerns the internal coherence of administrative law. A running theme in 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

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STRUGGLE FOR AUTO SAFETY (1990); *with* Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules,* 58 OHIO ST. L.J. 86 (1997).

[16] *Compare* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) *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 (2000); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992).

[17] STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE (1993); MASHAW & HARFST, *supra* note 15; Thomas O. McGarity, The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld, 75 TEX. L. REV. 525 (1997); McGarity, *supra* note 16.

[18] *See generally* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004); Biber, *supra* note 7; Eric Biber, *Two Sides of the Same Coin: Judicial Review Under APA Sections 706(1) and 706(2)* (Unpublished manuscript 2007, VA. ENVTL L. REV. (forthcoming));.

[19] *See, e.g.,* Abbot, *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, *supra* note 7, or 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* (unpublished manuscript 2007).

[21] *See* Magill, *supra* note 19. 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 (2002). *See generally* Vermont Yankee Nuclear Power Corp. v. NRDC, 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 Foundation of Chenery*, 116 YALE L.J. 952 (2007).

[23] *See, e.g.*, United States v Florida East Coast Railway, 410 U.S. 224 (1973).

[24] 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.").

determine how best to allocate internal resources.[25] Administrative deadlines run head-on into these strands of doctrine because in a world of limited resources, deadlines reshuffle agency resources from non-deadline 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, this Article establishes the frequency with which deadlines are utilized, against which agencies they are levied, and both the direct and indirect effect of deadlines on agency actions.[26] Part I provides a theoretical framework for analyzing the use and misuse of deadlines. We focus on the reasons Congress might choose to use timing restrictions to control agencies rather than substantive constraints or structure and process restrictions that are commonplace in the literature. One rational reconstruction of congressional deadline use is to speed up agency process by trading off rapidity for the quality or structure of agency decisions.

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. We analyze the relationship between administrative deadlines and the duration of agency actions; deadlines generally do increase the pace of agency action, but by relatively modest magnitudes. We also emphasize the distribution of deadlines across agency actions; not surprisingly, deadlines tend to be imposed on more important significant regulatory actions and the vast bulk of deadlines are issued against a handful of administrative agencies. Out of a concern for related changes in administrative decisionmaking, we also ask whether agency decisions constrained by deadlines are more likely to be issued using different procedures and in point of fact, they are; deadlines are associated with interim final rulemaking, a deviation from the ordinary mode of notice and comment informal rulemaking.

Having offered some theory on congressional choice and empirical evidence about agency behavior, we turn to the courts. Part III examines the way that courts address the presence of deadlines in administrative law, surveying the use of what we call deadline doctrines. When a statutory deadline exists, many courts excuse agency failure to use required procedures when a deadline is present or relax the intensiveness of substantive review.[27] In other contexts, the presence of deadlines makes legal challenges both more likely to survive threshold questions and more likely to result in agency defeats.[28] And many deadline doctrines are also 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 avoid the costly and time-consuming process of notice and comment regulation. To the extent that public input and reasoned agency deliberation is taken to be a desirable attribute of the administrative state, deadlines will often undermine those goals. There are many nuances and countervailing effects that we discuss more extensively below. Our analysis, however, establishes a number of risks and benefits from deadlines. In any given policy domain,

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[25] *See* Biber, *Resource Allocation*, *supra* note 7.

[26] For a more general overview and discussion, *see* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Administrative State* (unpublished manuscript 2007, VA. L. REV. (forthcoming)).

[27] *See* Part III, *infra*.

[28] *See id*.

deadlines can force desirable agency action, prompting welfare-maximizing or accountability-enhancing action by recalcitrant agencies. They can, however, also produce undesirable side effects, generating costly uncertainty and delay in domains that all parties would agree are more important (if all parties had full information), generating lower quality decisions for deadline-constrained actions, and shifting agency policies to less desirable modes of decisionmaking.

I. THEORY

The deadlines that constrain administrative agencies are generally imposed by Congress. Theories of congressional choice are legion and we do not want to wed ourselves any one of them. Perhaps congressional action is best understood from the perspective of public choice. Alternatively, perhaps Congress should be treated as a single institutional decisionmaking or maybe it should be disaggregated to a focus on parties or interests. Maybe the interaction between Congress and the bureaucracy is best modeled as a principal-agent problem, but of course these models abstract away from many institutional details. The discussion that follows is somewhat heterogeneous in its methods, drawing on insights from many, though certainly not all, models of congressional choice. In a sense, we are engaging in off-the-rack theorizing. Rather than advance a specific theory of congressional choice as correct, we take the most common theoretical framework and apply it to the context of deadlines, relaxing or expanding certain assumptions or insights as we proceed. The analysis begins with a simplified problem of institutional design, assuming a unitary Congress, Agency, and Court. We then relax the assumption of unitariness and explore how intra- and inter- institutional heterogeneity affects the use and misuse of deadlines.

A. Institutional Design

Suppose there are three actors—a Principal, and Agent, and a Monitor—that correspond imperfectly to Congress, an administrative agency, and a court respectively. Like others before us, we conceive of the key design problem for Congress as a four step process: (1) Delegation v. Casework; (2) Level of Substantive Discretion, (3) Procedural Restrictions, and (4) Judicial Enforcement. We assume that Congress prefers the policy to be implemented to be closer to its preferences (a simple spatial model).[29]

Suppose the Principal seeks to accomplish some arbitrary end, for example, to address 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 a level of substantive restrictions on the agency action. Substantive restrictions on agency policy might derive from a narrow statutory mandate, from a low level of discretion (equivalently a very high level of statutory detail), the express prohibition of certain policies, or a narrow (broad) bound of agency jurisdiction or authority. Administrative agencies have access to information that is not available to Congress, but that a rational principal would want the agent to utilize in formulating policy. Congress could demand that regulatory outcomes coincide with the enacting Congress' preferences, but without access to the agency's underlying expertise, this will be difficult. Thus, some degree of substantive discretion almost always accompanies a statutory delegation to the bureaucracy.

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

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, requiring, 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 does.[33] A statute might regulate the transparency of agency decisions like sunshine statutes.[34] Or, the organic statute might mandate that specifically identified actors within the bureaucracy consider 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 significant way for Congress to control agency policy, and therefore agency drift and the ultimate substantive policy outcome. [37] Within the structure and process literature, temporal restrictions have received far less attention.[38]

Having specified the level and type of procedural restrictions, Congress must also decide whether to make such provisions judicially enforceable. Just as the decision to delegate to the executive generates one set of agency problems, the decision to delegate enforcement authority to the courts generates another.[39] We remain agnostic about whether the judiciary is a faithful or unfaithful agent of Congress.[40] However, the analysis does assume that even if judges are faithful agents, there is 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 held unlawful. This risk of error need not be symmetric, nor zero in expectation. However, the risk of

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[30] *See, e.g.,* National Labor Relations Act.

[31] *See* United States v. Florida East Coast Railway, 410 U.S. 24 (1973).

[32] *Compare* City of West Chicago v. Nuclear Regulatory Commission, 701 F.2d 632 (1983), *with* Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission, 735 F.2d 1437, 1444-45 n.12 (D.C. Cir. 1984).

[33] 42 U.S.C. § 4332. *See* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978). *See generally* Celia Campbell-Mohn & John S. Applegate, *Learning From NEPA: New Guidelines for Responsible Risk Legislation*, 23 HARV. ENVL. L. REV. 93 (1999).

[34] Elizabeth Garrett & Adrian Vermeule, *Transparency in the Budget Process* (unpublished manuscript, 2006); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655 (2006).

[35] United States v Florida East Coast Railway, 410 US 224 (1973).

[36] Anne Joseph O'Connell, Qualifications (working paper 2007).

[37] Southern Railway v. Virginia, 290 U.S. 190 (1933).

[38] *But see* EPSTEIN & O'HALLORAN, *supra* note 2.

[39] Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006).

[40] *See, e.g.,* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975).

error is likely higher for enforcement of substantive limitations on agencies (such as jurisdictional determinations) than for temporal restrictions on agencies (such as deadlines).[41]

While courts may have different capacities to judge temporal and substantive dimensions of agency decisions, Congress faces similar capacity constraints. We wish to emphasize this tradeoff between the temporal dimension and the substantive dimension for Congress. Congress has a temporal preference as well as a substantive preference. It is easier to specify and monitor the temporal dimension, but doing so may produce shirking or reductions in quality along the substantive dimension. To illustrate, 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 do not. Or, the agency can engage in deregulation, but only after a very long delay. 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. 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." That is, agencies may prefer delay as a vehicle for shirking than producing low quality regulations, in which case the importance of statutory deadlines even greater.

Consider the effect of tandem requirements, then, of deadlines and other procedural requirements. Suppose Congress ratchets up other procedural requirements while simultaneously imposing a relatively quick deadline. A likely result is a decrease in the quality of agency deliberations and decisionmaking.[42] If a task that normally takes three hours 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 in the context of certain FDA decisions under deadline constraints.[43] If agencies must attempt to satisfy extensive procedural requirements in an unrealistic timeframe, the quality of agency decisions will likely fall, all else equal.[44]

Both the temporal effect and the substantive effects will have implications for agency actions not guided by deadlines as well. In addition to the direct effect on timing and quality of agency action, deadlines will also produce a shift in the internal allocation of agency resources.[45] 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 correlation between timing and quality, the use of deadlines in one policy area will affect the quality of decisions in others. In a world of limited

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[41] *Cf.* Gersen & Posner, *supra* note 10.

[42] *See* Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking,* 78 N.C. L. REV. 1013, 1047 (2000); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1456 (1992). 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 15 n.82.

[43] Carpenter et al., *supra* note 20.

[44] *See id.*

[45] *Cf.* Biber, *supra* note 7; Pierce, *supra* note 7.

resources, the agency 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, deadlines can also help legislators make an end-run around existing procedural requirements. For example, the legislative rule doctrine in administrative law requires that certain types of agency decisions can only be promulgated using notice and comment rulemaking.[46] 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,[47] imposing a deadline might obviate those requirements indirectly.[48]

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 social 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.[49] 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 quite drastically from the median preferences of the Senate.[50] Modeling congressional decisionmaking then might require an explicit focus on coalitional bargaining within the legislature.

Assume there are two coalitions in the legislature, bargaining over the terms of proposed legislation. Just as there will be bargaining about the substantive requirements of the bill, there will also be bargaining over procedural provisions, like 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 legislator may be willing to vote for a stronger substantive bill that also includes an unrealistic deadline. Other times, the existence of a deadline clause will preclude substantive alternatives entirely. For example, a deadline may eliminate the possibility of further study prior to action or the

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[46] *See, e.g.,* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 917 (2004); 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). Kevin W. Saunders, *Interpretive Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 352; Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 542 (1977). *See also* Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. (forthcoming 2007).

[47] *See infra* note 128.

[48] *See* Part III, *infra*.

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

[50] *See* John Londregan & James M. Snyder, Jr., *Comparing Committee and Floor Preferences*, 19 LEG. STUD. Q. 233 (1994); Keith Krehbiel, *Are Congressional Committees Composed of Preference Outliers?*, 84 AM. POL. SCI. REV. 149 (1990).

solicitation of comments, among other things. We do not have anything general to say about how bargaining will tend to affect the extent of deadlines in statutes. Deadlines should, however, be as much or as little a point of legislative bargaining as other statutory provisions.

Certain institutional actors also exert disproportionate influence on the policy process.[51] For example, the committee with primary jurisdiction over a proposed bill may well undermine the bill's prospects for enactment even if a majority of the floor favors it.[52] If veto points like this are real and groups of legislators exert more control over legislation than the median legislator on the floor, actors with preferences different from those of the floor might well drive policy. Statutory deadlines, if met, 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 if at the cost of a higher substantive guarantee. The general point is simply that preferences about timing trade-off against preferences about substance.

More important, just as partisan and preference divisions vary within a time period, congressional preferences vary over time as control of the legislature shifts or social views change. 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 when control of the legislature shifts in the future.[53] Decisions about the content, substantive restrictions, and procedural restrictions must reflect a balance between these two types of threats.

Deadlines balance these risks in a novel manner. The agency could be required to issue its rule during (or soon after or not soon after) the current period Congress. In that case, the deadline guards against bureaucratic drift by ensuring that the enacting period Congress gets to see (and possibly object to or overrule) the final regulation. The timing rule affects monitoring as well. By controlling the timing of agency action, deadlines allow legislators to ensure their presence (or absence) to respond to criticism and complaints by private parties.[54] Short statutory deadlines also guard against legislative drift by ensuring that agency action is implemented during the current Congress. Senators up for reelection in later cycles may care less about legislative drift because they retain their seats for a longer period of time. Unlike other legislative

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[51] *See generally* WILLIAM ESKRIDGE, PHILIP FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 59 (3d ed. 2002).

[52] *See* DAVID C. KING, TURF WARS 18 (1997).

[53] *See generally* 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 (1989); Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J. L. ECON. & ORG. 111 (1992); *see also* J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003); O'Connell, *supra* note 26, at 52-53.

[54] Mathew D. McCubbins & Thomas Schwartz, *Police Patrol Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms*, 28 AM. J. POLIT. SCI. 165 (1984).

tools that tend to control one type of drift at the expense of another, statutory deadlines do a reasonable job of jointly managing both.[55]

Most deadlines, however, are set in one Congress and come due during a future period Congress. Suppose the deadline is of this sort but comes due before the next Presidential election. So long as a House or Senate 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 SEC regulations prior to the next election may provide some greater degree of protection for the regulatory regime.[56] The future legislature can always repeal or alter the program, but once regulations have been implemented, perhaps some form of status quo bias will make it marginally harder to eliminate them—especially during periods of divided government.[57] 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 as well. 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. Agencies also grow more or less sympathetic to the views of congressional coalitions as time passes and different parties control the Presidency.[58]

To the extent that statutory deadlines require judicial enforcement, the degree of heterogeneity within the judiciary over time might make deadlines more or less attractive to legislators as well. The willingness of judges to aggressively enforce deadlines will have an obvious impact on the willingness of legislators to rely on deadlines. Changes in personnel or doctrine will each affect the legislative calculus as it pertains to using deadlines.

In sum, 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. We have argued that deadlines are an important element of the legislative toolkit, whose use and misuse implicates core problems of institutional design. And we have emphasized a range of relevant variables that will 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, requires a systematic empirical analysis, a task we begin in the next Part.

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[55] 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 6 to 14 months, are possible, but are also precisely when courts are most sympathetic to agency arguments that there is good cause to avoid notice and comment procedures. The short deadline provides political benefits, but therefore also comes with some procedural costs. In part, these costs can be compensated for by using oversight hearings and more careful monitoring of agency action.

[56] *Cf.* O'Connell, *supra* note 26.

[57] *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1999).

[58] In divided government, Congress may also impose unrealistic but symbolically powerful deadlines on agencies in the hope that the public will blame the agencies for not meeting the deadlines.

II. EMPIRICAL ANALYSIS

Although a nascent literature studies the use of deadlines in applied contexts,[59] there is little systematic evidence of the prevalence and implications of administrative deadlines for agency rulemaking.[60] Our theoretical discussion of administrative deadlines suggests several potentially important effects. But the current literature lacks knowledge about even the basic contours of deadlines. How frequently are deadlines imposed on agencies? Which agencies are most likely to be constrained by deadlines? A basic but extremely important empirical 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 decisionmaking away from certain forms of conventional procedures like notice and comment and towards other less time-consuming mechanisms? Or do deadlines reallocate resources away from nondeadline actions toward deadline actions? Although the answers to these questions are necessarily tentative, the analysis suggests there are critical tradeoffs between the timing of agency action, the procedures used to make agency decisions, and the quality of regulatory policy.[61]

A. Descriptive Overview

1. Deadlines Over Time

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[59] *See* M.K. Olson, *Managing Delegation in the FDA: Reducing Delay in New-Drug Review*, 29 J. HEALTH POLITICS, POLICY & L. 397 (2004); Amy Whitenour Ando, *Waiting to be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J. L. & ECON. 29 (1999); Daniel Carpenter, *Groups, the Media, Agency Waiting Costs, and FDA Drug Approval*, 46 AM. J. POL. SCI. 490 (2002); Abbot, *Case Studies*, *supra* note 7.

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

[61] The data are drawn from agency semiannual reports to the *Unified Agenda of Federal Regulatory and Deregulatory Actions*, which is published in the *Federal Register*, from April 1983 to October 2003. For a detailed description of the data and its advantages and limitations, see O'Connell, *supra* note 26, at 20. The *Unified Agenda* reports represent a successive picture of agency activity; therefore, there is considerable overlap among the semi-annual 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 commenting 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 particular rulemaking actions, such as an NPRM, are counted only once. For the analysis presented here, where there are multiple entries using the same Regulatory Identification number, a unique identifier, only the most recent *Unified Agenda* report entry was kept. Agencies do not report on deadlines until the April 1987 *Unified Agenda*. The information reported starting in 1987, however, contains some data on deadlines prior to 1987. 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 Advanced 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, according to the data files, but does not report many dates for those deadlines.

Table 1 presents the number of statutory, judicial, and total deadlines by year.[62] The use of deadlines is highest in the early 1990s, with 241 in 1991 and 256 in 1992. After that point, the use of deadlines appears to fall off somewhat. In 1998 and 1999 there were only 89 and 60 deadlines respectively. It is tempting to say that deadlines fell off in the 1990s from a high in the 1980s, but deadlines were used extensively in the early to mid 1990s and the year 2000 saw 146 statutory deadlines. The occurrence of deadlines varies significantly from year to year, but it does 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, the vast bulk of deadlines imposed on administrative agencies are statutory deadlines rather than judicial deadlines—thus, our emphasis on congressional choice in Part I. Figure 1 presents a bar graph of deadlines over time, where the total deadlines are decomposed into statutory and judicial deadlines. In most years, statutory deadlines constitute the vast bulk imposed on agencies, hovering between eighty and ninety percent. However, there are exceptions. For example, judicial deadlines constituted nearly half of all deadlines imposed in 1998 and 1999, suggesting that judicially imposed deadlines are a real and important conceptual category, if less frequently utilized.

2. Deadlines by Agency

Table 2 disaggregates deadlines by the agency on which they were imposed. Most agencies report few statutory or judicial deadlines during the covered time period. However, a handful of agencies list more than 100 deadlines during this relatively brief time period. The vast majority of all deadlines targeted the Environmental Protection Agency (EPA), which was subject to more than 500 deadlines during this time period. The Department of Interior received nearly 300 deadlines as well. The Department of Transportation's (DOT) various subdivisions received more than 100 deadlines. The Department of Agriculture (USDA) similarly received more than 200 in aggregate. The Department of Defense received approximately 150 deadlines, as did the Department of Health and Human Services (HHS).

For most agencies, deadlines are imposed by Congress rather than courts. There are, however, a few obvious outliers. The Department of Interior reported 130 judicial deadlines and only 110 statutory deadlines, suggesting an ongoing dispute with the courts. The only other agency with significant judicially imposed deadlines is the EPA. The EPA's Air and Radiation division listed 184 deadlines from the courts, and its Water division submitted information on 88 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.

Figure 2 traces the number of statutory deadlines reported with actual dates for four major agencies, from 1988-2003: the USDA, EPA, HHS, and DOT. A few points are noteworthy. First, there are two evident spikes in the plot. One affects three and possibly four agencies in the late 1980s and early 1990s, including the USDA, DOT, EPA, and arguably 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

[62] The table contains deadline figures 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 scope of actual deadlines.

(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 occurs around year 2000, but only for the EPA. The other thing to note is that there is no obvious increase or decrease in the use of deadlines over this (admittedly short) time period. If one were to draw a regression line through these data points, it would be very slightly downward sloping, but virtually flat. Were one to isolate single agencies, the line would be more sharply downward sloping for the DOT and USDA. Figure 2 is useful as an initial overview, though it masks a good deal of potential variation and information. For example, even if the use of deadlines were flat over time, it might still be the case that rules being targeted for deadlines differ or that agency response to deadlines changes over time.

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. To explore this question, we essentially ask whether the presence of a statutory deadline usually implies the presence 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 modest.[63] To illustrate, consider Table 4, which presents the data on deadline overlap categorically. Of all unique regulatory actions in the dataset, more than ninety percent are not associated with a deadline. Six percent are associated with only statutory deadlines; just less than one percent are associated with only a judicial deadline; and just less than one tenth of a percent are associated with both a judicial and a statutory deadlines.[64]

4. Importance of Deadline Actions

If deadlines are relatively rare, as they are, then perhaps our topic is, at most, theoretically intriguing, but practically unimportant. Evaluating this potential objection requires knowing not just about the frequency of deadlines, however, but also their targets. If deadlines are not only rare, but also regulate trivial agency actions, then this critique would have genuine force. Table 5 categorizes regulatory actions according to whether or not they are "significant." Of those actions accompanied by any deadline (statutory or judicial, or both), about 34 percent are significant regulatory actions,[65] compared with about 20 percent of actions with no deadline.

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[63] We use three common tests: (1) Pearson correlation with a one-tailed test for statistical significance, (2) Kendall Tau's 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.

[64] 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 two tenths of one percent of unique RIN's are associated with both judicial and statutory deadlines.

[65] The law defines "significant," or "major," rules as those that have at least a $100 million, "or otherwise significant," effect on the economy. Exec. Order No. 12,866 § 3(f) (Sept. 30, 1993). In the database created from the

Although most agency actions are not significant actions, deadline actions are much more likely to be significant regulatory actions than are non-deadline actions. This difference in means is significant in an independent samples t-test.[66] 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 coefficients and effects that are statistically significant. Deadlines more often accompany significant regulatory actions, rather than more mundane agency decisions.

Moreover, Congress is 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.[67] Each association in Table 7 is also 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, or federal 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 decisionmaking 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 significantly alter agency behavior on all three fronts.

1. Alternative Procedures

One important distortion of agency process would be less reliance on standard notice and comment rulemaking procedures. For example, "interim final rules" and "direct final rules" are two large categories of legally binding rules that are issued without prior comment.[68] Table 8

Unified Agenda reports, actions were deemed significant if Priority Code=10 (Economically Significant) or 20 (Other Significant), or if Major=Yes. *See* O'Connell, *supra* note 26, at 2 n.7, 57.

[66] A t-test of the means of significant actions in the two samples (RINs with any deadline (with and without an actual date) versus RINs with no deadline) is significant at $p < 0.000$. The test does not assume equal variances between the two samples as that assumption is rejected by Levene's Test for Equality in Variances with F-value=510.865 (p-value < 0.000).

[67] All 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. For this analysis, we looked only at reports to the *Unified Agenda* from April 1988 to October 2003. Agencies do 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 where both were reported. Duplicate information was removed in the same manner as before. *See supra* note 61.

[68] "Direct final rules" become effective some time after publication in the *Federal Register* unless the agency receives "adverse" comments. Second, "interim final rules" take effect immediately upon publication but the agencies takes 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. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGC-98-126, FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISHED FINAL ACTIONS WITHOUT PROPOSED RULES 6-7 (1992); Asimow, *Public Participation in the Adoption of Tax Regulations*, 44 TAX L. 343, 343–44 (1991); Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 401-02 (1999)..

presents a breakdown of deadline and nondeadline actions according to the use of interim and direct final rules.[69] For purposes of discussion, focus on the second and fourth columns of the Table. Of the class of agency actions accompanied by any deadline, 12.43 percent issued interim final rules, compared with only 7.66 percent of actions not accompanied by a deadline.[70]

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.[71] As the bottom half of Table 8 illustrates, direct final rules are used less often and are significantly less likely to be used for deadline actions. In part, this is likely because direct final rules are supposed to be used for non-significant actions and deadlines tend to get placed on significant regulatory actions. Although the actual percentages are extremely small—all less than one percent—the proportion of actions without a deadline for which direct rules were issued (0.76 percent of RINs) is more than three times the proportion of actions with a deadline for which direct rules are issued (0.17 percent of RINs).[72] The simple correlation between deadlines and interim final rules is also positive and statistically significant, and the simple correlations between deadlines and direct final rules is negative and statistically significant, as Table 9 shows.

2. Extent of Public Participation

Different procedures do not necessarily mean lower quality decisions. Deadlines may, however, produce distortions of traditional commenting and public participation in agency decisionmaking, undermining the administrative process.[73] Deadlines are actually associated with more extensive comment periods.[74] This may appear counterintuitive, but recall that deadlines are more often associated with significant actions, and significant actions tend to have more extensive comment periods than non-significant actions. The real question is whether within the class of significant regulatory actions, those associated with deadlines generate more comments or less comments. Among significant actions, deadline actions are issued with significantly fewer comment periods.[75] Within the relevant subset, deadlines produce less public

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[69] On direct rules, *see* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1 (1995).

[70] A t-test of the means of interim final rules in the two samples (RINs with any deadline (with and without an actual date), RINs with no deadline) is significant at $p < 0.001$. The test does not assume equal variances between the two samples as that assumption is rejected by Levene's Test for Equality in Variances with F-value=296.792 (p-value < 0.000).

[71] 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.

[72] The difference is significant. A t-test of the means of direct rules in the two samples (RINs with any deadline (with and without an actual date), RINs with no deadline) is significant at $p < 0.000$. The test does not assume equal variances between the two samples as that assumption is rejected by Levene's Test for Equality in Variances with F-value=53.503 (p-value < 0.001).

[73] *See generally* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005).

[74] The two variables are significantly correlated, with a simple correlation coefficient between 0.041 and 0.049 (depending on the estimator). The "comments" variable's value increases by one for a new comment period, a reopened comment period, or an extended comment period.

[75] The mean number of comment periods for significant regulatory actions with deadlines is 0.673 and the mean number of comment periods for significant regulatory actions without deadlines is 0.824. Not every significant action has a comment period in actuality; for instance, an agency could issue a significant regulation as an interim

input and less agency process, two variables typically associated with higher quality agency decisions. At a minimum, deadlines involve a tradeoff between the pace of agency action and the extent of the decisionmaking process.

3. Duration of Agency Actions

Because deadlines are a proposed solution to the problem of agency delay, an important question is whether deadline actions actually take less time to complete than nondeadline actions? If deadlines do not even alter the timing of agency decisions, then the range of potential negative side effects is all the more concerning. Table 11 provides basic correlations between duration, deadlines, and regulatory significance.[76] Significant regulatory actions are longer and deadline actions are shorter than non-deadline actions. Expressed differently, the average duration for rulemakings with an NPRM that end in a final action, either traditional final rule or interim or direct final rule, but do not have any deadline reported, is 518.96 days (95 percent confidence interval ranges from 501.34 to 536.57 days). By contrast, the average duration for rulemakings with an NPRM that end in a similar final action, but do have a deadline, is 426.77 days (95 percent confidence interval ranges from 394.15 to 459.40).[77]

Table 12 presents disaggregated results for the agencies facing the most deadlines. Deadlines shorten duration for all these agencies, but in many cases the effect is relatively modest. The average duration of USDA non-deadline action is 422 days versus 406 days for deadline actions. EPA non-deadline actions taken an average of 603 days versus 591 days for non-deadline actions. The difference for DOT is somewhat larger, 586 days with no deadlines versus 520 days with deadlines. But for HHS, deadlines seem to have a very large effect. HHS deadline-actions are completed in an average of 457 days, while non-deadline actions take an average of 912 days. Although preliminary, these data suggest that deadlines reduce the duration of HHS action by more than 50 percent, 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 a competing risks Cox proportional hazard model.[78] Duration or hazard models estimate the hazard rate, here, the instantaneous rate at

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

[76] As an indicator of duration, we compute the time between the initial NPRM and a traditional final rule or final action. In the database created from the *Unified Agenda* reports, actions were counted as a final rule or action if the rulemaking action listed in the Timetable field was coded as 330=Final Rule or 600=Final Action. *See* O'Connell, *supra* note 26, at 57. For this analysis, we looked only at reports to the *Unified Agenda* from April 1995 to October 2003 and kept RINs only if they had a NPRM with an actual date reported. Agencies do not report on significance of actions, a key explanatory variable, until 1995. Duplicate RINs were removed in the same manner as before. *See supra* note 61.

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

[78] For this analysis, we looked only at reports to the *Unified Agenda* from April 1995 to October 2003 and kept RINs only if they had a NPRM with an actual date reported. Agencies do not report on significance of actions, a kept explanatory variable, until 1995. Duplicate RINs were removed in the same manner as before. *See supra* note 61.

which an agency action ends after time *t*, given that the agency action has been ongoing until *t*.[79] The basic question here is simply whether deadlines increase the hazard rate, or put differently, shorten the duration of agency actions.[80] Positive coefficients predict shorter duration and negative coefficients predict longer duration. The results are presented in Table 13, along with coefficient estimates from several alternative specifications.[81]

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[79] For good statistical sources on hazard analysis, *see* William H. Greene, Econometric Analysis (2d ed. 1993); 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).

[80] Hazard analysis differs from standard ordinary least squares analysis in that it treats the dependent variable—length of rulemaking process (in days)—as a temporal variable, which permits the inclusion of censored observations and avoids the prediction of negative duration. *See* Greene, *supra* note 79. Unlike the exponential, lognormal, log-logisitic, or Weibull hazard models, the Cox Proportional Hazard (CPH) model does not impose a particular functional form on the baseline hazard function. The model does, however, assume that the proportionality of hazards across cases does not vary over time. In other words, hazard functions of any two individuals with different covariate values differ only by a proportional factor. *See* Janet M. Box-Steffensmeier & Christopher J.W. Zorn, *Duration Models and Proportional Hazards in Political Science*, 45 AM. J. POL. SCI. 972 (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 *i*th case and $h_0(t)$ is the baseline hazard rate. Due to the model's partial likelihood estimation, the baseline hazard function is estimated nonparametrically. *See* Janet M. Box-Steffensmeier & Bradford S. Jones, *Time is of the Essence: Event History Models in Political Science*, 41 AM. J. POL. SCI. 1414, 1433 (1997). 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: traditional final rule or action; interim final rule; direct final rule; or deletion or withdrawal. To estimate the current model, we compress these outcomes into two categories: final rule (traditional, interim, or direct) or deletion/withdrawal. In the data used here, 5748 RINs show a traditional final rule or action as the ultimate outcome; 70 RINs show an interim final rule as the ultimate outcome; 4 RINs show a direct final rule as the ultimate outcome; 839 RINs show deletion or withdrawal as the ultimate outcome; and 2289 RINs with an NPRM show no outcome. This final category of RINs is treated as censored. The average duration for final rules/actions (with and without deadlines, significant and non-significant) was 506.35 days (613.66 days, standard deviation); for interim final rules was 685.6 days (957.61); for direct final rules was 1219.25 days (526.1); and for withdrawals was 1541.28 days (1380.14). Many competing risk 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 between an NPRM and final outcome explains any of the variation in duration of the regulatory process. Change in party control of Congress 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 are withdrawn after control in Congress shifted in January, 1995. *See* O'Connell, *supra* note 26, at 42-45. But change in party control probably has a positive effect on duration if the NPRM ends in a rule. Agencies started off the rulemaking pleasing one set of members; now, they have to make changes before they finish it for pleasing the current set of members. To deal with this concern, many of the explanatory variables are included on their own and as interaction variables with one of the two strata.

[81] 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 are not appropriate (for example, the stphtest command in Stata). Instead, we plotted the observed and predicated survival probabilities for each of the competing risks (i.e., 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 widening for longer durations), confirming that the key assumption holds for at least one 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 specifications using different methods. The

First, and most important, the presence of any deadline shortens the duration of the regulatory process.[82] Holding constant the effect of other covariates, deadlines do shorten the time frame in which agencies issue policy. Although deadlines produce other side effects, they do quicken the pace of agency decisions.[83] These coefficients do not directly map onto measures of the actual change in duration. Keeping all explanatory covariates at their means, the odds of a rulemaking with a deadline coming to an end (either in a completed rule or in a withdrawal) before a rulemaking without a deadline are 1.43 to 1.[84] Second, significant regulatory actions take longer to complete or withdraw. Rules with bigger impacts tend to take longer to complete. Third, if the President changes after the NPRM is issued, the regulatory process is longer than if there is no Presidential change. And this result holds regardless of whether the process ends in a rule or withdrawal. Moreover, rules started under President Carter and President George H.W. Bush take longer to reach completion than rules started under President Clinton. Fourth, Congress matters, in interesting ways. If the party in control of Congress changes after the NPRM is issued, the rulemaking process is longer if the process ends in completion. But the process is shorter if the rule is deleted or withdrawn. Put differently, when the Republicans took over Congress in 1995, there were two effects on pending rules. For rules that were ultimately issued, there was greater delay. But some rules were also quickly withdrawn—more quickly than withdrawn rules absent a shift in congressional control. Interestingly, however, there is no significant relationship between the duration of the regulatory process and whether that process starts during a period of united or divided government. In summary, deadlines do produce faster

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simplest, and least appropriate, is a simple OLS regression equation of the number of duration of agency actions on the set of explanatory variables (excluding the interaction terms). A poisson regression is somewhat more appropriate because the distribution of the dependent variable. We also estimated other duration models using both the Weibull and the exponential distributions, as well as a Cox proportionate hazard model without the competing risks specification. The results are robust to all these alternative specifications.

[82] The existence of a deadline, however, lengthens the regulatory process 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 not complete a rulemaking, indeed to withdraw a regulatory action, in the face of a deadline is highly unusual. *See* 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 (finding that the EPA was less likely to withdraw a rulemaking with a deadline). An agency would not undertake such an action lightly and thus would likely take more time before choosing that outcome.

[83] This effect may be biased downward. To the extent that agencies may set internal deadlines for particular rulemakings in the absence of statutory deadlines, non-deadline rulemaking processes will have a shorter duration than otherwise. In addition, to the extent that Congress signals to the agency important rulemakings that should be finished promptly without the imposition of deadlines, non-deadline actions will taker less time. *Cf.* Cornelius M. Kerwin & Scott Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 129, 132 (1992) (without considering statutory deadlines, finding that judicial deadlines lengthen the EPA's rulemaking process using an OLS regression).

[84] 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 the expected hazard ratio with the deadline covariate set to zero and all other covariates set to their means. These ratios are, respectively, 0.333 and 0.233; the odds reported in the text are calculated by taking their ratio.

regulatory action, but this effect interacts in surprising ways with other sources of political and institutional variation.[85]

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 produce counterproductive agency behavior. These negative results are not inevitable, but they are frequent enough to cause genuine concern about the ability of deadlines to control agencies. This Part canvasses how several standard administrate 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, many courts will strike down such action on procedural grounds, rejecting any "good cause" exception to notice and comment requirements of section 553 of the APA. When an agency's statutory interpretation is challenged in the standard framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[86] 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 caselaw exists and facially plausible arguments that we discuss suggest it could be easier or harder for an agency to win in 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, we emphasize several reasons that deadlines might be constitutionally suspect.

A. Agency Inaction

[85] Although agencies make quicker decisions if they confront deadlines, all else being equal, they often miss the deadlines themselves. Of the 226 unique rulemakings with specific dates of a statutory deadline for an NPRM to be issued and for the actual issuance of the NPRM, the agency met the deadline in only 26.5 percent of the cases. For the subset of 48 significant rulemakings, the agency satisfied the NPRM deadline in 12.5 percent of the cases. The mean difference in days between the NPRM deadline and the actual NPRM was 178.5 days (past the deadline) (standard deviation=471.3); for significant actions, the mean difference was 270.7 days (standard deviation=460.5). Of the 1,245 unique rulemakings with specific dates of a statutory deadline for completed regulatory action for the actual completion, the agency met the deadline in only 18.4 percent of the cases. For the subset of 229 significant rulemakings, the agency satisfied the completion deadline in 21.4 percent of the cases. The mean difference in days between the completion deadline and the actual completion was 339.1 days (past the deadline) (standard deviation=637.0); for significant actions, the mean difference was 544.3 days (standard deviation=811.6). The EPA's pattern of missing deadlines has been well documented. *See* United States Government Accountability Office, Clean Air Act: EPA Should Improve the Management of Its Air Toxics Program, GAO-06-669 (June 2006); United States Government Accountability Office, Clean Air Act: EPA Has Completed Most of the Actions Required by the 1990 Amendments, but Many Were Completed Late, GAO-05-613 (May 2005); 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, 529, 560-64 (1994) (noting that court deadlines are less likely to be missed than statutory deadlines); Pierce, *supra* note 7, at 82.

[86] 467 U.S. 837 (1984).

Federal courts generally have extremely limited jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed" under Section 706(1) of the APA.[87] 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*."[88] In that case, 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 the Federal Land Policy and Management Act of 1976.[89] The *Southern Utah Wilderness Alliance* Court, however, explicitly indicated that statutory deadlines could establish the discrete mandatory action needed to bring a challenge under Section 706(1),[90] a view consistent with previous lower court decisions.[91] 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 Environmental Protection Agency (EPA)] where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary . . . ."[92] Many district courts have held that missed statutory deadlines in the Clean Air Act satisfy this citizen suit provision.[93] The Clean Water Act has an identical provision.[94] And, as with the Clean Air Act, many district

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[87] *See, e.g.*, 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); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1657 (2004). *See also* Biber, *supra* note 7.

[88] 542 U.S. at 64.

[89] *Id*. at 65-73.

[90] 542 U.S. at 9.

[91] 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 inferable 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) (footnotes 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*.; *cf*. Raymond Proffitt Foundation v. U.S. E.P.A., 930 F. Supp. 1088 (E.D. Pa. 1996) (deadline may be sufficient but is not necessary to show non-discretionary duty).

[92] 42 U.S.C. § 7604(a)(2).

[93] *See, e.g.*, Environmental Defense v. Leavitt, 329 F. Supp. 2d 55 (D.D.C. 2004); Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 797 F. Supp. 194 (E.D.N.Y. 1992); Sierra Club v. Ruckelshaus, 602 F.Supp. 892 (N.D. Cal. 1984).

[94] 33 U.S.C. § 1365(a)(2).

courts have ruled that an agency's failure to meet a statutory deadline qualifies under this provision as well.[95]

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.[96] Parties must meet applicable statutes of limitations,[97] have standing to sue,[98] and bring a live case.[99] Most critical, 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."[100] A statutory deadline 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.[101]

B. Late Agency Action

If the agency imposes legal obligations once the 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 Company*, the Court upheld the Commissioner of Social Security's untimely assignment of beneficiaries to coal companies for the payment of health

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

[96] Biber, *Resource Allocation*, *supra* note 7, at 29.

[97] In *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006), 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. 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); Center for Biological Diversity, 453 F.3d at 1334.

[98] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). *See generally* Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). Proving standing, under current precedent, can be quite difficult, particularly when the agency's inaction does not concern regulation of the plaintiffs themselves. Lujan v. Defenders of Wildlife, 504 U.S. at 562; *cf.* Massachusetts v. Environmental Protection Agency, No. 05-1120, slip op. at 12-25 (U.S. Apr. 2, 2007).

[99] 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 v. United States, 506 U.S. 9, 11 (1992).

[100] Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 65 (2004) ("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.").

[101] Challenges to agency inaction based on missed deadlines also present interesting jurisdictional questions as to what level of court should first hear such claims. Those challenges are typically heard in district court, in contrast to claims involving agency action. 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* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 752-53 (6th ed. 2006). *See also* 42 U.S.C. § 7607(b)(1) (Clean Air Act appellate jurisdiction for challenges to particular agency actions); 33 U.S.C. § 1369(b)(1) (similar provision for Clean Water Act).

insurance premiums under the Coal Industry Retiree Health Benefit Act of 1992.[102] 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."[103] But the Court refused to strike down the Commissioner's dilatory action as lacking legal authority because the Coal Act does not explicitly provide for what would happen in such a case. As the Court concluded, "'if 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.'"[104] Lower courts 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.[105] What courts then struggle with is determining whether the statute provides such consequences.[106]

Although this doctrinal result is clear enough, it is also subject to criticism. Suppose a statute grants legal authority to a new agency pursuant to the statute, but also sunsets 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.

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[102] 537 U.S. 149 (2003).

[103] *Id*. at 157.

[104] *Id*. at 159 (quoting United States v. James Daniel Good Real Property, 510 U.S. 43, 63 (1993)). The *Peabody* Court 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: "When, 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*. The Supreme Court in *Peabody* and *Pierce County* did not explicitly discuss laggard agency action in terms of the APA. If an 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*. International Union v. Chao, 361 F.3d 249 (3d Cir. 2004) (finding missed deadline not an abuse of discretion because the deadline was aspirational, not mandatory); Action on Smoking & Health v. Dep't of Labor, 100 F.3d 991 (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.

[105] *See, e.g.*, Newton County Wildlife Ass'n v. United States Forest Service, 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. United States Environmental Protection Agency, 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 Priority Lists] 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.")

[106] *See, e.g.*, Dixie Fuel Co. v. Commissioner of Social Security, 171 F.3d 1052 (6th Cir. 1999), *rev'd* Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003). Late agency action may raise additional concerns if the agency wants its action to apply retroactively. *See* Bowen v. Georgetown Univ. Hospital, 488 U.S. 216, 224-25 (Scalia, J., concurring) ("If, for example, 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.").

Regardless, this deadline doctrine on late action highlights the importance of hammer provisions, which specify regulatory outcomes in the event that an agency fails to meet a statutory deadline.[107] Hammer provisions can implement "a congressionally specified regulatory result."[108] Or hammer provisions can implement an agency's proposed rule if the agency does not promulgate the final rule before the deadline.[109] These provisions often impose "hars[h] default prohibitions" to motivate quicker agency action.[110] 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. The APA, however, excepts notice and comment requirements for "good cause." Agencies faced with deadlines often contend that deadlines require pressed work, making "notice and public procedure thereon . . . impracticable, unnecessary, or contrary to the public interest."[111]

Much of the considerable case law in this area concerns the 1977 Amendments to the Clean Air Act.[112] In 1978, after receiving plans from states designating areas as compliant and non-compliant with national ambient air quality standards for various air pollutants, the EPA Administrator promulgated a rule without prior comment, modifying those plans and imposing various obligations under the Act. 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

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[107] JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 15-16 (4th ed. 2006); M. Elizabeth Magill, *Congressional Control over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 153-57 (1995); Richard C. Fortuna, *The Birth of the Hammer*, ENVTL. FORUM, Sept./Oct. 1990, at 18, 20. Such provisions are more popular in divided government. *Cf*. id.

[108] LUBBERS, *supra* note 107, 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)).

[109] Magill, *supra* note 7, at 150 (explaining the hammer provisions in the Nutrition Labeling and Education Act of 1990).

[110] 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).

[111] 5 U.S.C. § 553(b)(3)(B).

[112] *See* LUBBERS, *supra* note 107, at 111; Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 125-29 (1984).

[113] United States Steel Corp. v. Environmental Protection Agency, 649 F.2d 572 (8th Cir. 1981); Western Oil & Gas Ass'n v. Environmental Protection Agency, 633 F.2d 803 (9th Cir. 1980); New Jersey v. Environmental Protection Agency, 626 F.2d 1038 (D.C. Cir. 1980); Sharon Steel Corp. v. Environmental Protection Agency, 597 F.2d 377 (3d Cir. 1979); United States Steel Corp. v. Environmental Protection Agency, 595 F.2d 207 (5th Cir. 1979); *see also* Jordan, *supra* note 112, at 127-28.

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 the opportunity provided for comments *after* the rule was promulgated cured any procedural problems.[117] For these courts, the EPA had failed to meet its burden to show why 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 the statutory deadline made prior notice and comment impractical. The Sixth Circuit concluded that courts that had reached the opposite holding "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

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

[115] Sharon Steel Corp., 597 F.2d at 380 (footnotes omitted). These courts emphasized that the Administrator 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]." United States Steel Corp. v. Environmental Protection Agency, 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] United States Steel Corp. v. Environmental Protection Agency, 595 F.2d at 213; *see also* New Jersey, 626 F.2d at 1043 n.3; Sharon Steel Corp., 597 F.2d at 379 n.4. And they pointed to the agency's repeated remarks that the designations in the final rule were "preliminary" in the statute's regulatory scheme, suggesting the agency could have issued the designations as a proposed rule. New Jersey, 626 F.2d at 1042.

[117] United States Steel Corp. v. Environmental Protection Agency, 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* Steel Corp., 597 F.2d at 381; New Jersey, 626 F.2d at 1038.

[118] Republic Steel Corp. v. Costle, 621 F.2d 797, 803 (6th Cir. 1980). 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] United States Steel Corp. v. Environmental Protection Agency, 605 F.2d 283, 287 (7th Cir. 1979). These two courts were therefore not troubled by the agency's provision of post-rule commenting. Republic Steel Corp., 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.").

[120] Republic Steel Corp., 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.").

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 multi-factor 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 if the deadline is "very tight and where the statute is particularly complicated."[124] But the agency cannot generally create its own emergency by not acting until quite close to the deadline.[125] Courts are also more accommodating to missed procedural mandates if the agency action is "of limited scope or duration."[126] Finally, courts "giv[e] greater weight to congressional deadlines in justifying lack of notice and comment when the deadlines implemented budget-cutting measures."[127] In short, agencies must exercise care in skipping notice and comment procedures, but if the ordinary requirements of notice and comment are truly burdensome given time constraints from the statute, 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

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[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." United States Steel Corp., 605 F.2d at 290.

[122] Republic Steel Corp. v. Costle, 621 F.2d at 804.

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

[124] Methodist Hospital of Sacramento v. Shalala, 38 F.3d 1225, 1236 (D.C. Cir. 1994). Courts have viewed 49 and 60 days as sufficiently "tight," but not 12 months, 14 months, and 18 months. National Women, Infants, and Children Grocers Ass'n v. Food and Nutrition Service, 416 F. Supp. 2d 92, 106-07 (D.D.C. 2006) (citing cases mostly from the courts of appeals).

[125] *Id*.

[126] LUBBERS, *supra* note 107, at 111. For example, interim final rulemaking that precedes final rulemaking is more acceptable. American Transfer & Food Storage v. Interstate Commerce Comm'n, 719 F.2d 1283, 1294 (5th Cir. 1983).

[127] LUBBERS, *supra* note 107, 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) under 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 90 days "without regard to . . . the notice and comment provisions of section 553 of title 5, United States Code." 7 U.S.C. § 7281. *See also* 16 U.S.C. § 3831 (requiring regulations implementing the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza to be issued within 90 days "without regard to . . . the notice and comment provisions of section"); 7 U.S.C. § 1522 note (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").

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.

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 the degree of deference courts owe to an agency's statutory interpretation is a partial 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 procedures (e.g. interpretive rules or guidance documents) are less likely to receive judicial

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[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 (2006). The term is originally from Thomas W. Merrill and Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001).

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

[132] *See generally* Sunstein, *supra* note 130; Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1486 (2005); Adrian Vermeule, Mead *in the Trenches*, 74 GEO. WASH. L. REV. 347 (2003).

[133] *Mead*, 533 U.S. at 226–27.

[134] Recent statements suggest 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 more formal procedures like notice and comment. *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 stated that a lack of procedural formality does not preclude *Chevron* deference. *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* National Cable & Telecommunications Assn. v. Brand X Internet Servs., 545 U.S. 967, 1003–05 (2005) (Breyer concurring).

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 views 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 deadline, 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." In assessing whether the agency has acted in an arbitrary or capricious matter, courts generally engage in a searching inquiry, including 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.'" [138]

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[135] *See, e.g.*, Delaney v. E.P.A., 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."); *see also* Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 712 (D.C. Cir. 1974); *infra* note 150 and accompanying text.

[136] *See, e.g.*, Natural Resources Defense Council v. Environmental Protection Agency, 2007 WL 1748069 (D.C. Cir. June 19, 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. Environmental Protection Agency, 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. It may well be, as the EPA and the states contend, that Congress has adopted a foolish and uneconomical scheme. . . . But under 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. United States Environmental Protection Agency, 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. 2406-07. *Cf.* Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 22 F.3d 1125, 1135-36 (D.C. Cir. 1994) (permitting the agency to extend statutory deadlines for compliance in particular circumstances).

[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 eventuality 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 (1997).

[138] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal citations omitted).

Little caselaw directly addresses deadlines in arbitrary and capricious review, but the inquiry could have several critical implications for agency behavior. On the one hand, when agencies are forced to promulgate rules, courts could apply a less searching standard for actions promulgated under deadline,[139] requiring less from the agency, in terms of procedure or substance.[140] This idea of reducing the intensity of arbitrary and capricious review because of statutory deadlines,[141] or agency resource constraints[142] has been advocated by a number of scholars, but case law on point is scarce and there are sensible reasons to resist ad hoc exceptions to standard doctrines of judicial review.

Agencies may act poorly when rushed—not considering necessary alternatives, not explaining their choices, or not acting 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."[143] When agencies sacrifice deliberative process to meet deadlines, decisions are more likely to fail the arbitrary and

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[139] 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.

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

[140] Some limited caselaw also supports this argument. In *California Human Development Corporation v. Brock*, the D.C. Circuit upheld an allocation of funds by the Department of Labor as rational given a deadline:

> 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. "[T]hat 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) (citations omitted); cf. Hercules, Inc. v. EPA, 598 F.2d 91(D.C. Cir. 1978) (explicitly relying on the presence of a statutory deadline to uphold the agency's questionable actions in a Section 557(b) challenge under the APA).

[141] Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. Rev. 1013, 1027 (2000); R. Shep Melnick, *The Political Roots of the Judicial Dilemma*, 49 ADMIN. L. REV. 585 (1997); R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN L. REV. 245 (1992).

[142] *See* Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 90 (1997); Biber, *Resource Allocation*, *supra* note 7, at 45. *Cf.* Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985).

[143] *Id*. (internal citations omitted).

capricious inquiry. And if courts do not relax ordinary requirements, then agencies will lose more often in challenges to deadline actions.[144]

E. Judicial Remedies

Statutory schemes that impose deadlines on agency action rarely explicitly permit agencies or courts to modify those deadlines, but some exceptions do exist.[145] The Freedom of Information Act (FOIA), for instance, sets strict deadlines for agencies to release non-exempted 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 therefore, and of the right of such person to appeal to the head of the agency any adverse determination . . . ."[146] The statute expressly allows, however, the court to grant the agency additional time if the agency meets certain requirements.[147] 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 the agency's action."[148] 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.[149] For example, in *Natural Resources Defense Council, Inc. v. Train*, the D.C. Circuit noted two circumstances where the court could use its equitable powers to provide the agency additional time: when meeting deadlines would unduly jeopardize the implementation of other essential programs and where compliance is technologically impossible.[150]

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[144] *Cf.* Salameda v. INS, 70 F.3d 447, 452 (7th Cir. 1995) ("understaffing is not a defense to a violation of principles of administrative law"). *See also* Pierce, *supra* note 7, at 73-75.

[145] *See* Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 178 (1981).

[146] 5 U.S.C. § 552(a)(6)(A).

[147] 5 U.S.C. § 552(a)(6)(C) ("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 America v. Watergate Special Prosecution Force, 547 F.2d 605, 615-16 (D.C. Cir. 1976).

[148] Abbott, *supra* note 7, at 178.

[149] *Id*.

[150] 510 F.2d 692, 712 (D.C. Cir. 1974) ("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 distinctions. *See, e.g.*, Sierra Club v. Thomas, 658 F. Supp. 165, 171 n.5 (N.D. Cal.1987); Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 569 (D.D.C. 1986); State of New York v. Gorsuch, 554 F. Supp. 1060, 1065 & n.4 (S.D.N.Y. 1983). 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 v. Thomas, 658 F. Supp. 165, 171 (N.D. Cal. 1987). And 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

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.[151] Courts, however, exercise this authority rarely.[152] 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 promises to meet.[153] Or, courts will simply declare that the agency should act expeditiously, perhaps suggesting a target date for completion.[154] 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 deadline doctrines above rest on a fundamental assumption, mainly, that deadlines are constitutionally unproblematic. Although the use 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.

F.3d 1178 (10th Cir. 1999); Natural Resources Defense Council v. United States Environmental Protection Agency, 797 F. Supp. 194 (E.D.N.Y. 1992); New York v. Gorsuch, 554 F. Supp. 1060 (S.D.N.Y. 1983).

[151] *See* In re International Chemical Workers Union, 958 F.2d at 1149 (APA authority); Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, 1177 (9th Cir. 2002) (equitable authority). But when courts do impose judicial deadlines, they essentially create hammer provisions of their own. In *Northwest Environmental Advocates v. Environmental Protection Agency*, the Northern District of California gave the EPA two years to establish regulations for ballast water discharges from vessels at American ports. 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. 2006 WL 2669042, at *13-*15.

[152] *See* In re International Chemical Workers Union, 958 F.2d 1144, 1150 (D.C. Cir. 1992) ("There is a point when the court must "let the 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."). 2006 WL 2669042, at *13-*14.

[153] *See, e.g.*, Alaska Ctr. for the Environment v. Browner, 20 F.3d 981, 987 (9th Cir. 1994) ("In enacting environmental legislation, and providing for citizen suits to enforce its directives, Congress can only act as a human institution, lacking clairvoyance to foresee the precise nature of agency dereliction of duties that Congress prescribes. When such dereliction occurs, 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.").

[154] *See, e.g.*, Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1159 (D.C. Cir. 1983) ("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 . . ., we expect promulgation of a final rule within a year's time."). To put pressure on the agency, courts can also retain jurisdiction over a challenge to agency inaction. *See, e.g.*, *In re* Center 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 model year 1989 light truck CAFE standards.").

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, of Presidential Administration, the assertion of greater centralized control by the President over many aspects of administrative process.[155] The President has always had nominal control over non-independent agencies, and a degree of influence on independent agencies because of the appointments power.[156] But starting with President Reagan's Executive Order in the early 1980's, and its subsequent revisions by Presidents Clinton and George W. Bush, Presidents have sought greater ex ante control of proposed agency policies.[157] This is not the place to rehash the Presidential Administration debates, but the growing influence of 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, non-independent agencies must seek OMB review of legally binding rules, typically prior to issuing notice as well as prior to promulgating the final rule, as well as of significant guidance documents.[158] Although Executive Order 12,866 mandates that agencies notify OMB of any statutory or judicial deadlines and, "to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time for [OMB] to conduct its review,"[159] deadlines for agency action may permit the agency to forego that process or to ignore OMB objections.[160] Although the Executive Orders do not permit judicial review, courts have occasionally commanded agencies to meet their discrete mandatory obligations even if the OMB has not approved the regulatory action.[161] 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."[162]

Since the Clinton Administration, an increasing proportion of agency actions must be "cleared" by OIRA.[163] The most recent Executive Order on this matter also requires that

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[155] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). *Cf.* Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947 (2003); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1 (1994).

[156] 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 (1935).

[157] Kagan, *supra* note 155.

[158] See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), as amended by Exec. Order No. 13,422, 72 Fed. Reg. 2703 (Jan. 18, 2007).

[159] Exec. Order No. 12,866, § 6(a)(3)(D).

[160] *See* Kagan, *supra* note 155, at 2279 (noting that "the 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").

[161] Environmental Defense Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986); *see also In re* United Mine Workers of Am., 190 F.3d 545, 551 (D.C. Cir. 1998).

[162] Exec. Order No. 12,866, § 9.

[163] Exec. Order No. 13,422, §§ 1-3, 7 (adding guidance documents to items for review); *see also* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003).

agencies consider formal rulemaking—a notoriously slow method of policy-making—in a wider range of contexts.[164] Agencies are also typically required to engage in some cost-benefit justification of proposed rules, and elaborate analyses for significant rules.[165] 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 legislation. 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;[166] meeting statutory deadlines may mean failing to meet Presidential requirements.

What if statutory timing requirements conflict with executive procedural requirements? Current law suggests 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. Absent such a disclaimer (or even with one), one could certainly invoke separation of powers principles to argue that deadlines interfere with the President's ability to implement the law and manage executive agencies. 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 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. If the courts concluded that the use of deadlines to countermand the Executive Orders governing regulatory review raised a serious constitutional question, courts might well apply the canon of constitutional avoidance to interpret the statute.[167] This 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.[168] 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 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

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[164] Exec. Order No. 13,422, § 5.

[165] Exec. Order No. 12,866, § 6(a).

[166] Exec. Order No. 12,866, § 6(b).

[167] *See* Adrian Vermeule, *Saving Constructions*, 15 GEO. L. J. 1945 (1997). *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 162-84 (2d ed. 1986); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994); Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481 (1990); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71.

[168] *See* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMM. 307 (2006).

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.[169] Adherents of the relaxed review school would often allow agencies to ignore statutory deadlines in much the way that the saving interpretation would do so in this hypothetical.

The implications might be 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 has long been said to potentially produce more efficient and effective risk regulation.[170] Nor is congressional interference with the OIRA Executive Orders far-fetched. Various legislators in the current period 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 new Executive Order.[171] As the White House seeks to ratchet up control of administrative agencies, congressional counter-moves 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 review of agency inaction more likely. Second, the presence of a deadline increases the probability that agencies will successfully avoid notice and comment procedural requirements pursuant to the "good cause" exception in the APA. Third, 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 grows. 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. Fourth, 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.[172] 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. Together, these deadline doctrines likely do more harm than good in administrative law, or so we now suggest.

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[169] *See* Pierce, *supra* note 7.

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

[171] *See* H.R. 2829, § 901 ("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 removed the defunding provision.

[172] Barnhart v. Walton, 535 U.S. 212 (2002).

IV. NORMATIVE IMPLICATIONS

The theoretical, empirical, and doctrinal analysis above suggests several normative implications. However, we start with a caveat. Sometimes it is more important that rules exist than that a rule be right; indeed, when rules serve only as coordination mechanisms for social actors, the actual content of a rule may be arbitrary. For this subset of regulatory action, quicker action is better because there is no tradeoff between content, process, and timing. The majority of regulatory actions, however, are otherwise. When there is a right (or at least better) answer, our work emphasizes several reasons to think that the number of deadlines used by Congress may be sub-optimal. Earlier, we suggested that deadlines 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. Against this backdrop, how are agencies likely to respond? The mix of theory and data suggest three likely effects.

First, some portion of the underlying distribution of actions that would likely have been promulgated using notice and comment procedures will be issued using less formal mechanisms. Because deadlines can 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. Many themes in administrative law, be they democratic or technocratic, argue that notice and comment is the most desirable form of agency action.[173] For these schools of thought, deadlines should make administrative behavior worse.

A second related effect derives from the *Mead* doctrine. Ordinarily, *Mead* provides a counterweight for agencies considering informal decisionmaking mechanisms.[174] Because procedural formality typically allows an agency to qualify for *Chevron* deference,[175] agencies that prefer deference from courts in litigation will tend towards more procedural formality, notwithstanding the additional costs.[176] Some current deadline doctrines undermine this incentive. Because statutory deadlines are often taken to signal congressional clarity under Step One of *Chevron*, the probability that judicial deference will be given to agency views is marginally lower. Thus, deadlines not only give agencies a way to avoid notice and comment rulemaking, but they also weaken an otherwise-existing incentive to use notice and comment.

However, recall the alternative that 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

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[173] *See generally* Cuéllar, *supra* note 73.

[174] *See generally* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1429–30 (2004)

[175] *But see* Barnhart v. Walton, 535 U.S. 212 (2002).

[176] This obviates many underlying complexities. *See* Matthew C. Stephenson, *The Strategic Substitution Effect*, 120 HARV. L. REV. 528 (2006).

courts and commentary has clearly been towards more notice and comment rather than less. Deadline doctrines are then a consequential exception to this general rule.

Third, arbitrary and capricious review requires that agencies must 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.[177] Although the arbitrary and capricious doctrine does not demand procedural formality, some degree of adequate 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 as arbitrary and capricious. 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 ad hoc exceptions to long-stable doctrine.

Neither of these alternatives strikes us as particularly desirable in many contexts. The first results in lower quality agency actions that are more likely to be struck down, resulting in 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,[178] we remain skeptical. 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. Administrative deadlines do seem to speed up agency action, but the assorted deadline doctrines also likely shift agency decisions out of notice and comment, may increase delay in the ultimate implementation of rules, and cause greater confusion and uncertainty in administrative law.

Deadlines also seem to shift internal agency resources away from policy programs without deadlines in favor of policy programs with deadlines.[179] Many strains of administrative law seek to preserve the agency's ability to allocate internal resources.[180] Agency decisions not to enforce or adjudicate are defended on this ground; the extraordinary deference given to agency decisions not to act generally, as well as the presumption against reviewability of certain agency inactions, are 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 on this front, we need to know whether the existing allocation of agency resources is desirable; whether relative institutional capacities suggest that Congress, agencies, or courts should make that decisions about agency resources; and if the existing allocation is not desirable, and if Congress is an appropriate institutional decisionmaker, whether deadlines are a sensible (lowest-cost) mechanism for adjusting the allocation.

To the extent that deadlines are often used in risk regulation, the existing literature provides several reasons to be skeptical of deadlines. First, there is a general tendency to favor

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[177] Motor Vehicle Mfrs. Assn. v State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983).

[178] Pierce, *supra* note 7.

[179] Biber, *supra* note 7; Pierce, *supra* note 7; Cross, *supra* note 141; Abbott, *supra* note 7.

[180] *See* id.

new high profile risks for regulation over older, more familiar risks that may be more serious.[181] This new risk bias produces an inefficient allocation of resources because older, more serious risks are not given their appropriate share of resources.[182] If deadlines often accompany statutory commands to address newly recognized risks (as they 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, which seems not to be the norm.[183] 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, one needs to compare not just 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 is that the agency would have taken too long to do the wrong thing. Still 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.[184]

Suppose the existing allocation of agency resources is incorrect. Are congressional deadlines a sensible 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, we are hard pressed to see why comparative institutional competence arguments demand that Congress avoid deadlines on this ground.

On the other hand, there is something mildly awkward about a legislature that admittedly does not have access to the agency's expertise not only making judgments about the internal allocation of agency resources, but also doing so indirectly, by using deadlines rather than directly using budgeting authority or clear statutory commands.[185] If so, then a remaining question is whether deadlines are a particularly objectionable mechanism for allocating agency resources, even if there are no good grounds for objecting to congressional reallocation of

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[181] Roger G. Noll & James Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 774–75 (1990); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 593 (2002); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 494–507 (2002); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 715–35 (1999).

[182] BREYER, A VICIOUS CIRCLE, *supra* note 17.

[183] *See* Pierce, *supra* note 7. *See generally* Abbot, *supra* note 7, at 192-94 (discussing what he terms "agency resource misallocation costs").

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

[185] *See* Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 606 (1997); cf. Biber, *Resource Allocation*, *supra* note 7, at 36.

agency resources as a general matter. 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 is so.[186] If deadline actions are worse than non-deadline actions, deadline actions should be struck down more often by courts, which will produce more delay, and arguably a greater displacement of agency resources than Congress originally intended. Thus, even if the actual shift in resources is desirable, the overall consequences of using deadlines to accomplish the shift are somewhat suspect.[187]

The simple point is that there are risks as well as benefits from statutory deadlines, both in terms of social welfare and political accountability.[188] Deadlines may 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 reduce the quality of agency actions, then actions will be prompt but not 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 process that allows for public input, the development of expertise, and reasoned deliberation, none of these goals are necessarily served well by deadlines. Deadlines are, therefore, unlikely to be a panacea for remedying the pathologies of regulatory policy.

A main effect of deadlines is democratic, helping the legislature to control the behavior of its agents, which in turn helps voters control their representatives. Deadlines can 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 the legislature. More deadlines should be enacted during periods of divided government. Congress should also more often impose deadlines on agencies that are perceived to be further from legislative ideal points.

In part, these are empirical predictions, but they have normative implications as well. Deadlines imposed in particular political 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 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 they would not otherwise implement without deadlines.

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[186] Carpenter et al., *supra* note 20.

[187] On the other hand, it is possible that deadlines, by functioning as credible commitment devices, give agency more authority (at least relative to OMB and interest groups) and help agencies make better decisions. *Cf.* Magill, *supra* note 7, at 152, 184.

[188] *See* Abbott, *supra* note 7.

Again, the proper comparison should not presume coordinated Executive control at its best. Rather, 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 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. But to the extent that Congress is more representative,[189] deadlines may promote political accountability.

CONCLUSION & FUTURE RESEARCH

Before concluding, we emphasize potential future research that follows on our findings.. Deadlines reallocate resources away from programs without deadlines and towards programs with deadlines. If the resource-allocation hypothesis is correct, then deadlines in one policy should produce an increase in the expected duration of agency actions in other policy areas that the agency implements. Alternatively, if deadlines lower the quality of average agency decisions,[190] then it should be the case that actions with deadlines are more likely to be struck down in post-enactment legal challenges than agency actions that are not subject to deadlines. Assuming that the quality of agency decisionmaking 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. Moreover, deadlines may be doing more harm than good in the administrative state. Deadlines do quicken agency action, but they also produce policy resulting from systematically different decisionmaking processes that are less intensive than the norm. Deadlines seem to trade timing against quality or at least process. 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 sub-par agency decisions will be given legal effect. Deadlines are not uniformly undesirable, of course, but nor are they are a panacea for the problem of regulatory delay. The theoretical, empirical, doctrinal, and normative analysis emphasizes the importance of deadlines not only for administrative law, but also institutional design and democratic theory more generally.

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[189] Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006);

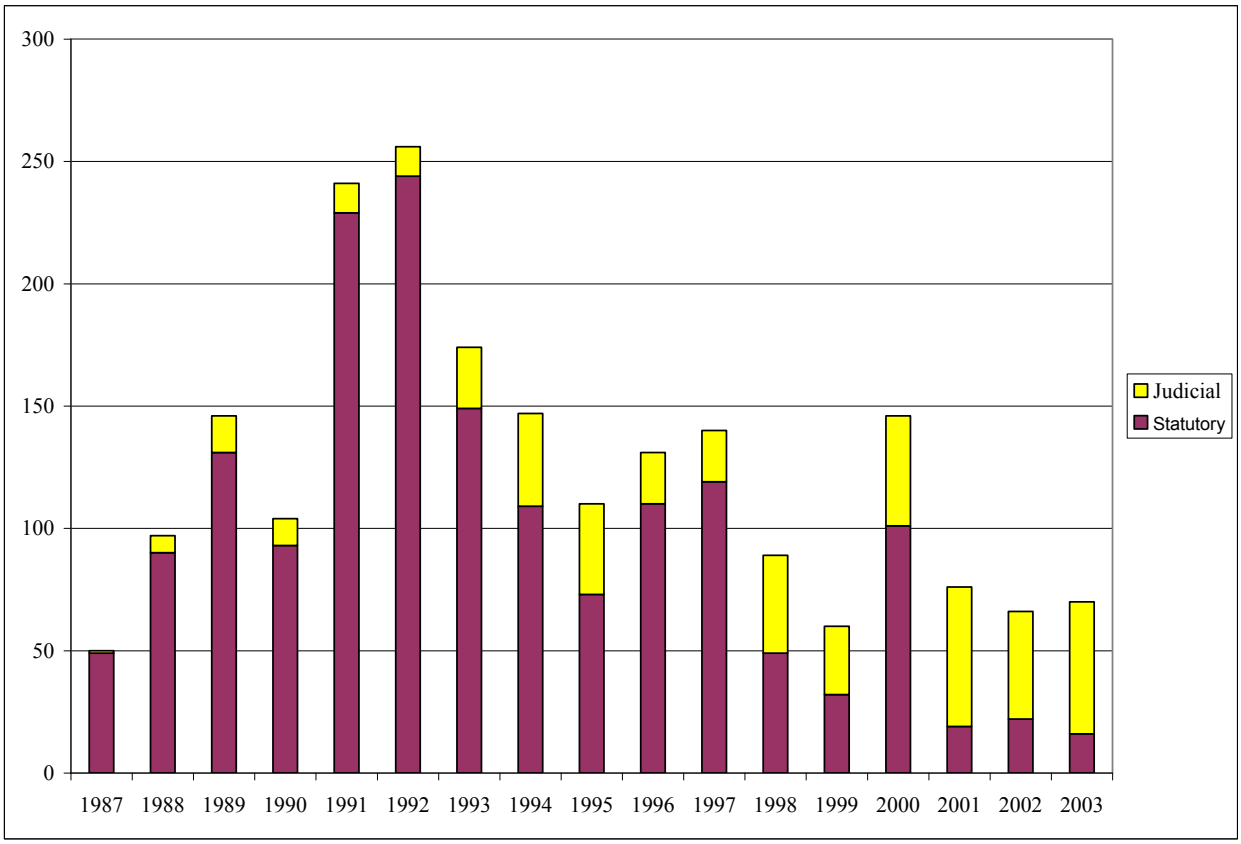
[190] *Cf.* Carpenter et al, *supra* note 20.

Table 1. Deadlines by Year

Year	Statutory	Judicial	Total	Percent Statutory	Percent Judicial
1987	49	1	50	98.00	2.00
1988	90	7	97	92.78	7.22
1989	131	15	146	89.73	10.27
1990	93	11	104	89.42	10.58
1991	229	12	241	95.02	4.98
1992	244	12	256	95.31	4.69
1993	149	25	174	85.63	14.37
1994	109	38	147	74.15	25.85
1995	73	37	110	66.36	33.64
1996	110	21	131	83.97	16.03
1997	119	21	140	85.00	15.00
1998	49	40	89	55.06	44.94
1999	32	28	60	53.33	46.67
2000	101	45	146	69.18	30.82
2001	19	57	76	25.00	75.00
2002	22	44	66	33.33	66.67
2003	16	54	70	22.86	77.14

Data: Total number of judicial and statutory deadlines reported by all agencies, with actual dates, by year (of deadline date). Source: *Unified Agenda* reports, April 1983-October 2003; most recent entry for an RIN was kept; earlier entries were deleted.

Figure 1. Statutory and Judicial Deadlines, 1986-2003



Data: Total number of judicial and statutory deadlines reported by all agencies, with actual dates, by year (of deadline date). Source: *Unified Agenda* reports, April 1983-October 2003; most recent entry for an RIN was kept; earlier entries were deleted.

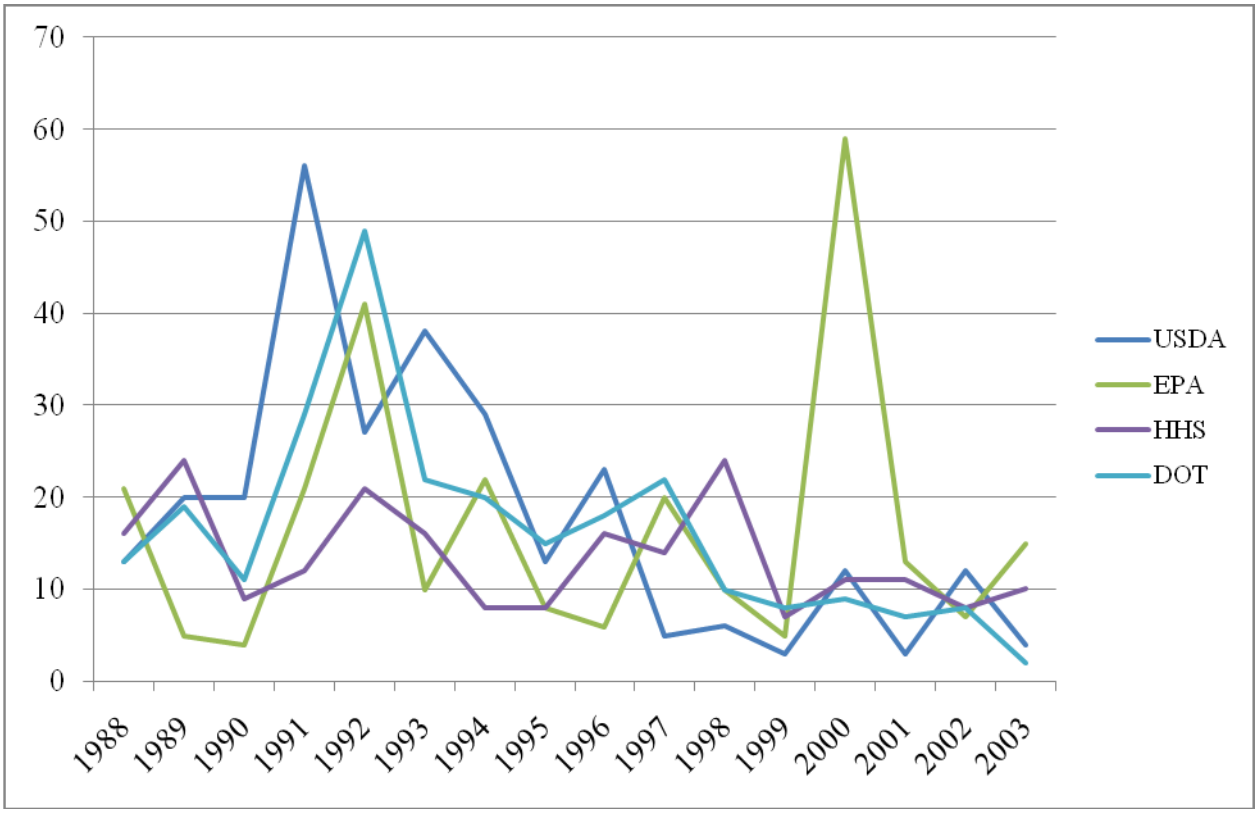
Table 2. Deadlines by Agency

Agency	ID	Statutory	Judicial	Total
Advisory Council on Historic Preservation	3010	0	0	0
Architectural and Transportation Barriers Compliance Board	3014	6	0	6
CEQ	331	0	0	0
CFTC	3038	11	0	11
Civil Aeronautics Board	3024	0	0	0
Commission on Civil Rights	3035	1	0	1
Corporation for National and Community Service	3045	0	0	0
Court Services & Offender Supervision Agency for DC	3225	1	0	1
CPSC	3041	5	0	5
DHS	1601	1	0	1
DOC	605	1	0	1
DOC-NOAA	648	645	18	663
DOC-PTO	651	14	0	14
DOD	710	2	0	2
DOD-Air Force	701	0	0	0
DOD-Army	702	0	0	0
DOD-Navy	703	0	0	0
DOD-Office of the Secretary	790	140	0	140
DOE	1901	5	0	5
DOE-Energy Efficiency and Renewable Energy	1904	31	0	31
DOI	1004	8	0	8
DOI-FWS	1018	110	130	240
DOJ	1103	1	0	1
DOJ-INS	1115	33	1	34
DOL	1205	15	0	15
DOT	2105	18	2	20
DOT-Coast Guard	2115	28	2	30
DOT-FAA	2120	21	0	21
DOT-FHA	2125	47	0	47
DOT-FMCSA	2126	18	0	18
DOT-FRA	2130	31	0	31
DOT-NHTSA	2127	49	0	49
Education	1800	0	0	0
EEOC	3046	5	0	5
EPA	2002	0	0	0
EPA-Air and Radiation	2060	218	184	402

Agency	ID	Statutory	Judicial	Total
EPA-Solid Waste and Emergency Response	2050	44	60	104
EPA-Water	2040	49	88	137
Farm Council for the Arts and Humanities	3134	0	0	0
Farm Credit Administration	3052	4	0	4
Farm Credit System Insurance Corporation	3055	2	0	2
FCC	3060	28	1	29
FDIC	3064	23	0	23
Federal Home Loan Bank Board	3068	2	0	2
Federal Housing Finance Board	3069	2	0	2
Federal Mediation and Conciliation Service	3076	0	0	0
Federal Reserve System	7100	25	0	25
FEMA	3067	9	0	9
FMC	3072	11	0	11
FTC	3084	6	1	7
General: DOD, GSA, NASA	9000	47	0	47
GSA	3090	29	2	31
HHS	905	30	1	31
HHS-CMMS	938	119	4	123
HUD	2501	20	0	20
ICC	3120	1	0	1
Institute of Museum and Library Services	3137	0	0	0
Merit Systems Protection Board	3124	0	0	0
MK Udall Foundation	3320	0	0	0
NARA	3095	3	0	3
NASA	2700	7	0	7
National Capital Planning Commission	3125	0	0	0
National Credit Union Administration	3133	11	0	11
National Indian Gaming Commission	3141	0	0	0
NEA	3135	1	0	1
NEH	3136	1	0	1
NLRB	3142	0	0	0
NRC	3150	2	0	2
NSF	3145	3	0	3
Office of Federal Inspector, Alaska Natural Gas Transportation System	3204	0	0	0
Office of Government Ethics	3209	0	0	0
Office of Special Counsel	3255	1	0	1
OMB	348	3	0	3
OPIC	3420	0	0	0
OPM	3206	36	0	36
Panama Canal Commission	3207	1	0	1
Peace Corps	420	0	0	0

Agency	ID	Statutory	Judicial	Total
Pennsylvania Avenue Development Corporation	3208	1	0	1
Presidio Trust	3212	0	0	0
Railroad Retirement Board	3220	2	0	2
Resolution Trust Corporation	3205	4	0	4
SBA	3245	25	0	25
SEC	3235	25	0	25
Selective Service System	3240	0	0	0
State	1400	26	0	26
Thrift Depositor Protection Oversight Board	3203	2	0	2
Treasury	1505	12	0	12
Treasury-Customs	1515	22	1	23
Treasury-IRS	1545	37	2	39
TVA	3316	1	0	1
USAID	412	1	0	1
USDA	503	1	0	1
USDA-Farm Service Agency	560	151	0	151
USDA-Food and Nutrition	584	58	0	58
USDA-Food Safety and Inspection Service	583	2	0	2
USDA-Rural Housing Service	575	30	0	30
USIA	3116	0	0	0
USTR	350	0	0	0
VA	2900	13	1	14

Figure 2. Deadlines Over Time for Four Major Agencies



Data: Number of statutory deadlines reported by USDA, EPA, HHS, and DOT, with actual dates, by year (of deadline date). Source: *Unified Agenda* reports, April 1983-October 2003; most recent entry for an RIN was kept; earlier entries were deleted.

Table 3. Simple Correlation of Judicial and Statutory Deadlines

	Correlation Coefficient	P value	N
Pearson	0.042	<0.000	32,694
Kendall Tau B	0.049	<0.000	32,694
Spearman's Rho	0.049	<0.000	32,694

Data: Correlation between number of statutory deadlines and judicial deadlines reported, with and without actual dates, by RIN. One-tailed significance test. Source: *Unified Agenda* reports, April 1988-October 2003; most recent entry for an RIN was kept; earlier entries were deleted.

Table 4. Categorical Association of Statutory and Judicial Deadlines

Statutory Deadline Only	2475
Judicial Deadlines Only	332
Statutory and Judicial Deadlines	81
No Deadlines	29806

Data: Number of RINs reporting statutory deadlines only, judicial deadlines only, both statutory and judicial deadlines, and no deadlines, all with and without actual dates. Source: *Unified Agenda* reports, April 1988-October 2003; most recent entry for an RIN was kept; earlier entries were deleted.

Table 5. Significant Rules and Deadlines

	Any Deadline	Statutory Deadline	No Deadline
Significant Rules	616	482	3704
Non-Significant Rules	1201	1057	14959
Percent Significant	33.90 %	31.32 %	19.85 %

Data: Number of RINs (stratified by whether the RIN is significant or non-significant) reporting any deadline, any statutory deadline, and no deadline, with and without actual dates. Source: *Unified Agenda* reports, April 1995-October 2003; most recent entry for an RIN was kept; earlier entries were deleted.

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

Correlation	**Coefficient**	**P value**	N
Pearson	0.098	<0.000	20,480
Kendall Tau B	0.098	<0.000	20,480
Spearman's Rho	0.098	<0.000	20,480

Data: Correlation between significance of regulatory action and presence of any deadline, with and without an actual date, by RIN. Two-tailed significance test. Source: Unified Agenda reports, April 1995-October 2003; most recent entry for an RIN was kept; earlier entries were deleted.

Table 7. Simple Correlations of Deadlines and Regulation Type

Regulatory Characteristic	Simple Correlation Coefficient	N
Unfunded Government Mandate	0.033	32,694
Unfunded Private Mandate	0.069	32,694
State Government	0.127	32,694
Local Government	0.089	32,694
Tribal Government	0.046	32,694
Federal Government	0.116	32,694

Data: Correlation between particular regulatory characteristics and any deadlines reported, with and without actual dates, by RIN. Correlation coefficient idential for Pearson, Kendall's Tau B, and Spearman's Rho; two-tailed significance test. Source: *Unified Agenda* reports, April 1988-October 2003; most recent entry for an RIN was kept; earlier entries were deleted.

Table 8. Agency Decision Process and Deadlines

	Any Deadline	Statutory Deadline	No Deadline
Interim Rules	359	355	2282
No Interim Rules	2529	2201	27524
Percent Interim Rules	12.43 %	13.89 %	7.66 %
Direct Rules	5	4	230
No Direct Rules	2883	2552	29576
Percent Direct Rules	0.17 %	0.16 %	0.77 %

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

Table 9. Simple Correlations of Agency Decision Process and Deadlines

	Pearson Correlation (p)	Kendall's Tau (p)	Spearman's Rho (p)
Interim Rules	0.042 (<0.00) n=32,694	0.049 (<0.00) n=32,694	0.049 (<0.00) n=32,694
Direct Rules	-0.02 (<0.00) n=32,694	-0.02 (<0.00) n=32,694	-0.02 (<0.00) n=32,694

Data: Correlation between types of rulemaking (direct final rules, interim final rules) and presence of any deadline, with and without an actual date, by RIN. Two-tailed significance test. Source: *Unified Agenda* reports, April 1988-October 2003; most recent entry for an RIN was kept; earlier entries were deleted.

Table 10. Simple Correlation of Comment Periods and Any Deadlines

	Correlation Coefficient	P value	N
Pearson	0.049	<0.000	32,694
Kendall Tau B	0.041	<0.000	32,694
Spearman's Rho	0.042	<0.000	32,694

Data: Correlation between 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 deadlines reported, with and without actual dates, by RIN. Two-tailed significance test. Source: *Unified Agenda* reports, April 1988-October 2003; most recent entry for an RIN was kept; earlier entries were deleted.

Table 11. Simple Correlation between Significance, Deadlines, and Duration

	Pearson Correlation	Kendall's Tau	Spearman's Rho
Regulatory Significance	**0.061** (p<0.001) N=5776	**0.071** (p<0.001) N=5776	**0.087** (p<0.001) N=5776
Deadline Present	**-0.054** (p<0.001) N=5783	**-0.048** (p<0.001) N=5783	**-0.058** (p<0.001) N=5783

Data: Correlation between significance of regulatory action and duration (first line) and between the presence of any deadline, with and without an actual date, and duration (second line), by RIN. Two-tailed significance test. Source: *Unified Agenda* reports, April 1995-October 2003; most recent entry for an RIN was kept; earlier entries were deleted.

Table 12. Average Duration of Agency Action

	Non-Deadlines			Deadlines		
	Mean	95 % CI	N	Mean	95 % CI	N
USDA	422.17	376.90-467.43	357	406.83	274.49-539.17	35
EPA	603.30	524.89-681.70	249	591.34	500.47-682.21	163
HHS	911.64	826.86-996.42	425	456.61	336.88-576.34	51
DOT	585.59	522.13-649.04	546	519.72	424.58-614.86	71

Table 13. Estimates of Duration of Rulemakings

	CPH	**Weibull**	**OLS**	**Poisson**
Covariate	Coefficient (SE clustered on RIN)	Coefficient (SE)	Coefficient (SE)	Coefficient (SE)
Deadline	0.355	0.305	-124.782	-0.120
	(0.049)**	(0.040)**	(24.081)**	(0.001)**
Regulatory Significance	-0.250	-0.256	72.158	0.043
	(0.038)**	(0.033)**	(18.722)**	(0.001)**
NPRM in Divided Government	-0.033	-0.059	268.522	0.266
	(0.034)	(0.034)	(18.786)**	(0.001)**
Congressional Chance	-1.336	-1.271	394.309	0.714
	(0.037)**	(0.037)**	(19.942)**	(0.001)**
Presidential Change	-1.632	-1.918	1,153.563	1.054
	(0.059)**	(0.047)**	(23.224)**	(0.001)**
Carter	-0.824	-1.559	4,864.863	1.022
	(0.291)**	(0.282)**	(141.474)**	(0.003)**
Reagan	-0.522	-0.523	1,986.422	0.733
	(0.083)**	(0.076)**	(44.360)**	(0.001)**
Bush 41	0.035	0.009	612.549	0.317
	(0.068)	(0.060)	(32.983)**	(0.001)**
Bush 43	0.494	0.514	-436.179	-0.644
	(0.034)**	(0.033)**	(16.671)**	(0.001)**
Sign*Withdrawal	0.010			
	(0.097)			
Deadline*Withdrawal	-0.649			
	(0.159)**			
Divided Gov*W	-0.078			
	(0.105)			
CongChange*w	1.200			
	(0.138)**			
PresChange*W	-0.597			
	(0.146)**			
Carter*W	-1.091			
	(0.577)			
Reagan*W	0.420			
	(0.145)**			
Bush41*W	0.125			
	(0.150)			
Bush43*W	-0.476			
	(0.167)**			
Constant		-8.996	242.540	5.657
		(0.099)**	(32.823)**	(0.002)**
Observations	17852	17852	8950	8950

Covariates included in the CPH model but not significant: State Government, Local Government, Federal Government, Tribal Government, State Government*Withdrawal, Local Government*Withdrawal, Federal Government*Withdrawal, Tribal Government*Withdrawal Covariates for all agencies in the database (other category was dropped) were also included. The following agencies had a significantly positive effect on duration (negative effect on the hazard rate): USDA, DOD, DHS, DOI, DOJ, DOL, Treasury, HHS, DOE, EPA, DOT, FCC, ICC, NRC, and SEC. The following agencies had a significantly negative effect on duration (positive effect on the hazard rate): DOC, Education, and SBA.

Readers with comments should address them to:

Professor Jacob Gersen
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
jgersen@uchicago.edu

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