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Judicial Review Under the APA of Agency Inaction in Contravention of a Statutory Mandate: *Norton v. Southern Utah Wilderness Alliance*

by William D. Araiza and Robert G. Dreher

Norton v. Southern Utah Wilderness Alliance, presently before the U.S. Supreme Court on appeal from the U.S. Court of Appeals for the Tenth Circuit,[1] raises a fundamental issue of administrative law: whether the federal courts have jurisdiction under the Administrative Procedure Act (APA) to review inaction by a federal agency when that inaction violates a nondiscretionary statutory mandate imposed by the U.S. Congress. That question goes to the heart of modern administrative law, which is fundamentally concerned with the relationships among agencies, other institutions of government, and the public, and in particular with the legal principles that constrain and direct the actions of administrative agencies to ensure their fidelity to policies established by law.

Judicial review is central to the rule of law, serving as an essential check on administrative action that disregards legislative mandates or constitutional rights. For this reason, the courts have long recognized a presumption in favor of providing judicial review of executive action. The modern understanding of administrative law recognizes that agency inaction that is in dereliction of a statutory command can inflict injury on legally protected interests that is as damaging as affirmative agency action taken in violation of statutory limitations. For these reasons, the APA explicitly provides for judicial review of an agency's failure to act.[2]

The position taken by the Bureau of Land Management (BLM) in this case—that the federal courts lack jurisdiction to hear claims that federal agencies have failed to carry out legislative mandates except in the most limited circumstances—conflicts with these basic principles of modern administrative law. The BLM's legal argument misreads the relevant language of the APA, and disregards Congress'

William Araiza is a Professor at Loyola Law School, Los Angeles. Robert Dreher is Deputy Executive Director of the Georgetown Environmental Law and Policy Institute, Georgetown University Law Center.

[Editors' Note: This Article is based on an amicus curiae brief submitted February 17, 2004, by a group of professors of environmental and administrative law in support of respondents Southern Utah Wilderness Alliance et al. in Norton v. Southern Utah Wilderness Alliance*, No. 03-101 (U.S., on appeal from the U.S. Court of Appeals for the Tenth Circuit). Oral argument occurred on March 23, 2004. In* Southern Utah*, a district court decision holding that it lacked subject matter jurisdiction to review an environmental group's claims that the Bureau of Land Management (BLM) violated the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA) by not properly managing off-road vehicle use on federal lands classified as wilderness study areas was reversed and remanded.* Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 33 ELR 20025 (10th Cir. 2002). Environmental groups sued the BLM, alleging that the BLM had violated FLPMA and NEPA by not properly managing off-road vehicle use on federal lands in Utah that are classified as wilderness study areas. The district court dismissed the plaintiffs' claims, holding that the federal courts lack authority under the Administrative Procedure Act (APA) to review a federal agency's inaction except in narrow circumstances. The court of appeals reversed and remanded, concluding that the BLM's alleged failure to comply with FLPMA's directive that the agency manage wilderness study areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. §1782(c), would, if proven, constitute "agency action unlawfully withheld" under §706(1) of the APA.*

The signatories to the brief were Robert W. Adler, James I. Farr Chair and Professor, Wallace Stegner Center for Land, Resources, and the Environment, University of Utah's S.J. Quinney College of Law; Michael D. Axline, Professor, Director of Clinical Programs and Co-Director of the Environmental Law Clinic, University of Oregon School of Law; Robert Benson, Professor, Loyola Law School, Los Angeles; Ashutosh Bhagwat, Professor and Associate Academic Dean, University of California, Hastings College of the Law; John E. Bonine, Professor, University of Oregon School of Law; Rebecca Bratspies, Visiting Associate Professor, Michigan State University-DCL College of Law, Associate Professor, University of Idaho College of Law; Sande L. Buhai, Clinical Professor, Loyola Law School, Los Angeles; William W. Buzbee, Professor, Emory University School of Law; Debra L. Donahue, Winston S. Howard Professor, University of Wyoming College of Law; Cynthia Drew, Associate Professor, University of Miami School of Law; David M. Driesen, Associate Professor, Syracuse University College of Law; Cynthia Farina, Professor of Law and Associate Dean, Cornell University; Joseph Feller, Professor, Arizona State University; Roger W. Findley, Fritz B. Burns Chair of Real Property, Loyola Law School, Los Angeles; Cyril Fox, Professor, University of Pittsburgh School of Law; Lisa Heinzerling, Professor, Georgetown University Law Center; Oliver Houck, Professor, Tulane University Law School; William S. Jordan, McDowell Professor, University of Akron School of Law; Robert B. Keiter, Wallace Stegner Professor and Director of the Wallace Stegner Center for Land, Resources, and the Environment, University of Utah's S.J. Quinney College of Law; Charles Koch, Dudley Warner Woodbridge Professor, Marshall-Wythe School of Law, College of William and Mary; Kenneth R. Kreiling, Professor, Vermont Law School; Jeffrey S. Lubbers, fellow in law and government, American University's Washington College of Law; Patricia Ross McCubbin, Assistant Professor, Southern Illinois University School of Law; Thomas O. McGarity, W. James Kronzer Chair in Trial and Appellate Advocacy, University of Texas School of Law; Kenneth M. Murchison, James E. & Betty M. Phillips Professor, Louisiana State University Law Center; Richard Ottinger, Dean Emeritus, Pace Law School; Patrick Parenteau, Professor and Director of the Environmental and Natural Resources Law Clinic, Vermont Law School; Zygmunt J.B. Plater, Professor, Boston College Law School; Ann Powers, Professor, Pace Law School's Center for Environmental Legal Studies; Arnold W. Reitze Jr., J.B. and Maurice C. Shapiro Professor and Director of the Environmental Law Program, George Washington University Law School; Irma S. Russell, Professor, University of Memphis School of Law; Daniel P. Selmi, Professor, Loyola Law School, Los Angeles; Gregory Sergienko, Professor and Associate Dean of Academic Affairs, Western State University College of Law; Karin P. Sheldon, Professor, Associate Dean for the Environmental Law Program, and Director of the Environmental Law Center, Vermont Law School; Amy Sinden, Assistant Professor, Temple University Beasley School of Law; Mark Squillace, Professor, University of Toledo College of Law; John-Mark Stensvaag, Charlotte and Frederick Hubbell Professor of Environmental and Natural Resources Law, University of Iowa College of Law; and Sandra B. Zellmer, Visiting Professor, University of Nebraska College of Law, Professor, University of Toledo College of Law.]

1. Southern Wilderness Alliance v. Norton, 301 F.3d 1217, 33 ELR 20025 (10th Cir. 2002).
2. 5 U.S.C. §§551(13), 702.

clear intent that the APA "afford a remedy for every legal wrong."[3] The BLM's position would, if accepted by the Court, create a significant gap in the ability of the courts to constrain executive agencies to follow the will of Congress. It would also establish a fundamental imbalance in the ability of persons whose interests are injured by federal agency misconduct to obtain a remedy, improperly favoring those who are regulated directly by agency action while disfavoring the beneficiaries of statutory mandates established to protect and promote specific public interests. Both outcomes would undermine the rule of law in this country.

Judicial Review of Agency Action Is Essential to the Rule of Law

Judicial Review Serves Important Societal Interests in Promoting Fidelity to Congressional Purposes, Guarding Against Undue Influence of Private Interests Over the Regulatory Process, and Supporting Public Confidence in Government

Judicial review of agency action serves important societal purposes, broadly embodied in the notion of the rule of law.[4] Judicial review promotes fidelity by agencies to statutory directives and guards against undue influence by private interests in the regulatory process.[5] The lack of normal safeguards of electoral accountability and separation of powers for administrative agencies makes concerns regarding factional influence over governmental processes and disregard of democratically reached public policies especially intense in the administrative context.[6] The availability of judicial review for persons injured by agency action moderates these concerns, serving as an essential constraint upon the exercise of arbitrary or venal power by administrative agencies.[7]

The role of judicial review in assuring the rule of law is deeply rooted in our governmental system. Justice Clarence Thomas has observed: "Our constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates or constitutional rights."[8] As this Court has noted, Chief Justice John Marshall "long ago captured the essential idea" when he observed that "'a government of laws and of principle'" could not leave persons injured by unlawful official conduct without a remedy.[9] In the largest sense, judicial review "provides, and has always provided, vital legitimacy to actions of administrative agencies in the American system of government."[10]

Administrative Law Recognizes a Broad Presumption That Judicial Review of Agency Conduct Is Available

For these reasons, the federal courts have historically adopted a presumption in favor of the availability of judicial review of agency action. The Court concluded in *Abbott Laboratories v. Gardner*[11] that "a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Thus, "federal judges traditionally proceed from the 'strong presumption that Congress intends judicial review.'"[12]

The Court recognized in *Abbott Laboratories* that the general expectation in administrative law that judicial review be available was "reinforced" by the enactment of the APA.[13] The APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.'"[14] The framers of the APA designed the judicial review provisions of the Act to "afford a remedy for every legal wrong,"[15] and defined "agency action" broadly to "assure the complete coverage of every form of agency power, proceeding, action, or inaction."[16] The Court has accordingly recognized that the Act "is meant to cover comprehensively every manner in which an agency may exercise its power,"[17] and emphasized that the Act's "'generous review provisions' must be given a 'hospitable' interpretation."[18] Thus, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[19]

3. S. Rep. No. 79-752, at 7 (1945).

4. *See* Louis Jaffe, Judicial Control of Administrative Action 320-27 (1965); Richard Stewart & Cass Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1203 (1982) (discussing functions of rule of law).

5. *See* Richard J. Pierce Jr., Administrative Law Treatise §16.11 (4th ed. 2002) (judicial review furthers two related goals: "(1) reduction of the risk that agencies will engage in lawless conduct; and (2) reduction of the risk that agency decisionmaking will be infected by factional bias"); Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 33 (1983).

6. Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. Chi. L. Rev. 653, 655 (1985).

7. *See id*. at 656 (noting that the prospect of review increases the likelihood of fidelity to substantive and procedural norms during the decisionmaking process long before judicial review is invoked).

8. Shalala v. Illinois Council on Long-Term Health Care, Inc., 529 U.S. 1, 44 (2000) (Thomas, J., dissenting). *See also* Stephen Breyer, Administrative Law and Regulatory Policy 985 (5th ed. 2002) ("[T]he presumption of review owes its source to considerations of accountability and legislative supremacy, ideas embodied in article I, and also to rule of law considerations, embodied in the due process clause . . . .").

9. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 424 (1995) (quoting United States v. Nourse, 34 U.S. (9 Pet.) 8, 28-29 (1835)).

10. Peter H.A. Lehner, *Judicial Review of Administrative Inaction*, 83 Colum. L. Rev. 627 (1983).

11. 387 U.S. 136, 140 (1967).

12. *Gutierrez de Martinez*, 515 U.S. at 424 (quoting Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986)).

13. 387 U.S. at 140.

14. *Id*. (quoting 5 U.S.C. §702).

15. S. Rep. No. 79-752, at 7 (1945) [hereinafter S. Rep.], *reprinted in* Administrative Procedure Act: Legislative History 79th Congress 193 (1946) [hereinafter Leg. His.); H.R. Rep. No. 79-1980, at 17 (1946) [hereinafter H.R. Rep.], *reprinted in* Leg. His., *supra*, at 255 (H.R. Rep.). For convenience, references to the legislative history of the APA are hereinafter made to the published volume, and cited as Leg. His.

16. Leg. His., *supra* note 15, at 198 (S. Rep.); 255 (H.R. Rep.).

17. Whitman v. American Trucking Ass'n, 531 U.S. 457, 478, 31 ELR 20512 (2001).

18. *Abbott Laboratories*, 387 U.S. at 141.

19. *Id*. While the Act creates exceptions to the presumption of reviewability, the exceptions are narrow: judicial review of an agency's final action will be denied only where it is: (1) expressly precluded by statute; or (2) committed by law to an agency's discretion. 5 U.S.C. §701(a). *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410, 1 ELR 20110 (1971) (exception for action "committed to agency discretion" applicable only in "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply") (internal quotations omitted). The BLM does not invoke either exception in this case.

An Agency's Failure to Implement a Statutory Mandate Threatens the Rule of Law No Less Than Affirmative Agency Action That Violates Legal Requirements

The Concerns Supporting the Presumptive Availability of Judicial Review for Agency Action Apply With Equal Force to Agency Inaction in Dereliction of Statutory Mandates

From its earliest days, this Court has recognized that judicial relief is warranted where an executive officer has failed to perform a mandatory duty. Faced with a request for mandamus to compel an administrative action—delivery of executed commissions of appointment to office—alleged to have been withheld unlawfully by the Secretary of State, Justice Marshall observed in *Marbury v. Madison*[20] that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[21] That basic right to a judicial remedy extends, as Justice Marshall made resoundingly clear in *Marbury*, to administrative inaction that impairs legal rights, no matter how lofty the public officer may be: "[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."[22]

The need for the courts to provide a remedy for unlawful administrative defaults has become more compelling, and better recognized, as the modern administrative state has evolved. The development of modern administrative law can be traced in significant measure from the recognition that statutorily granted rights have equal entitlement to judicial protection as traditional common-law rights.[23] The pre-New Deal understanding of the role of the courts in reviewing administrative conduct was based on the assumptions that market ordering within the constraints of the common law formed a natural baseline, and that the courts should accordingly be vigilant to protect traditional private rights from improper government intervention.[24] This traditional paradigm constrained the courts' willingness to respond to claims of agency failure to act: the presumption in favor of the existing status quo amounted to a "one-way ratchet" imposing legally enforceable restraints on government regulation, but not on inaction, while the beneficiaries of such regulation, lacking traditional liberty or property interests, were relegated to the political process when agencies failed to implement the law.[25]

Modern administrative law, developed in parallel with the rise of the modern regulatory state, has decisively rejected this limited view of courts' role in vindicating statutorily granted rights. As recognized by the courts and legal scholars for nearly three-quarters of a century, common-law rights and statutory rights equally reflect policy judgments by government decisionmakers. Thus, nothing about the common-law basis of a right endows it with higher status than a right the legislature has found appropriate to bestow.[26] From early in the 20th century, the Court's decisions recognized that common-law ordering is not a natural status quo, and that both action and inaction reflect government choices.[27]

Modern administrative law reflects this understanding. Thus, for example, modern procedural due process doctrine recognizes that statutorily granted interests, no less than traditional common-law rights, may constitute property subject to constitutional protections.[28] Similarly, the Court's standing decisions have dispensed with any requirement that a plaintiff possess a "legal right" in favor of a looser requirement that the plaintiff suffer actual injury that is "arguably within the zone of interests protected by a statute."[29] The need for the modern judiciary to be sensitive to the vindication of statutorily granted rights has been expressed eloquently by Justice Anthony M. Kennedy:

> As [g]overnment programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), or Ogden seeking an injunction to halt Gibbons' steamboat operations, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824). In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . .[30]

The modern understanding that the common law does not form a natural baseline, and that statutorily conferred rights are as deserving of judicial protection as common-law-based rights, compels recognition that agency *inaction* in dereliction of a statutory mandate is as threatening to legally protected interests as agency *action* that violates statutory requirements. Just as holders of common-law rights may find their interests injured by governmental regulation that alters the preexisting status quo, the holders of statutorily granted rights are vulnerable to an agency's failure to act

20. 5 U.S. (1 Cranch) 137 (1803).

21. *Id.* at 163.

22. *Id.* at 166.

23. Indeed, "[t]he rise of the modern regulatory state results in large part from an understanding that government 'inaction' is itself a decision and may have serious adverse consequences for affected citizens." Sunstein, *supra* note 6, at 683.

24. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 474-75, 501-03 (1987).

25. Sunstein, *supra* note 6, at 666-67.

26. *See, e.g.*, Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 Cornell L. Rev. 1199, 1204 n.18 (2003):

> The New Deal Court's rejection of *Lochner* recognized the artificiality of a privileged legal status quo. In validating the modern regulatory state, the New Deal Court acknowledged the parity of targets and beneficiaries of regulation. . . . Only if the enforcement of contract, property, and trespass laws is ignored can the economics of "laissez-faire" be understood to reflect the absence of governmental intervention.

27. West Coast Hotel v. Parrish, 300 U.S. 379, 399 (1937) (suggesting that in the absence of minimum wage laws, community relief programs would "provide what is in effect a subsidy for unconscionable employers"); Miller v. Schoene, 276 U.S. 272, 279 (1928) ("It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury . . . to go on unchecked.").

28. *See* Roth v. Board of Regents, 408 U.S. 564 (1972).

29. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

30. Lujan v. Defenders of Wildlife, 504 U.S. 555, 580, 22 ELR 20913 (1992) (Kennedy, J., concurring).

that leaves intact a harmful status quo. The very establishment of statutory programs, and the creation of agencies to administer them, reflect Congress' recognition that interests not recognized by the common law deserve governmental protection, and the failure of an agency to implement a congressional command directly harms those statutorily protected interests.[31] Nonimplementation of a statutory mandate intended to promote societal interests in health and welfare, for example, can result in the public's continued exposure to pollutants, safety hazards, unfair trade practices, or other evils that Congress sought to eliminate, or in the degradation of lands held by law as a resource for public use and enjoyment. Nonimplementation also erodes faith in the legal system, undermining government legitimacy.[32]

For these reasons, as Justice Felix Frankfurter recognized in *Rochester Telephone Corp. v. United States*,[33] the distinction between inaction and action in the context of modern administrative law "is as unilluminating and mischief-making a distinction as the outmoded line between 'nonfeasance' and 'malfeasance.'" The role of judicial review in promoting adherence to statutory goals, and in guarding against arbitrary decisionmaking, is as vitally necessary with respect to agency defaults as to agency excesses.[34]

Agency Inaction Poses a Particular Threat to the Rule of Law by Defeating Congressional Policies Intended to Benefit Broad Public Interests

By threatening the accomplishment of programs adopted by Congress to benefit broad public interests, agency inaction may be particularly threatening to the rule of law. Many regulatory statutes seek to benefit interests held by a wide class of people. Indeed, a primary justification for statutory regulation is to ensure that a diffuse public interest is served, for example, by providing a public good.[35] But the very diffuseness of the public interest often renders beneficiaries less politically influential than those whom the statute regulates. Individual regulated parties tend to feel the burdens of regulation more sharply than individual beneficiaries feel the benefit. Thus, political vindication of beneficiary interests may encounter serious collective action problems.[36] Such problems include free-rider issues: when the benefit of a statute is generally available no individual beneficiary may be motivated to defend it, preferring instead to "free-ride" on the effort of other beneficiaries.[37] Moreover, advocates of broadly shared interests may face serious transaction costs, in identifying like-minded individuals, for example, and convincing them to pursue concerted political action.[38] By contrast, regulated parties may be smaller in number, be more familiar with each other by virtue of engaging in the same regulated activity, and feel regulatory burdens more acutely.[39] Moreover, regulated parties may have far superior financial resources to bring to bear on regulatory processes affecting their economic interests.[40] As a result, regulated parties often exert more effective political influence than regulatory beneficiaries.[41]

The relative ineffectiveness of diffuse public interests in the political process combines with "agency capture," the tendency of regulatory agencies over time to become the servants of the interests they are ostensibly regulating, to undercut the ability of statutory beneficiaries to protect and vindicate their interests through political or administrative channels. As Prof. Richard Stewart has observed:

> It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges and even by some agency members, that the comparative over-representation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.[42]

In the absence of effective judicial review for agency failures to implement a statutory mandate, the statute's beneficiaries would thus face serious difficulty in obtaining redress, either from the agency or from the political process. Requiring citizens to return to the political process to enforce legislative victories already obtained would impose a double and unfair burden on them. Moreover, in the absence of a credible threat of judicial scrutiny at the behest of statutory beneficiaries, the tendency of an agency to skew its decisionmaking in favor of regulated entities, who can readily obtain review of agency action affecting their interests, would be exacerbated.[43]

31. Sunstein, *supra* note 6, at 630.

32. *See* Lehner, *supra* note 10, at 630.

33. 307 U.S. 125, 140-42 (1939).

34. The Court has recognized that the decision to commence enforcement proceedings has traditionally been viewed as committed to agency discretion. Heckler v. Chaney, 470 U.S. 821, 832, 15 ELR 20335 (1985). The Court noted that such decisions are only "presumptively unreviewable," however, *id.*, and emphasized that judicial review of agency inaction is appropriate even with respect to enforcement matters where the governing statute provides meaningful standards to restrain the agency's discretion. *Id.* at 834. The Court's recognition of a rebuttable presumption for enforcement discretion thus does not undercut the general principle that an agency's failure to act is subject to review where there is "law to apply." As the Court noted: "[I]n establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Id.* at 833.

35. *See*, *e.g.*, Breyer, *supra* note 8, at 7.

36. *See generally* Mancur Olson, The Logic of Collective Action (1965); Pierce, *supra* note 5, §16.11.

37. *See, e.g.*, Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 231 n.44 (1986); E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. Econ. & Org. 313, 342 (1985).

38. *See, e.g.*, Olson, *supra* note 36, at 48. *See also* Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713 (1985).

39. *See* Olson, *supra* note 36, at 33-36; Macey, *supra* note 37, at 229.

40. *See* David M. Driesen, The Economic Dynamics of Environmental Law 114-16 (2003) (noting that regulated industries routinely devote a portion of their revenues to hire lawyers, lobbyists, and scientists to argue against strict regulation of their activities, and therefore participate very heavily in regulatory processes).

41. *See, e.g.*, Kay Schlozman & John T. Tierney, Organized Interests and American Democracy 400 (1986); Roger G. Noll & Bruce M. Owen, The Political Economy of Deregulation: Interest Groups in the Regulatory Process 41-53 (1983).

42. Richard Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1713 (1975). *See also* Pierce, *supra* note 5, §16.11 (citing studies documenting capture).

43. *See*, *e.g.*, William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 Admin. L. Rev. 763, 768-72 (1997); Richard J. Pierce Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 87-88 (1995) ("[O]nce agencies know that statutory beneficiaries cannot invoke judicial enforcement of the duty to engage in reasoned decision making, agencies can safely ignore comments filed by beneficiaries . . . . All regulatory agencies will soon resemble the Interstate Commerce Commission (ICC) of the 1950s.").

The APA Explicitly Affords Review of Agency Inaction

Concerns about the failure of existing legal and administrative mechanisms to protect the interests of regulatory beneficiaries underlie the adoption of the APA. In its 1941 report, the U.S. Attorney General's Committee on Administrative Procedure found that judicial review effectively checked agency excesses in derogation of private legal rights, but stated:

> From the point of view of public policy and public interest, it is important not only that the administrator should not improperly encroach on private right but also that he should effectively discharge his statutory obligations. Excessive favor of private interest may be as prejudicial as excessive encroachment. . . . A Federal Trade Commission may violate the legislative policy and cause harm to private interests by failing to investigate and detect unfair methods of competition as well as by overzealously condemning fair methods.[44]

The committee observed that judicial review at that time was rarely available to compel effective enforcement of the law by administrators, and noted that "the problem of whether the administrator's refusal to take action is reviewable remains."[45]

Some bills introduced during Congress' consideration of the APA addressed the problem identified by the Attorney General's committee in only limited ways. Provisions for judicial review of agency conduct in various U.S. House of Representatives bills either ignored the issue of inaction,[46] or offered a remedy for inaction only where an agency's action was "short of statutory right, grant, privilege[,] or benefit" or for an agency's "neglect, failure, or refusal" to act upon "applications" to the agency for a rule, order, or permission.[47]

In contrast, the U.S. Senate bill that ultimately became the APA, S. 7, took a broad approach to judicial review, in order to "afford a remedy for every legal wrong."[48] The Senate bill defined "agency action" expansively as including affirmative actions such as rules, orders, licenses, etc., and the denial of such affirmative relief.[49] However, to "assure the complete coverage of every form of agency power, proceeding, action, or inaction,"[50] S. 7 went farther by explicitly adding the term "*failure to act*" to the definition of agency action.[51] The judicial review provisions of the Senate bill incorporated the broad definition of agency action, affording a right of review to "[a]ny person suffering legal wrong because of *any* agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute."[52] Finally, S. 7 explicitly affirmed the power of the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed."[53]

The provisions of the Senate bill providing expansive judicial review were enacted unchanged in the final APA.[54] The APA thus provided a comprehensive remedy for agency inaction, in keeping with the congressional determination "to afford a remedy for every legal wrong."

The Federal Courts Have Authority Under the APA to Review a Federal Agency's Inaction That Breaches a Statutory Duty With Respect to Management of Public Lands

The BLM's Assertion That the APA Precludes Judicial Review of Its Failure to Comply With a Mandatory Statutory Duty Misreads the Text of the APA and Contravenes Clear Congressional Intent

The Federal Land Policy and Management Act (FLPMA)[55] imposes a clear, mandatory duty upon the Secretary of the Interior with respect to management of federal lands identified as potential wilderness areas: "During the period of review of such areas and until Congress has determined otherwise, *the Secretary shall continue to manage such lands* according to his authority under this Act and other applicable law *in a manner so as not to impair the suitability of such areas for preservation as wilderness* . . . ."[56] The U.S. Department of the Interior (DOI) has adopted formal guidance interpreting what constitutes "impairment" of the suitability of wilderness study areas.[57] The BLM's guidance recognizes that the cross-country operation of motor vehicles impairs the wilderness values of such areas by creating new tracks and roads, and prohibits the agency from permitting such motor vehicle use within wilderness study areas except in emergencies or for official purposes.[58]

A failure by the Secretary to fulfill her affirmative duty to manage potential wilderness areas so as to maintain their suitability for preservation as wilderness constitutes a "fail-

44. S. Doc. No. 8, Administrative Procedure in Government Agencies 76 (1941).

45. *Id.* at 86.

46. *See* Leg. His., *supra* note 15, at 131-39 (H.R. Rep. 184).

47. *Id*. at 145-46 (H.R. Rep. 339); 154 (H.R. Rep. 1117). *See also id*. at 176 (H.R. Rep. 1206) (judicial review provided for final decisions "rendered pursuant to the formal procedures provided herein").

48. *Id*. at 193 (S. Rep.). *See also id.* at 192 (S. Rep.) (noting that S. 7 "contains more comprehensive provisions for judicial review for the redress of any legal wrong" than a predecessor bill).

49. *Id*. at 218 (S. 7).

50. *Id*. at 198 (S. Rep.).

51. *Id*. at 218 (S. 7) (emphasis added). None of the other bills then under consideration before the 79th Congress, including H.R. 1203, the bill introduced in the House as a counterpart to S. 7, included this term. *See generally id*. at 131-83 (setting forth text of House bills under consideration), 156 (H.R. Rep. 1203).

52. *Id*. at 222 (S. 7) (emphasis added).

53. *Id*. These provisions received favorable attention in the congressional debate preceding enactment of the APA. Sen. Pat McCarran (R-Nev.), Chairman of the Senate Judiciary Committee that authored the bill, emphasized the bill's provisions for judicial review, noting that "it is something in which the American public has been and is much concerned, harkening back, if we may, to the Constitution of the United States, which sets up the judicial branch of the [g]overnment for the redress of human wrongs and for the enforcement of human rights." *Id*. at 305. Rep. William L. Springer (R-Ill.) placed particular emphasis on the provision empowering reviewing courts to compel agency action unlawfully withheld or unreasonably delayed, noting: "In many of those cases there has been a withholding or a long delay, and that particular feature is intended to hasten action on the part of these agencies. I feel confident each Member will approve that provision in this bill." *Id*. at 377.

54. *See* 5 U.S.C. §§551(13) (definition of "agency action"); 702 (right of review); 706(1) (scope of review to compel agency action). The bill enacted was a House substitute for S. 7 that incorporated its terms with minor revisions and additions; the definition of "agency action" and the provisions for judicial review were substantively unchanged. *See* Leg. His. *supra* note 15, at 284, 288-89.

55. 43 U.S.C. §§1701-1785, ELR Stat. FLPMA §§102-603.

56. *Id*. §1782(c) (emphases added).

57. *See* BLM, U.S. DOI, Handbook §8550-1, Interim Management Policy for Lands Under Wilderness Review (2002).

58. *Id*. ch. 1.B.3, 1.B.11.

ure to act" within the plain meaning of the APA, and is thus subject to judicial review under that Act. The Act includes "failure to act" within the definition of "agency action" subject to judicial review,[59] and authorizes the courts to "compel agency action unlawfully withheld or unreasonably delayed."[60] The duty imposed on the Secretary by FLPMA with respect to the management of these lands is mandatory, not discretionary,[61] and the BLM does not suggest that review is precluded by statute or that the agency's conduct is committed to agency discretion by law.[62] Where, as here, plaintiffs allege that the Secretary's conduct has breached her statutory duty under FLPMA, the federal courts plainly have subject matter jurisdiction to hear the claim.

The BLM argues, however, that the APA does not grant the courts authority to review failures by land management agencies to act except in extremely narrow circumstances. As an initial matter, the BLM's suggestion that land management agencies deserve special exemption under the Act appears simply self-serving. Apart from its exemption of "matters relating to . . . public property" from notice-and-comment rulemaking procedures,[63] the APA does not treat land management agencies differently in any respect from other federal agencies.[64] Given the importance of judicial review to administrative law, the Court should be wary of attempts by federal agencies to carve out for themselves broad exemptions from judicial scrutiny.

More basically, however, the BLM's legal argument is premised on a wishful misreading of the text of the APA, and conflicts with clear congressional intent to afford expansive judicial review.[65] The BLM argues, first, that the Act's definition of "agency action" must be read as limited to specific "discrete products of a focused decisionmaking process by the agency," such as rules, orders, licenses, sanctions, and relief. Next, the BLM posits that the term "failure to act" must mean a failure to take such formal agency action. Based on this syllogism, the BLM argues that the relief available under §706(1) and §706(2) of the Act must also be perfectly symmetrical: the only actions that may be compelled under §706(1), in the BLM's view, are discrete actions that would be reviewable under §706(2) if taken by an agency. Finally, the BLM overlays this argument with the notion of finality, arguing that judicial review under either §706(1) or §706(2) is limited to final, discrete agency actions that have been taken or withheld.

The BLM's convoluted interpretation is contrary both to the actual text of the Act and to the legislative history. The BLM's first premise reads §551(13)'s definition of "agency action" as an exclusive listing of discrete formal acts, effectively ignoring the word "includes." As the statute's use of that word indicates, however, the definition of "agency action" in §551(13) is inclusive and exemplary, not exclusive.[66] The term "agency action" was intentionally defined broadly by Congress to "assure the complete coverage of every form of agency power, proceeding, action, or inaction,"[67] in keeping with Congress' overarching resolve to "afford a remedy for every legal wrong."[68] As this Court has accordingly recognized, the Act "is meant to cover comprehensively *every manner in which an agency may exercise its power*."[69]

The phrase "failure to act," moreover, is not limited, as the BLM suggests, to the failure to take a discrete formal action like the issuance of a rule or order. The BLM treats the statutory phrase "failure to act" in §551(13) as if it read, instead, "failure to take *such action*." In the BLM's view, the statutory definition would thus read "agency action includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or the *failure to take such action*." The actual text of this provision does not link a "failure to act" to the exemplars of affirmative agency action it lists, however, and the structure of the provision does not support any inference that it is so limited. If Congress had meant to define "failure to act" narrowly as a "failure to *take such action*," it plainly could have done so, as it did by defining agency action to include the listed examples and "the equivalent or denial thereof."

As discussed above, the phrase "failure to act" was added separately in the Senate bill to the definition of "agency action" used in other bills then under consideration. Given the understanding, widely accepted by the time the APA was enacted, that agency inaction can constitute an exercise of

59. 5 U.S.C. §§551(13), 702.

60. *Id.* §706(1).

61. *See* 43 U.S.C. §1782(c) ("the Secretary *shall* continue to manage . . .").

62. *See* 5 U.S.C. §701(a). Although the BLM repeatedly suggests that judicial review in this case may interfere with its discretion in managing the public lands, it has never claimed that management of these lands is committed to its absolute discretion by law. Nor could it; the specific, nondiscretionary duty imposed by §1782(c) of FLPMA, together with other provisions in that detailed statute, preclude any such claim. Similarly, the broad discretion exercised by agencies in enforcement, recognized by the Court in Heckler v. Chaney, 470 U.S. 821, 15 ELR 20335 (1985), is not at issue here. Indeed, the BLM does not rely upon *Heckler* in its argument.

63. 5 U.S.C. §553(a)(2).

64. The BLM, in its brief before the Court, repeatedly invokes the Court's decision in Lujan v. National Wildlife Fed'n, 497 U.S. 871, 20 ELR 20962 (1990), for the proposition that an agency's "day-to-day administration of its programs" cannot be reviewed. The BLM misreads *Lujan*, however. In *Lujan*, the Court rejected an attempt by plaintiffs to aggregate a large number of individual actions into a single reviewable "program." The Court found that the alleged "land withdrawal program" was not an identifiable agency action that could receive "wholesale" review. *Id.* at 891. The Court did *not*, however, suggest that the plaintiffs could not seek judicial review of the agency's conduct in these matters at all; to the contrary, it simply directed plaintiffs to bring their complaints regarding the agency's conduct in "case-by-case" challenges. *Id.* at 894. The plaintiffs here have done so, raising challenges to the BLM's management of particular lands.

65. The BLM, in its brief submitted to the Court, relies for its view of congressional intent almost exclusively upon the views expressed by the U.S. Department of Justice (DOJ) to the Congress as it considered the Act. *See* Petitioners' Brief at 18-25, Norton v. Southern Utah Wilderness Alliance (No. 03-101) (discussing the 1941 report of the Attorney General's Committee on Administrative Procedure and the post-enactment Attorney General's Manual on the APA, while citing actual statements of congressional committees or congressmen only twice—once for the Senate report's description of the Attorney General's Committee's "contribution"). While the Court has given the Attorney General's Manual on the APA "some deference," given the role played by the DOJ in the legislative process, *see*, *e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 546, 8 ELR 20288 (1978), it cannot supersede actual evidence of congressional intent, such as the reports of the congressional committees who drafted the APA.

66. *See* Standard Oil of Cal. v. Federal Trade Comm'n, 596 F. 2d 1381, 1384 (9th Cir. 1979) (§551(13) is "illustrative rather than exclusive"), *rev'd on other grounds*, 449 U.S. 232, 238 n.7 (1980) (agreeing with the court of appeals regarding the existence of agency action, but finding it nonfinal).

67. LEG. HIS., *supra* note 15, at 198 (S. REP.), 255 (H.R. REP.).

68. *Id.* at 193 (S. REP.), 251 (H.R. REP.).

69. Whitman v. American Trucking Ass'n, 531 U.S. 457, 478, 31 ELR 20512 (2001) (emphasis added).

agency power fully as much as agency action, Congress' deliberate inclusion of the term "failure to act" within the meaning of "agency action" must be read broadly to include any form of agency default that injures persons holding statutorily protected interests. Congress in fact *declined* to enact proposed bills that would have defined "agency action" more narrowly, by omitting the term "failure to act" or by restricting judicial review to final decisions rendered pursuant to formal procedures. Indeed, one such failed bill proposed virtually the *exact* approach that the BLM now wishes to read into §551(13), permitting review only of particular final actions and agency failures to take such final actions.[70] Congress' decision instead to define reviewable agency action broadly to include any "failure to act" must therefore be understood as rejecting the narrow interpretation now offered by the BLM.

Without the BLM's restrictive, and erroneous reading of "agency action" and "failure to act," the agency's argument that the provisions of §706(1) and §706(2) are narrow mirrors, providing review only of discrete formal decisions taken or withheld, falls of its own weight. Nothing in either provision, or in the Act's legislative history, supports that view. Section 706 defines the standard of review for the courts in actions under the APA. It cannot be read as limiting or otherwise governing the right to review conferred by §702, and is simply irrelevant to the issue whether judicial review is *available*. The provisions of §706(1) and §706(2) are indeed complementary, but they reflect the different functions of the courts when faced, respectively, with inaction and action. Section 706(1) specifies the scope of review for an agency's "failure to act"; its reference to "agency action unlawfully withheld or unreasonably delayed" must be read as referring to that term, and it provides specific authority for the courts to remedy such a failure by compelling appropriate action to achieve compliance with a statutory command, regardless of whether such action takes the form of discrete, formal decisions. Section 706(2), by contrast, sets the scope of review for affirmative agency actions, authorizing the courts to "hold unlawful and set aside" such affirmative acts when they violate the applicable legal standard.

Finally, the BLM's invocation, in its brief before the Court, of the finality requirement is simply misplaced. While the doctrine of finality applies to a claim for judicial review of agency inaction, the text of the APA does not support the BLM's reading of §706(1) as affording the courts authority to compel only discrete agency action that would be final if taken. It is §704 that limits judicial review (unless otherwise provided by statute) to "final agency action." When "agency action" in that provision is read to embrace "failure to act," the plain meaning of §704 is that the courts may review any "*final failure to act*" (not, as the BLM would have it, any "failure to take final action"). This is the construction of §§704 and 706(1) that the federal courts have long adopted when faced with claims of unlawful inaction or unreasonable delay on the part of a federal agency. As the Tenth Circuit explained in this case:

> Once the agency's delay in carrying out [a mandatory duty] becomes unreasonable, or once the established statutory deadline for carrying out that duty lapses, the agency's inaction under these circumstances is, in essence, the same as if the agency had issued a final order or rule declaring that it would not complete its legally required duty.[71]

The recognition by the courts that an agency's failure to act must at some point be deemed "final" is consistent with the Court's teaching in *Abbott Laboratories* that finality is to be determined in a "pragmatic" and "flexible" manner.[72] Although an affirmative agency action is not considered final unless it marks the "consummation" of the agency's decisionmaking process,[73] an agency's failure to act may result as readily from neglect as from deliberate decision. Requiring a deliberate decision not to act before permitting judicial review would inappropriately entangle the courts in searching for agency motives on poorly defined records. Indeed, requiring a demonstrable decision not to act before permitting judicial review would encourage agencies not to make such decisions, or at least not to document them, in order to evade judicial review. More broadly, it would preclude judicial review altogether of agency inaction that is the product of neglect, rather than defiance, no matter how egregiously it may derogate from congressional direction. Finally, requiring such a decision before permitting judicial review squarely collides with §706(1)'s authorization to courts to compel agency action "unreasonably delayed." If that provision means anything, it must mean that a failure to decide, if it amounts to "unreasonable delay," can be corrected by a court. For these reasons, the courts have properly focused on whether the agency's *failure* to act is effectively final, either because it violates a statutory deadline or because it constitutes unreasonable delay.

The second element of finality, that an agency's action have concrete real-world impact,[74] is also satisfied where an agency's failure to act inflicts actual injury on statutorily protected interests, concretely affecting the legal rights of parties holding such interests. Where an agency's failure to adhere to a statutory mandate demonstrably injures statutorily protected interests, such as those of wilderness users in this case, that failure must be deemed final.

The BLM's Interpretation of the APA Would Undermine Core Principles of Administrative Law, Creating a Loophole Permitting Agencies to Escape Judicial Review and Establishing an Inappropriate Double Standard Favoring Regulated Entities Over Beneficiaries of Statutory Mandates

The BLM's erroneous and restrictive interpretation of the APA would undercut principles of administrative law that

70. *See* LEG. HIS., *supra* note 15, at 154 (H.R. REP. 1117) (restricting judicial review to "final actions, rules, or orders, or those for which there is no other adequate judicial remedy (*including the neglect, failure, or refusal of an agency to act upon any application for a rule, order, permission*, or the amendment or modification thereof, within the time prescribed by law or within a reasonable time) . . .") (emphasis added).

71. 301 F.3d at 1229. *See also*, *e.g.*, Coalition for Sustainable Resources, Inc. v. U.S. Forest Serv., 259 F.3d 1244, 1251 (10th Cir. 2001); Sierra Club v. Thomas, 828 F.2d 783, 793, 17 ELR 21198 (D.C. Cir. 1987) ("[I]f an agency is under an unequivocal statutory duty to act, failure to do so constitutes, in effect, an affirmative act that triggers 'final agency action' review.") *See also* Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65, 99-101 (1996) (discussing constructive agency action); Lehner, *supra* note 10, at 652-55.

72. 387 U.S. at 149-50.

73. Bennett v. Spear, 520 U.S. 154, 177-78, 27 ELR 20824 (1997).

74. *Id*. at 178 (final action is "one by which rights or obligations have been determined, or from which legal consequences will flow") (internal quotes omitted).

are central to the notion of the rule of law. Judicial review is a critical check on lawless agency behavior, enforcing fidelity to statutory directives, deterring improper influence by private parties over agency regulatory processes, and fostering public faith in the legitimacy of government. By carving out a broad and ill-defined exemption for land management agency administration of statutory programs, the BLM's interpretation of the Act would create, as the Tenth Circuit noted, a "no-man's-land" of judicial review "in which a federal agency could f[lout] mandatory, non-discretionary duties simply because it might be able to satisfy these duties through some form of non-final action."[75] The BLM's response can only be termed imperious: persons injured by such lawless conduct should, the BLM submits, simply ask the offending agency to correct its failure to act. The agency may then, in its sole discretion, choose to respond to such a request in a manner that "could" serve as the basis for "any judicial review that may be available."[76] The BLM acknowledges that an agency would be under no legal duty even to respond to such a petition.[77] The BLM and other agencies can hardly be expected to miss the point that they may escape judicial scrutiny altogether simply by ignoring public complaints.

Moreover, by artificially constricting judicial review of agency inaction, the BLM's position would reestablish a double standard, obsolete in administrative law since the New Deal era, favoring the interests of regulated parties over the interests of beneficiaries of statutory programs. Agency inaction poses particular threats to the implementation of broad public policies and to the alleviation of nontraditional harms recognized by Congress. Precluding judicial review of an agency's failure to implement a statutory mandate would leave the beneficiaries of statutory programs without a judicial remedy for agency default, and without effective political recourse. By contrast, under the BLM's theory, persons directly regulated or restricted by an agency would always have a judicial remedy: in the case at hand, for example, off-road vehicle users would have the right to challenge any final BLM action closing wilderness study areas to vehicular use, while wilderness recreationists could not similarly challenge the agency's failure to take such steps even in the face of demonstrable degradation of the wilderness values of such areas. Such a "one-way ratchet" in favor of regulated parties would exacerbate the risks of "agency capture," since agencies could ignore without risk the views of persons unable to invoke judicial review.

Recognition of the Court's Authority to Review an Agency's Failure to Act That Breaches a Statutory Duty Would Not Lead to Impermissible Judicial Interference in Agency Functions

The BLM asserts that the Court must adopt its restrictive position in order to avoid "improper intrusion by courts into agency activities."[78] The BLM invokes a landscape in which federal judges, acting under the authority of §706(1), micro-manage every aspect of an agency's conduct, instructing agencies in "how to act" rather than compelling agencies to act.

The BLM's concern about the scope of potential remedies the courts might impose is unduly hyperbolic. In fact, the federal courts have extensive experience in adjudicating claims of agency action unlawfully withheld or unreasonably delayed, and have shown great sensitivity to agency autonomy in crafting remedies for such claims. The U.S. Court of Appeals for the District of Columbia Circuit, for example, the court with the most extensive involvement with administrative litigation, uses a "rule of reason" in determining when an agency action has been unreasonably delayed; the factors it weighs include the effect that expediting delayed action might have on agency activities of a higher or competing priority, as well as the nature and extent of interests prejudiced by the delay.[79] Other courts have shown similar sensitivity to agency functions in reviewing claims of agency failures to act.[80] Contrary to the BLM's fears, the remedies entered by the courts in such cases have rarely gone beyond determining a schedule for completion of an agency's duty,[81] or retaining jurisdiction to supervise the agency's progress.[82] The court of appeals in the present case noted that "compelling agency action is distinct from ordering a particular outcome,"[83] and made clear that it was merely holding that plaintiffs' claims should be heard.[84] Just as the equitable discretion of the federal courts can protect the legitimate sovereign interests of state officials subject to a federal consent decree,[85] so too the remedial discretion of the courts can prevent undue interference with federal agency functions.

In any event, the BLM's concerns about the breadth of hypothetical remedies do not speak to whether federal courts possess *subject matter jurisdiction* under the APA to hear claims of agency failure to act. As the Tenth Circuit noted, the BLM confuses its claim of discretion over *how* to implement a statutory mandate with the actual question before the Court: whether the agency has discretion to disobey a mandatory statutory command altogether. To accord with the basic principles of the rule of law, that proposition must be rejected.

75. 301 F.3d at 1230 n.10.

76. Petitioners' Brief at 29, Norton v. Southern Utah Wilderness Alliance (No. 03-101); *see also id.* at 36.

77. *Id*. at 29.

78. *Id*. at 25.

79. *See, e.g.*, Telecommunications Research & Action Ctr. v. Federal Communications Comm'n, 750 F.2d 70, 80 (D.C. Cir. 1984).

80. *See*, *e.g.*, National Ass'n for the Advancement of Colored People v. Secretary of Hous. & Urban Dev., 817 F.2d 149, 159-60 (1st Cir. 1987) (Breyer, J.):

> We do not see any reason why the court cannot effectively ensure [the Department of Housing and Urban Development's (HUD's)] future responsible exercise of discretion while at the same time preserving for the agency its discretionary options . . . . In formulating its remedy, of course, the district court may, as it has already done, seek the advice and participation of HUD.

Estate of Smith v. Heckler, 747 F.2d 583, 591 (10th Cir. 1984) (noting that the "court is not a 'super agency' and cannot control the specifics of how the Secretary satisfies [a statutory] duty").

81. *See, e.g.*, MCI Telecommunications Corp. v. Federal Communications Comm'n, 627 F.2d 322 (D.C. Cir. 1980); Public Citizen Health Research Group v. Chao, 314 F.3d 143 (3d Cir. 2002).

82. *See, e.g.*, Air Line Pilots Ass'n v. CAB, 750 F.2d 81, 87 (D.C. Cir. 1984).

83. 301 F.3d at 1226.

84. *Id*. at 1233.

85. *See* Frew v. Hawkins, 124 S. Ct. 899, 905-06 (2004).