

# JUDICIAL REVIEW OF AGENCY DELAYS CAUSED BY A LACK OF APPROPRIATIONS: THE YUCCA TWO-STEP

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## ABSTRACT

*The doctrine of implied repeals allows Congress to repeal existing legislation, without explicitly stating its intention to do so, through the enactment of new legislation. While there has always been a presumption against implied repeals, this presumption has essentially transformed into a hard-and-fast rule forbidding implicit repeals. Nowhere is this transformation more pronounced than where the claimed repeal rests solely on an appropriations act.*

*While a presumption against implied repeals makes sense, the hard-and-fast rule forbidding implied repeals can lead to absurd results. For instance, in *In re Aiken County*, the application of this rule led to a mandate that the Nuclear Regulatory Commission spend \$11.1 million toward the licensing process of Yucca Mountain as the United States' future nuclear waste repository. While everyone agreed that it is highly unlikely that Yucca Mountain would ever be the country's nuclear waste repository, and despite the fact that no money has been appropriated toward the project in years, the D.C. Circuit Court of Appeals refused to construe the lack of appropriations as congressional intent to implicitly repeal the statutory mandate.*

*Rather than applying a hard-and-fast rule forbidding implicit repeals, this Note, using a modified version of the Chevron Two-Step, argues that in certain instances, when congressional intent to do so is clear, implicitly repealing a prior statute based on a later appropriations act is appropriate. Further, this Note argues that when congressional intent to repeal a prior statute is not clear, rather than immediately compelling agency action, courts should conduct a three-prong balancing test and grant deference to the agency if the delay caused by a lack of appropriations is reasonable.*

## TABLE OF CONTENTS

INTRODUCTION .....	373
I. CLIMBING YUCCA MOUNTAIN: HOW WE GOT HERE.....	377
A. A Growing Demand for Nuclear Energy in the United States.....	378
B. Taking Out the Trash: The Search for a Nuclear Waste Repository.....	379
C. Navigating a Mountain of Litigation .....	383
1. <i>First Appeal in the D.C. Circuit Court of Appeals</i> ....	384
2. <i>Second Challenge in the D.C. Circuit Court of Appeals</i> .....	385
3. <i>Flouting the Law? The Third Challenge in the D.C. Circuit Court of Appeals</i> .....	385
II. THE PRESUMPTION AGAINST IMPLIED REPEALS .....	387
A. The Presumption Against Implied Repeals in the Appropriations Context.....	389
1. <i>The (Potentially Flawed) Rationale for the Presumption Against Implied Repeals</i> .....	389
2. <i>A Prevailing Presumption: Case Law Denying Implicit Repeals</i> .....	391
B. Overcoming the Odds: Beating the Presumption Against Implied Repeals.....	395
III. AGENCY DELAYS AND JUDICIAL REVIEW .....	398
A. Judicial Review of Agency Inaction.....	398
B. Judicial Review of Agency Delays.....	400
C. Judicial Review of Agency Action Under the <i>Chevron</i> Two-Step.....	401
IV. THE YUCCA TWO-STEP .....	404
A. Step One: Finding Clear Congressional Intent in Appropriations Acts.....	405
1. <i>Finding Intent Through Textualism</i> .....	405
2. <i>Beyond the Text: The “Shocks-the-Conscience” Standard</i> .....	406
B. Step Two: When Is Agency Action Reasonable? .....	409
1. <i>Legitimacy of Agency Delays: A Burden Shifting Approach</i> .....	410
2. <i>Additional Benefits of Limited Agency Action</i> .....	411
3. <i>Additional Costs of Compelling Immediate Agency Action</i> .....	412
CONCLUSION .....	413

## INTRODUCTION

To the average United States citizen, the variety of ways to spend \$11.1 million seems endless.<sup>1</sup> For instance, those who like to give back could feed 1,448 families of four for a year<sup>2</sup> or provide four years of college tuition to 123 students in need.<sup>3</sup> Those who would rather drive fast could put down a 21% payment on the world's most expensive car.<sup>4</sup> Surely, no one would just throw this money away. After a recent ruling by the District of Columbia Court of Appeals relating to the disposal of nuclear waste in Yucca Mountain, Nevada,<sup>5</sup> however, \$11.1 million will be disposed of in a manner similar to the nuclear waste at issue: inefficiently.<sup>6</sup>

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1. See Robert Pear, *Median Income Rises, but Is Still 6% Below Level at Start of Recession in '07*, N.Y. TIMES, Aug. 22, 2013, at A13, available at [http://www.nytimes.com/2013/08/22/us/politics/us-median-income-rises-but-is-still-6-below-its-2007-peak.html?\\_r=0](http://www.nytimes.com/2013/08/22/us/politics/us-median-income-rises-but-is-still-6-below-its-2007-peak.html?_r=0) (noting that in June 2013, the median annual household income in the United States was \$52,100).

2. Nanci Hellmich, *Cost of Feeding a Family of Four: \$146 to \$289 a Week*, USA TODAY (May 1, 2013, 5:27 PM), <http://www.usatoday.com/story/news/nation/2013/05/01/grocery-costs-for-family/2104165/>.

3. Kim Clark, *Tuition at Public Colleges Rises 4.8%*, CNN MONEY (Oct. 24, 2012, 10:35 AM), <http://money.cnn.com/2012/10/24/pf/college/public-college-tuition/> (stating that the average tuition in 2012–2013 was \$22,261).

4. Scott Reyburn, *Ferrari GTO Becomes Most Expensive Car at \$52 Million*, BLOOMBERG (Oct. 3, 2013, 9:31 AM), <http://www.bloomberg.com/news/2013-10-02/ferrari-gto-becomes-most-expensive-car-at-52-million.html>.

5. See discussion *infra* Part I. The battle over where to store the country's growing amount of nuclear waste has been ongoing since the 1980s. See discussion *infra* Section I.A. While it was originally settled that Yucca Mountain, Nevada, would be a permanent disposal site, politics have gotten in the way, and the United States is still not close to determining where to store its nuclear waste.

6. See *In re Aiken Cnty. (Aiken Cnty. III)*, 725 F.3d 255, 259-61 (D.C. Cir. 2013) (holding that the Nuclear Regulatory Commission must comply with a statutory mandate and spend \$11.1 million to review an application for a nuclear waste repository at Yucca Mountain, despite the fact that the funds are inadequate to complete the review process and despite the fact that there is no indication that additional appropriations will be set aside to complete the review process in the future).

After years of trying to find a feasible nuclear waste repository and an apparent solution in Yucca Mountain, it became clear in 2010 that alternative options would have to be considered.<sup>7</sup> A congressional budget that had once set aside \$572 million for Yucca Mountain's licensing process had declined to \$0 by 2011.<sup>8</sup> Only \$11.1 million in funding for the project remained,<sup>9</sup> and it was agreed that this amount was "wholly insufficient to complete the processing of the application."<sup>10</sup> Still, the D.C. Circuit Court of Appeals, seemingly against the will of the Executive and Legislative branches, ordered the Nuclear Regulatory Commission (NRC) to put the \$11.1 million toward the Yucca Mountain licensing process.<sup>11</sup> The court made its decision in large part due to the presumption against implied repeals, which essentially forbids courts from assuming that Congress has repealed prior statutes absent a clear statement affirming its intention to do so.<sup>12</sup> While the court was following a statutory mandate ordering the NRC to spend the funds, the court could have avoided the wasteful spending by taking one of two alternative courses of action.

First, despite the presumption against implied repeals, the court could have interpreted the lack of appropriations toward Yucca Mountain as clear congressional intent to implicitly repeal the statute mandating the NRC to spend the funds.<sup>13</sup> For several reasons, courts have been hesitant to repeal legislation based solely on a later appropriations act.<sup>14</sup> As the Fourth Circuit Court of Appeals has stated, however, "[w]hile the canon of statutory interpretation disfavoring implied repeals in appropriations bills is strong, it is still just a canon of interpretation. It is not an absolute rule."<sup>15</sup>

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7. See discussion *infra* Part I.

8. TODD GARVEY, CONG. RESEARCH SERV., R41675, CLOSING YUCCA MOUNTAIN: LITIGATION ASSOCIATED WITH ATTEMPTS TO ABANDON THE PLANNED NUCLEAR WASTE REPOSITORY 3 (2012), available at <http://fas.org/sgp/crs/misc/R41675.pdf>.

9. See Bret Kupfer, Note, *Agency Discretion and Statutory Mandates in a Time of Inadequate Funding: An Alternative to In Re Aiken County*, 46 CONN. L. REV. 331, 331 (2013) (noting that the \$11.1 million consisted of "carryover appropriations" from past years).

10. *Aiken Cnty. III*, 725 F.3d at 269 (Garland, J., dissenting).

11. *Id.* at 259 (majority opinion).

12. *Id.* at 260.

13. See *Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 338 (4th Cir. 2007).

14. See discussion *infra* Subsection II.A.1.

15. *Dudas*, 506 F.3d at 338.

Because the Supreme Court has long disfavored repealing statutes by implication,<sup>16</sup> a second alternative—allowing the NRC to delay spending until Congress allocates additional funding—is a more realistic option.<sup>17</sup> Typically, courts give a greater degree of deference to an agency’s decision not to act than an agency’s decision to take action.<sup>18</sup> Still, there is no single standard of review for agency inaction; courts give more or less deference depending on the nature of the inaction.<sup>19</sup> The case involving Yucca Mountain, *In re Aiken County*, involves a distinct type of agency inaction—agency delay—by the NRC.<sup>20</sup> The Supreme Court has never directly addressed how lower courts should adjudicate agency delays,<sup>21</sup> but currently, the courts most often look to the flawed<sup>22</sup> “TRAC analysis” to determine whether an agency delay in rulemaking or adjudication is unreasonable.<sup>23</sup>

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16. *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936).

17. *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 785 (D.C. Cir. 1971) (stating that the presumption against implied repeals “applies with full vigor when . . . the subsequent legislation is an appropriations measure”).

18. See Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 461-62 (2008) (noting that with judicial review of agency action and inaction, “the level of deference var[ies] depending on the importance that resource allocation plays in the agency’s decision”); see also Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 670 (1983) (noting Justice Scalia’s philosophy that “courts should always give deregulation or the failure to regulate greater deference than is given to agency decisions to regulate”).

19. Lehner, *supra* note 18, at 670 (“The intensity of regulatory oversight varies widely among the statutory schemes that govern administrative agencies.”). Given the lack of one clear standard of review, there is confusion both regarding the standard of review for agency inaction and “considerable uncertainty at the circuit level regarding the remedies that courts may consider once they have concluded that an agency improperly failed to act.” See Biber, *supra* note 18, at 462, 467.

20. See *In re Aiken Cnty. (Aiken Cnty. II)*, No. 11-1271, 2012 WL 3140360, at \*1 (D.C. Cir. Aug. 3, 2012) (Kavanaugh, J., concurring). In this case, the NRC was delaying action until it received sufficient funding to go forward. *Id.* (“The Commission resists on the ground that it does not have sufficient appropriated funds to complete action on the license application.”).

21. See Michael D. Sant’Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1411 (2011) (“The Supreme Court has never addressed how a court should assess agency delay.”).

22. *Id.* at 1414 (“The TRAC analysis makes no attempt to distinguish between legitimate and illegitimate causes of delay, rulemaking versus adjudication, specific versus broad statutory mandates, or decisions about priorities versus substantive action.”).

23. *Id.* (“The most common approach used by the lower federal courts to review delays in both rulemaking proceedings and adjudications is the ‘TRAC

While some legal scholarship questioning the presumption against implied repeals when a later statute conflicts with an earlier enacted statute exists,<sup>24</sup> in large part, it has accepted the courts' view disfavoring the implicit repeal of a prior statute.<sup>25</sup> Further, there is little legal scholarship examining judicial review of agency delays.<sup>26</sup> This Note fills a gap in legal scholarship by providing a new approach to analyzing agency delays caused by a lack of appropriations,<sup>27</sup> addressing both the weaknesses of the presumption against implied repeals<sup>28</sup> and the TRAC analysis.<sup>29</sup> The solution first requires courts to take a hard look at whether the appropriations act signals clear congressional intent to implicitly repeal prior legislation.<sup>30</sup> In determining whether clear congressional intent exists to repeal the existing legislation, courts should look to both the amount of money that either has been appropriated or not appropriated to a specific project and the text of the appropriations act.<sup>31</sup> If the text and funds appropriated "shock the conscience," signaling clear congressional intent, then the inquiry ends at step one, and the courts must enforce the congressional intent.<sup>32</sup> If congressional intent is not made clear through the appropriations act and funds appropriated, however, the courts must proceed to step two of the test and engage in a modified approach to the flawed TRAC analysis to determine whether the agency's delay is

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analysis' . . ."). The "TRAC Analysis" derives from *Telecommunications Research & Action Center v. FCC (TRAC v. FCC)*, 750 F.2d 70 (D.C. Cir. 1984). The TRAC test employs a six-factor balancing test to determine whether or not the agency delay is unreasonable. *Id.* at 80.

24. See generally Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988); Karen Petroski, Comment, *Rethorizing the Presumption Against Implied Repeals*, 92 CALIF. L. REV. 487, 488-91 (2004).

25. But see Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669, 671 (2005) (arguing that the "canon disfavoring legislative changes through the appropriations process [is] unjustified as a matter of positive political theory").

26. See Sant'Amrogio, *supra* note 21, at 1402 ("Legal scholars have devoted little attention to judicial review of agency delays or to the role that courts might play in curing them.").

27. See discussion *infra* Part IV.

28. See discussion *infra* Subsection II.A.1.

29. See discussion *supra* note 27 and accompanying text.

30. See discussion *infra* Section IV.A.

31. See discussion *infra* Section IV.A.

32. See discussion *infra* Section IV.A.

reasonable.<sup>33</sup> By applying this two-prong test, courts will avoid nonsensical results and save both time and money.

Part I examines the history and legislation leading to the designation of Yucca Mountain as a site for nuclear waste disposal as well as the Department of Energy's attempts to overturn this decision.<sup>34</sup> It looks at the D.C. Circuit Court of Appeals' three decisions, eventually leading to the ruling that the NRC must continue to research Yucca Mountain as a potential site for nuclear waste disposal, even though Congress has not appropriated additional funds toward the project in years.<sup>35</sup> Part II examines past decisions of the courts that have led to the presumption against implied repeals.<sup>36</sup> Specifically, this Part examines how in certain cases, congressional appropriations can and should be used as a clear signal of Congress's intent to implicitly repeal a prior statute.<sup>37</sup> Part III discusses the current method that courts use to review agency delays and addresses the concerns present with this method.<sup>38</sup> Part IV outlines a new two-prong test that applies in situations where an agency delay results from a lack of appropriations.<sup>39</sup> This test both (1) analyzes situations where appropriations alone can signal clear congressional intent to repeal existing legislation; and (2) determines when agency delays due to a lack of appropriations are reasonable.<sup>40</sup>

## I. CLIMBING YUCCA MOUNTAIN: HOW WE GOT HERE

As the demand for nuclear power grew throughout the 1900s, so did the amount of nuclear waste, creating a question that still exists today: Where should it go? The United States has struggled for years to find a permanent disposal site for its growing amount of nuclear waste.<sup>41</sup> While it once appeared all but certain that Yucca Mountain would be the answer to this problem, due to a variety of factors, it is now highly unlikely that nuclear waste will ever be stored at Yucca Mountain.<sup>42</sup> After years of litigation in the D.C.

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33. See discussion *infra* Section IV.A.

34. See discussion *infra* Part I.

35. See discussion *infra* Part I.

36. See discussion *infra* Part II.

37. See discussion *infra* Part II.

38. See discussion *infra* Part III.

39. See discussion *infra* Part IV.

40. See discussion *infra* Part IV.

41. See discussion *infra* Section I.B.

42. See discussion *infra* Section I.B.

Circuit Court of Appeals and a dwindling budget, the country is still searching for its nuclear waste repository.<sup>43</sup> By examining the history of the country's search for a nuclear waste repository, and the D.C. Circuit's holding that the NRC must spend \$11.1 million researching Yucca Mountain as a waste repository despite the fact that all indications point to the spending as being useless, it becomes clear that judicial review of agency delays caused by a lack of appropriations must be reexamined.

#### A. A Growing Demand for Nuclear Energy in the United States

The nuclear energy industry, unlike any other energy industry, is a public enterprise and one that grew to unprecedented heights throughout the late 1900s.<sup>44</sup> The demand for nuclear energy in the United States began in 1946, when Congress granted the Atomic Energy Commission (AEC) the responsibility to regulate the industry.<sup>45</sup> Eight years later, Congress passed the Atomic Energy Act of 1954.<sup>46</sup> The Atomic Energy Act encouraged nuclear energy usage,<sup>47</sup> and consequently, the nuclear energy industry began to grow at a rapid pace. By 2007, nuclear power plants in the United States had generated more nuclear power than Central America, South America, Africa, Asia, and the Middle East combined.<sup>48</sup> Serious

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43. See discussion *infra* Sections I.B-C.

44. Megan Easley, Note, *Standing in Nuclear Waste: Challenging the Disposal of Yucca Mountain*, 97 CORNELL L. REV. 659, 662, 664 (2012) ("From its inception, nuclear power has been uniquely positioned as the 'only energy source that began as, and remains, a primarily public enterprise.'" (quoting MARC ALLEN EISNER, JEFF WORSHAM & EVAN J. RINGQUIST, CONTEMPORARY REGULATORY POLICY 270 (2d ed. 2006))).

45. See *History*, U.S. NRC, <http://www.nrc.gov/about-nrc/history.html> (last updated Sept. 30, 2014) (explaining that after Congress passed the Atomic Energy Act of 1946, nuclear regulation was the responsibility of the Atomic Energy Commission).

46. Act of Aug. 30, 1954, ch. 1073, 68 Stat. 919, 921 (codified as amended in scattered sections of 42 U.S.C.).

47. 42 U.S.C. § 2011(a) (2012) ("It is . . . the policy of the United States that—(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject . . . to the paramount objective of making the maximum contribution to the common defense and security . . .").

48. Easley, *supra* note 44, at 662 ("The sixty-five nuclear power plants . . . in thirty-one states have historically generated an average of one-fifth of the United States' electricity supply. In 2007, these nuclear power plants generated over eight hundred billion kilowatt-hours of electric power, more than nuclear power in Central



discussions regarding where to put the growing amount of nuclear waste in the United States did not begin, however, until the country had no choice but to address the problem in 1979.<sup>49</sup>

## B. Taking Out the Trash: The Search for a Nuclear Waste Repository

Despite the growing popularity of nuclear energy during the latter half of the 1900s, United States industry experts initially put little effort into finding a permanent nuclear waste repository.<sup>50</sup> In 1965, the AEC began storing spent nuclear fuel in an abandoned salt mine in Lyons, Kansas,<sup>51</sup> and in June 1970, the AEC decided to build a federal high-level waste repository in the Lyons mine.<sup>52</sup> As a precursor to the United States' unsuccessful attempts to find an adequate solution for nuclear waste disposal, however, a mixture of adverse public reaction and political pressure caused the project's cancellation in 1972.<sup>53</sup>

The Energy Reorganization Act of 1974 disbanded the AEC and created the Nuclear Regulatory Commission (NRC)<sup>54</sup> in an effort to "promote more efficient management" of nuclear energy and

America, South America, Africa, Asia, and the Middle East combined." (footnote omitted)).

49. See discussion *infra* Section I.B.

50. See Easley, *supra* note 44, at 664 n.29 ("For many years, the United States nuclear establishment felt no urgency about the waste disposal problem because it appeared to be easily solvable and not technically interesting." (quoting DAVID BODANSKY, NUCLEAR ENERGY: PRINCIPLES, PRACTICES, AND PROSPECTS 254 (2d ed. 2004))). Across the world, however, a greater concern may have existed. See Tom Kenny, Note, *Where to Put It All? Opening the Judicial Road for a Long-Term Solution to the Nation's Nuclear Waste Problem*, 86 NOTRE DAME L. REV. 1319, 1321 (2011) (noting that in 1959, Pyotr Kapitsa, a Russian Nobel Prize winner, proposed sending nuclear waste to outer space; other disposal options that have been considered include "ocean dumping, subseabed disposal, and reprocessing the spent nuclear fuel to recover uranium and plutonium" (footnote omitted)).

51. Letter from J. Dexter Peach, Director, U.S. Gen. Accounting Office, to Nancy L. Kassebaum, U.S. Senator (Mar. 23, 1982), available at <http://www.gao.gov/assets/140/136974.pdf>.

52. *Id.* at 2. "High-level waste . . . is characterized by high-levels of penetrating radiation and must be isolated from the environment for many thousands of years," whereas "[l]ow-level nuclear waste . . . ranges from materials suspected of being slightly contaminated with radiation to highly contaminated materials which remain radioactive for long periods of time." *Id.* at 1 nn.1-2.

53. *Id.* at 2 ("Before . . . issues could be resolved . . . adverse public and political reaction caused the project to be cancelled in 1972.").

54. See Adam J. White, *Yucca Mountain: A Post-Mortem*, 37 NEW ATLANTIS 3, 6 (2012) (explaining that when President Ford signed the Energy Reorganization Act and created the NRC, it effectively terminated the AEC).

research.<sup>55</sup> Despite the creation of the NRC, the country made little progress in its search for a permanent nuclear waste repository until 1979.<sup>56</sup> On March 28, 1979, nuclear power came to the forefront of national attention as a result of the Three Mile Island crisis in Pennsylvania,<sup>57</sup> when an accident melted half of a nuclear reactor's core and prompted fear of radioactive contamination throughout the country.<sup>58</sup> As a result, in 1981, President Reagan instructed the Secretary of Energy, James Edwards, to develop a solution for the storage and disposal of nuclear waste.<sup>59</sup> Edwards's proposed solution was the Nuclear Waste Policy Act of 1983 (NWPA).<sup>60</sup>

The NWPA originally called for the Department of Energy's (DOE) Secretary to identify five potential locations for the country's first nuclear waste repository.<sup>61</sup> After nominating the initial sites, the Secretary had until January 1, 1985, to recommend three final sites to the President.<sup>62</sup> No later than sixty days after receiving the Secretary's submissions, the President was to approve or disapprove of each site.<sup>63</sup> The DOE studied sites in Mississippi, Nevada, Texas, Utah, and Washington, and in 1986, the Secretary of Energy recommended three potential sites: Yucca Mountain, Nevada; Deaf Smith County, Texas; and Hanford Engineer Works, Washington.<sup>64</sup>

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55. Act of Oct. 11, 1974, Pub. L. No. 93-438, 88 Stat. 1233, 1233 (codified as amended in scattered sections of 42 U.S.C.).

56. See BODANSKY, *supra* note 50, at 254.

57. See *Background on the Three Mile Island Accident*, U.S. NRC, <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html> (last updated Dec. 12, 2014). On March 28, 1979, the Three Mile Island Unit 2 (TMI-2) reactor partially melted down, resulting in "the most serious accident in U.S. commercial nuclear power plant operating history." *Id.* Both the NRC and the public were concerned that the reactor's core may burn or explode. *Id.* The NRC Chairman and the Governor of Pennsylvania agreed that it would be in the public's best interest to evacuate the area near the plant, and pregnant women and preschool-aged children within five miles were advised to leave the area. *Id.*

58. See *History*, *supra* note 45.

59. See White, *supra* note 54, at 6.

60. See Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (codified at 42 U.S.C. § 10101 (1982)). Congress passed the NWPA after acknowledging that "[f]ederal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste . . . have not been adequate." 42 U.S.C. § 10131(a)(3).

61. *Id.* § 10132(b)(1)(A) ("[T]he Secretary shall nominate at least 5 sites that he determines suitable for site characterization for selection of the first repository site.").

62. *Id.* § 10132(b)(1)(B).

63. *Id.* § 10132(c)(1).

64. See White, *supra* note 54, at 6-7.

Despite the Secretary's three recommendations, Congress "short-circuited the original process,"<sup>65</sup> making Yucca Mountain the only possible site.<sup>66</sup> While Harry Reid, Nevada's junior senator at the time, believed the decision resulted solely from politics,<sup>67</sup> it appeared that the nation had finally settled on a nuclear waste repository.<sup>68</sup> Over the next fifteen years, the DOE performed site-characterization activities, resting on the assumption that Yucca Mountain would be the nation's nuclear waste repository.<sup>69</sup> In 2002, the DOE gave a final recommendation in favor of Yucca Mountain as the country's permanent nuclear waste repository,<sup>70</sup> which President George W. Bush immediately approved.<sup>71</sup>

Predictably, the State of Nevada objected to dumping the country's nuclear waste on its land, but Congress nonetheless passed a joint resolution approving the selection of Yucca Mountain.<sup>72</sup> After Congress completed the site-selection process, the DOE was given ninety days to submit a licensing application for a repository at Yucca Mountain to the NRC.<sup>73</sup> While it took six years rather than ninety days,<sup>74</sup> the DOE finally submitted a licensing application

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65. *In re Aiken Cnty. (Aiken Cnty. I)*, 645 F.3d 428, 431 (D.C. Cir. 2011).

66. *See* Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (codified at 42 U.S.C. § 10172 (1988)) (directing the Secretary to "provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site").

67. *See* Susan Rasky, *Nevada May End Up Holding the Nuclear Bag*, N.Y. TIMES, Dec. 20, 1987, at E4. Reid described the decision as "base, raw, power politics." *Id.*

68. *Id.* (noting that Senator J. Bennett Johnston, a Louisiana Democrat, stated, "I think it's fair to say we've solved the nuclear waste problem with this legislation").

69. *See* 42 U.S.C. § 10133(b)(1)(A)(i)-(v) (1982). Site-characterization activities under this statute included a description of the extent of the planned excavations, plans for any onsite testing with radioactive or nonradioactive material, criteria to be used to determine the suitability of each candidate site, plans for the decontamination of each candidate site, and any other information required by the Commission. *Id.*

70. *Aiken Cnty. I*, 645 F.3d at 431.

71. *See* White, *supra* note 54, at 9.

72. *Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1309 (D.C. Cir. 2004) ("The Resolution affirmatively and finally approved the Yucca site for a repository, thus bringing the site-selection process to a conclusion.").

73. *Aiken Cnty. I*, 645 F.3d at 432 (citing 42 U.S.C. § 10134(b)).

74. *Id.* As part of the licensing application process, the DOE was required to show that Yucca Mountain could meet the Environmental Protection Agency's standards for protecting public health, but the DOE "experienced persistent problems with its quality assurance program for the Yucca Mountain project," substantially slowing down the licensing process. *See* U.S. GOV'T ACCOUNTABILITY

seeking approval to construct a geologic repository at Yucca Mountain on June 3, 2008.<sup>75</sup>

While the United States had supposedly “solved the nuclear waste problem” with prior legislation,<sup>76</sup> then-Senator Barack Obama’s presidential campaign coincided with the timing of the DOE’s licensing application submission.<sup>77</sup> With the State of Nevada a key battleground in the 2008 election, and Senate Majority Leader Harry Reid of Nevada vehemently opposing Yucca Mountain as the country’s nuclear waste disposal site, then-Senator Obama vowed that he would “end the notion of Yucca Mountain.”<sup>78</sup> In 2008, with President Obama officially elected, Harry Reid was doing everything in his power to make sure that Yucca Mountain would never become the nation’s nuclear waste dumping ground.<sup>79</sup> In May 2009, Gregory Jaczko, a former staffer of Reid—the man who had previously described the 1987 NWPA Amendment as the “[S]crew Nevada [B]ill”<sup>80</sup>—was now in charge of the NRC.<sup>81</sup> As a result of the political reorganization, the DOE filed a motion in 2010 to withdraw its licensing application with prejudice,<sup>82</sup> asserting that the site was

OFFICE, GAO-07-1010, DOE HAS IMPROVED ITS QUALITY ASSURANCE PROGRAM, BUT WHETHER ITS APPLICATION FOR A NRC LICENSE WILL BE HIGH QUALITY IS UNCLEAR 2 (2007), available at <http://www.gao.gov/assets/270/265042.pdf>.

75. Department of Energy; Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, NV, 73 Fed. Reg. 53284, 53284 (Sept. 15, 2008).

76. Rasky, *supra* note 67, at E4 (internal quotation marks omitted).

77. For an advertisement of then-Senator Barack Obama attacking then-Senator John McCain for supporting Yucca Mountain as a nuclear waste repository, see Sarah Wheaton, *Obama Ad Attacks McCain on Yucca Mountain*, N.Y. TIMES (Aug. 9, 2008, 2:27 PM), [http://thecaucus.blogs.nytimes.com/2008/08/09/obama-ad-attacks-mccain-on-yucca-mountain/?\\_r=0](http://thecaucus.blogs.nytimes.com/2008/08/09/obama-ad-attacks-mccain-on-yucca-mountain/?_r=0).

78. Easley, *supra* note 44, at 673 (internal quotation marks omitted) (citing Editorial, *Where Does It All Go?*, N.Y. TIMES, Dec. 20, 2008, at A26).

79. See White, *supra* note 54, at 4 (stating that the Obama administration “unilaterally nullif[ie]d the decades-old statutory framework for Yucca [Mountain]”).

80. Amber Phillips, *What Republicans’ Big Win Means for Harry Reid’s Fight Against Yucca Mountain*, LAS VEGAS SUN (Nov. 7, 2014, 2:00 AM), <http://www.lasvegassun.com/news/2014/nov/07/what-republicans-big-win-means-nevadas-yucca-mount/>.

81. See White, *supra* note 54, at 10-11.

82. To withdraw with prejudice “is a final adjudication of the issues presented by the pleadings and normally bars further suit between the parties on the same cause of action.” *Slotkin v. Brookdale Hosp. Ctr.*, 377 F. Supp. 275, 277 (S.D.N.Y. 1974). This would have the effect of permanently banning Yucca Mountain from consideration as the nation’s nuclear waste disposal site.

no longer a viable option for the long-term disposal of nuclear waste.<sup>83</sup>

By 2010, in addition to the political influences, congressional budget proposals also suggested that options other than Yucca Mountain should be considered as the country's nuclear waste repository.<sup>84</sup> The 2005 fiscal year budget proposal set aside \$572 million to finance the Yucca Mountain licensing process.<sup>85</sup> This number dropped to \$288 million in 2009, and in 2010 dropped further to \$197 million.<sup>86</sup> In 2011, 2012, and 2013, budget proposals cut out all funding toward Yucca Mountain.<sup>87</sup>

### C. Navigating a Mountain of Litigation

Just as political pressure and a lack of funding have drawn out the DOE's search for a permanent nuclear waste repository,<sup>88</sup> so too has a stream of litigation that began in 2010.<sup>89</sup> State and local government units that were forced to temporarily store nuclear waste, as well as private citizens living near the temporary waste sites, challenged the DOE's motion to withdraw its licensing application for Yucca Mountain.<sup>90</sup> The Atomic Safety and Licensing Board Panel (ASLBP) originally denied the DOE's motion to withdraw with prejudice in 2010 because the NWPA forbids the DOE from doing so.<sup>91</sup> The matter was not resolved completely until

83. *Aiken Cnty. I*, 645 F.3d 428, 432 (D.C. Cir. 2011) (“[The DOE] ‘does not intend ever to refile an application to construct a permanent geologic repository . . . at Yucca Mountain.’” (quoting U.S. Dep’t of Energy (High-Level Waste Repository), 71 N.R.C. 609, 629 (2010))).

84. GARVEY, *supra* note 8, at 6 & n.45.

85. *Id.* at 3.

86. *Id.* For an illustration of how quickly funding for Yucca Mountain was being cut in 2010, see Stephen Power, *Chu, Orszag at Odds over Yucca Funding*, WALL ST. J. (Jan. 14, 2010, 3:34 PM), <http://online.wsj.com/news/articles/SB10001424052748703414504575001852488180226>.

87. GARVEY, *supra* note 8 (“[T]he [Obama] Administration’s FY2011, FY2012, and FY2013 budget proposals eliminated all funding for the Yucca Mountain project.”).

88. See discussion *supra* Section I.B.

89. *Aiken Cnty. I*, 645 F.3d 428 (D.C. Cir. 2011).

90. *Id.* at 431. These state and local government units were Aiken County, South Carolina, the State of South Carolina, and the State of Washington. *Id.*

91. U.S. Dep’t of Energy (High-Level Waste Repository), 74 N.R.C. 368, 368-69 (2011); U.S. Dep’t of Energy (High-Level Waste Repository), 71 N.R.C. 609, 617 (2010) (finding that the NWPA “mandates progress toward a merits decision by the Nuclear Regulatory Commission on the construction permit”). The ASLBP is the “trial-level adjudicatory body of the NRC” that conducts public

August 13, 2013, when the D.C. Circuit Court of Appeals made its ruling in *In re Aiken County*.<sup>92</sup>

### 1. *First Appeal in the D.C. Circuit Court of Appeals*

After the ASLBP denied the DOE's motion to withdraw, the Secretary of the NRC reviewed briefs arguing what action the NRC should take with respect to the decision.<sup>93</sup> The same petitioners from the ASLBP decision challenged the DOE's "apparent decision to abandon development of the Yucca Mountain nuclear waste repository."<sup>94</sup> Petitioners feared that if Yucca Mountain was never used as a nuclear waste repository, then the temporarily stored waste would remain in their jurisdictions for years to come.<sup>95</sup> The court acknowledged that Petitioners' fears were reasonable, but stated that Petitioners' challenges to the administrative process were premature until Petitioners could demonstrate that one of the respondents had violated a clear duty to act or otherwise violated the law.<sup>96</sup>

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hearings as well as uncontested hearings. *ASLBP Responsibilities*, U.S. NRC, <http://www.nrc.gov/about-nrc/regulatory/adjudicatory/aslbp-respons.html> (last updated Jan. 10, 2014). Each Licensing Board is typically made up of three administrative judges, "usually consisting of one attorney skilled in the conduct of administrative hearings and two experts in scientific or technical areas relevant to the subject matter [in] dispute." *Id.*

92. *See Aiken Cnty. III*, 725 F.3d 255, 257 (D.C. Cir. 2013).

93. *Aiken Cnty. I*, 645 F.3d at 432 ("[T]he Secretary of the Commission invited all of the participants before the Licensing Board to file briefs as to whether the Commission should review, reverse, or uphold the Licensing Board's decision to deny the DOE's motion to withdraw.").

94. *Id.* at 430. As evidence that the DOE was attempting to abandon Yucca Mountain, Petitioners pointed to the fact that the DOE had drafted plans to shut down Yucca Mountain and had announced that it was abandoning Yucca Mountain when it created a Blue Ribbon Commission to find another way to dispose of nuclear waste. *Id.* at 430, 433. The petitioners argued that the DOE did not have the legal authority to withdraw its application, and therefore, the DOE's actions violated the NWPA. *Id.* at 433. Petitioners further argued that the DOE violated the National Environmental Policy Act because it took actions to abandon Yucca Mountain permanently and without preparing an environmental impact statement. *Id.*

95. *Id.* at 434.

96. *Id.* at 434, 437. For an analysis of which Petitioners should have had standing to challenge the NWPA and seek redress, see Easley, *supra* note 44, at 686.

## 2. *Second Challenge in the D.C. Circuit Court of Appeals*

In 2012, the same Petitioners filed suit again.<sup>97</sup> The NRC was required to issue a final decision approving or disapproving the DOE's licensing application no later than three years after its licensing submission.<sup>98</sup> The DOE filed the original application in June 2008, and after over three years of inaction, in 2012, Petitioners asked the D.C. Circuit to order the NRC to comply with the statutory mandate.<sup>99</sup> The NRC refused to act on the licensing application because it did not have sufficient funds to complete the application process.<sup>100</sup> The court did not grant mandamus to Petitioners because the issue would become moot if Congress either appropriated additional funds to the NRC in 2013 or enacted a new statute forbidding the NRC from using the remaining appropriations toward the application process.<sup>101</sup> The court, however, acknowledged that if Congress did not provide additional instructions to the NRC, then it would act on the petition for mandamus in the future.<sup>102</sup>

## 3. *Flouting the Law? The Third Challenge in the D.C. Circuit Court of Appeals*

As it turned out, Congress did not provide additional instructions to the NRC, and on August 13, 2013, the D.C. Circuit Court of Appeals granted the Petitioners mandamus, finding that the NRC's refusal to complete the licensing application process violated the law.<sup>103</sup> The court reasoned that while it was not disputed that the \$11.1 million that the NRC had to conduct the licensing process was

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97. *Aiken Cnty. II*, No. 11-1271, 2012 WL 3140360 (D.C. Cir. Aug. 3, 2012).

98. 42 U.S.C. § 10134(d) (1982).

99. *Aiken Cnty. II*, 2012 WL 3140360, at \*1-2 (Kavanaugh, J., concurring) (“Petitioners seek mandamus. They ask us to order the Nuclear Regulatory Commission to comply with the statutory mandate requiring the Commission to act on the Department of Energy’s long-pending license application to store nuclear waste at Yucca Mountain.”).

100. *Id.* at \*1.

101. *Id.* (“Congress’s upcoming appropriations decisions could well affect whether those expenditures are necessary.”).

102. *Id.* (“Of course, it is possible that Congress will take neither of those steps . . . . In that circumstance, I believe mandamus likely would have to be granted. An . . . agency generally has no authority to disregard a statute that mandates or prohibits specific agency actions . . . .”).

103. *Aiken Cnty. III*, 725 F.3d 255, 257 (D.C. Cir. 2013).

insufficient,<sup>104</sup> Congress often appropriates money gradually, and agencies cannot ignore statutory mandates because there is not sufficient funding to *complete* the project.<sup>105</sup> Importantly, the court ruled that although congressional appropriations had been nonexistent in the last three years, it could not construe the lack of appropriations as congressional intent to implicitly repeal the statutory mandate.<sup>106</sup> The court reasoned that just because this particular Congress refused to make additional appropriations to continue the licensing process does not mean that a future Congress will come to the same decision.<sup>107</sup> The court accused the NRC of “flouting the law”<sup>108</sup> and mandated the NRC to continue with the licensing process until it either exhausted the remaining funds or Congress explicitly repealed the law.<sup>109</sup>

In his dissent, Chief Judge Garland argued that granting Petitioners’ writ of mandamus would cause the NRC “to do ‘a useless thing.’”<sup>110</sup> The NRC had concluded that it could not make any meaningful progress toward the licensing application with \$11.1 million,<sup>111</sup> and Chief Judge Garland stated that with only limited

104. *Id.* at 269 (Garland, J., dissenting) (stating that “[n]o one disputes that \$11 million is wholly insufficient to complete the processing of the application”).

105. *Id.* at 259 (majority opinion). A delay in agency action may be caused by an agency’s attempt to ensure that its decision is consistent with the wishes of the enacting Congress; however, delays in agency action also occur for other reasons, such as “Congress’s failure to provide the agency with the resources necessary to achieve its mandated goals.” Sant’Ambrogio, *supra* note 21, at 1393. There can be no doubt that in this case, the agency delay was caused by congressional failure to provide the agency with the necessary resources. *See Aiken Cnty. III*, 725 F.3d at 260.

106. *Aiken Cnty. III*, 725 F.3d at 260 (“[C]ourts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated.” (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978))).

107. *Id.*

108. *Id.* at 259.

109. *Id.* at 267 (stating that “unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the Nuclear Regulatory Commission must promptly continue with the legally mandated licensing process”).

110. *Id.* at 269 (Garland, J., dissenting) (quoting *United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228, 232 (D.C. Cir. 1936)).

111. *See id.* (“The NRC . . . has suspended the application proceeding until there are sufficient funds to make meaningful progress.”). The Supreme Court has previously acknowledged that decisions such as this are precisely within an agency’s expertise and one of the reasons agencies exist in the first place.

[A]n agency’s allocation of funds from a lump-sum appropriation requires “a complicated balancing of a number of factors which are peculiarly within its expertise”: whether its “resources are best spent” on one



funds remaining, granting the writ of mandamus would force the NRC to spend those funds unpacking its boxes and then repacking them again.<sup>112</sup> Nevertheless, largely because of the presumption against implied repeals, the court had made its decision to require the NRC to carry out a “useless” process.<sup>113</sup>

## II. THE PRESUMPTION AGAINST IMPLIED REPEALS

To understand why the *In re Aiken County* court did not interpret Congress’s lack of appropriations as a clear signal that Congress no longer intended to use Yucca Mountain as the country’s nuclear waste repository, it is best to begin with the doctrine of implied repeals.<sup>114</sup> The doctrine of implied repeals allows Congress, through the enactment of new legislation, to repeal existing statutes without explicitly stating its intention to do so.<sup>115</sup> If the two statutes conflict, the later act, “even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first.”<sup>116</sup> Most courts, however, follow a statutory canon providing a presumption against the implicit repeal of prior statutes.<sup>117</sup> Although the United States Supreme Court has acknowledged that legislation may be repealed by implication if the legislature’s intent to do so is clear,<sup>118</sup> as a practical matter, the presumption against implied repeals has today transformed into a hard-and-fast rule forbidding implied repeals.<sup>119</sup>

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program or another; whether it is “likely to succeed” in fulfilling its statutory mandate; whether a particular program “best fits the agency’s overall policies”; and, “indeed, whether the agency has enough resources” to fund a program “at all.”

*Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

112. *Aiken Cnty. III*, 725 F.3d at 270 (Garland, J., dissenting).

113. *Id.* at 269.

114. The D.C. Circuit’s holding relied heavily on the presumption against implied repeals, stating that “courts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated.” *Id.* at 260 (majority opinion).

115. 1A Norman J. Singer & J.D. Shambie Singer, *STATUTES AND STATUTORY CONSTRUCTION* § 23:9 (7th ed. 2009).

116. *Id.*

117. *Id.* § 23:10.

118. *See Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936) (noting that the “intention of the legislature to repeal must be clear and manifest”).

119. *See Petroski, supra* note 24, at 489 (stating that especially as of late, “the absence of any principled understanding of the purposes served by the

The presumption against implied repeals arises most often when a new statute conflicts with an existing statute.<sup>120</sup> If there are two reasonable interpretations of the statute, then the judge should choose the interpretation that does not conflict with the existing statute.<sup>121</sup> If the two statutes cannot be reconciled, however, then only the portion of the earlier statute that cannot be reconciled should be repealed.<sup>122</sup> Those in favor of the presumption against implied repeals argue that because the legislature is aware of all existing statutes, it would explicitly state its intention to repeal an existing statute if it wanted to do so.<sup>123</sup> Without an affirmative statement of the legislature's intent to repeal existing legislation, courts have held that the only two situations where repeal by implication may be found are (1) when provisions of the two acts directly and irreconcilably conflict; and (2) when the subsequent statute is "clearly intended as a substitute" of the prior statute.<sup>124</sup>

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presumption against implied repeals seems to have led a majority of current Supreme Court justices to transform the presumption into a rule forbidding implied repeals").

120. See LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 146 (Russell Weaver ed., 2008). One of the most cited cases discussing implied repeals, *Morton v. Mancari*, 417 U.S. 535 (1974), arose after a new statute, the Equal Employment Opportunity Act of 1972, conflicted with but did not explicitly repeal an existing statute, the Indian Reorganization Act of 1934. *Id.* at 537. The Indian Reorganization Act stated that when making appointments to various positions, "qualified Indians shall . . . have the preference to appointment to vacancies." *Id.* at 538 (quoting 25 U.S.C. § 472 (1934)). The later-enacted Equal Opportunity Act of 1972 stated that appointments to positions "shall be made free from any discrimination based on race, color, religion, sex, or national origin." *Id.* at 540 & n.6 (quoting 42 U.S.C. § 2000e-16(a) (Supp II 1973)). The Supreme Court refused to find that the new statute implicitly repealed the existing statute because the "cardinal rule" is that implicit repeals are disfavored. *Id.* at 549 (citing *Posadas*, 296 U.S. at 503; *Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm'n*, 393 U.S. 186, 193 (1968)).

121. JELLUM, *supra* note 120, at 146.

122. *Id.*

123. *Id.* (stating that the presumption against implied repeals rests "on the potentially flawed presumption that the legislature was aware of the conflicting, existing law and specifically opted not to repeal it").

124. *Posadas*, 296 U.S. at 503.

## A. The Presumption Against Implied Repeals in the Appropriations Context

The presumption against implied repeals applies with “full vigor” when the subsequent statute is an appropriations measure.<sup>125</sup> In fact, “the policy applies with even greater force when the claimed repeal rests solely on the Appropriations Act”<sup>126</sup> because there is an assumption that the legislature does not thoroughly deliberate over appropriations measures.<sup>127</sup> Just like any canon of statutory interpretation, however, the presumption against implied repeals can be overcome if there is specific evidence showing that Congress intended to implicitly repeal the prior statute through a subsequent appropriations bill.<sup>128</sup>

### 1. *The (Potentially Flawed) Rationale for the Presumption Against Implied Repeals*

There are several reasons why the Court has stated that the presumption against implied repeals applies “with even greater force” when it rests solely on an appropriations act.<sup>129</sup> The greatest concern is that some members of Congress will be oblivious to the nuances of the new appropriations act and its effect on existing laws.<sup>130</sup> There is also a concern that appropriations laws are “short-sighted and have little effect on the law beyond the years for which they apportion public monies.”<sup>131</sup> The appropriations process, as compared with the authorization process,<sup>132</sup> has been described as

125. *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 785 (D.C. Cir. 1971).

126. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (italics omitted).

127. *McCubbins & Rodriguez*, *supra* note 25, at 687-88.

128. *See* JELLUM, *supra* note 120, at 147.

129. *See Hill*, 437 U.S. at 190 (italics omitted).

130. *See* *McCubbins & Rodriguez*, *supra* note 25, at 686, 689 (explaining that when existing legislation is explicitly repealed, the courts have the comfort of knowing that Congress is fully aware of the repeal and its implications on existing law, as all members of Congress are required to vote to repeal legislation; only the Appropriations Committee, however, determines how much funding to set aside for certain projects).

131. *Id.* at 688 (quoting William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *DUKE L.J.* 1215, 1215 (2001)).

132. “The most important forms of annual legislation are authorization and appropriation acts.” KENNETH J. ALLEN, *FEDERAL GRANT PRACTICE: A GUIDE FOR THE GOVERNMENT AND GRANTEEES* § 8.5 (2014). An authorization of appropriations is a directive to Congress that allows for the funding of the subject at issue. *Id.* On the

“hurried, opaque, and, on the whole, nondeliberative.”<sup>133</sup> The courts have shown a clear preference for deliberative decision-making in Congress.<sup>134</sup> Therefore, when two statutes conflict, they will likely favor the statute passed through an authorization act as opposed to an appropriations act.<sup>135</sup>

While these concerns are not without merit, Mathew D. McCubbins and Daniel B. Rodriguez<sup>136</sup> make compelling arguments that they are not quite as pronounced as some have argued.<sup>137</sup> Addressing the first major concern—that not all members of Congress are aware of the intricacies of appropriations acts—McCubbins and Rodriguez point out the high level of involvement that legislators have with the appropriations process.<sup>138</sup> Supporting this notion is the fact that currently, the House Appropriations Committee consists of fifty-one members from thirty states,<sup>139</sup> and the Senate Appropriations Committee consists of thirty members.<sup>140</sup> Further, the members of the House Appropriations Committee are “ideologically similar to the party they represent, and in the aggregate are quite close to the entire House membership.”<sup>141</sup> The makeup of the Committees, combined with the high frequency that appropriations bills are amended,<sup>142</sup> suggests that there is more congressional exposure to appropriations bills than supporters of the presumption against implied repeals suggest. McCubbins and Rodriguez also address the concern that the appropriations process is

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other hand, an appropriations act provides the “budget authority” for the funding at issue. *Id.*

133. See McCubbins & Rodriguez, *supra* note 25, at 688.

134. *Id.* at 689-90.

135. *Id.* at 690.

136. At the time of publishing their article, Mathew D. McCubbins was a “Distinguished Professor and Chancellor’s Associates Chair VIII” of the University of California, San Diego’s Department of Political Science, and Daniel B. Rodriguez was “Dean and Professor of Law” at the University of San Diego School of Law. *Id.* at 669 n.\*.

137. See generally *id.* at 707-08.

138. *Id.* at 695 (stating that legislators have a “direct and significant” impact on the appropriations process).

139. See *Full Committee Members*, U.S. HOUSE REPRESENTATIVES, <http://appropriations.house.gov/about/members/> (last visited Feb. 9, 2015) (providing a complete list of members of the House Appropriations Committee).

140. *Committee Members*, U.S. SENATE, <http://www.appropriations.senate.gov/about-committee/committee-members> (last visited Feb. 9, 2015).

141. McCubbins & Rodriguez, *supra* note 25, at 696.

142. *Id.* (describing appropriations bills as “among the most frequently amended of all legislation”).

“hurried, opaque, and . . . nondeliberative,”<sup>143</sup> arguing that the process is in fact thorough and transparent given the time spent creating the appropriations budget and the multitude of information that is available to the public at large throughout the process.<sup>144</sup>

To understand how the presumption against implied repeals came to apply to appropriations measures, and the rationale given by the courts, it is important to focus on prior case law where the presumption against implied repeals has been upheld.<sup>145</sup> In particular, the cases of *Tennessee Valley Authority v. Hill*,<sup>146</sup> commonly known as the “Snail Darter case,”<sup>147</sup> and *Calloway v. District of Columbia*<sup>148</sup> illustrate the difficulty of overcoming the presumption against implied repeals in the appropriations context.<sup>149</sup> As other cases prove, however, the presumption against implied repeals is not impossible to overcome.<sup>150</sup>

## 2. *A Prevailing Presumption: Case Law Denying Implicit Repeals*

In 1967, the Tennessee Valley Authority began constructing the Tellico Dam along the Little Tennessee River.<sup>151</sup> The dam was designed to hold water covering 16,500 acres of farmland and to provide significant value to the area.<sup>152</sup> Congress, recognizing this, had appropriated funds to the project every year since 1967.<sup>153</sup>

143. *Id.* at 688, 701-07.

144. *Id.* at 702. The creation of the appropriations budget “begins more than a year and a half before appropriations legislation is crafted with reports by the General Accounting Office and estimates from executive agencies.” *Id.* “Then, 12 months before the legislation hits the floor, the Office of Management and Budget produces its budget review.” *Id.* Further, when creating the federal appropriations budget, committee reports and any other documentation involved in the process are made available to any interested person, which is “unlike regular legislation where there is no public release requirement for staff and committee reports until 48 hours before the vote.” *Id.*

145. *See* discussion *infra* Subsection II.A.2.

146. 437 U.S. 153 (1978).

147. Harry S. Mattice, Jr., *Winning a Battle, Losing a War: The “Snail Darter Case” and the Changing Relationship Between Law and Media*, 80 TENN. L. REV. 549, 549 (2013).

148. 216 F.3d 1 (D.C. Cir. 2000).

149. *See* discussion *infra* Subsection II.A.2.

150. *See* discussion *infra* Section II.B.

151. *Hill*, 437 U.S. at 156-57. The Tennessee Valley Authority is a “wholly owned public corporation of the United States.” *Id.*

152. *Id.* at 157.

153. *Id.* at 157-58.

Despite the continuing appropriations toward the project and the apparent value it would add to the area, the Supreme Court ordered the Tennessee Valley Authority to stop the project during the middle of its construction because of the Endangered Species Act.<sup>154</sup>

In 1973, Congress passed the Endangered Species Act (ESA), authorizing the Secretary of the Interior to declare a species of life endangered.<sup>155</sup> Once a species was declared endangered, federal departments and agencies were required to ensure that their actions did not jeopardize the continued existence of the endangered species.<sup>156</sup> In 1975, the snail darter<sup>157</sup> was listed as an endangered species, and the Secretary of the Interior determined that the snail darter's "critical habitat" was the area of the Tellico Dam that had been under construction since 1967.<sup>158</sup> Consequently, the ESA ordered the Tennessee Valley Authority to immediately halt construction on the Tellico Dam in order to avoid jeopardizing the snail darter's critical habitat.<sup>159</sup>

Even after the Tellico Dam was named the snail darter's critical habitat, however, Tennessee Valley Authority continued to receive congressional appropriations to be allocated toward the completion of the dam.<sup>160</sup> In February 1976, respondents filed suit arguing that, by continuing to construct the dam, Tennessee Valley Authority was in direct violation of the ESA.<sup>161</sup> The district court dismissed the complaint because the project was already 80% complete and \$53 million that had already been spent would not be recoverable.<sup>162</sup> The Supreme Court, however, sided with the Sixth Circuit Court of

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154. *Id.* at 194-95.

155. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C.).

156. *Id.* § 7, 87 Stat. at 892 (forbidding actions that resulted in the "destruction . . . of habitat of [endangered] species which is determined by the Secretary . . . to be critical").

157. The snail darter was a "previously unknown species of perch." *Hill*, 437 U.S. at 158.

158. *Hill*, 437 U.S. at 159, 161-62 (internal quotation marks omitted).

159. *Id.* at 160, 162.

160. *Id.* at 164 (noting that in 1975, two years after the ESA had passed, Congress appropriated an additional \$29 million toward the Tellico Dam project).

161. *Id.* ("[R]espondents filed the case now under review, seeking to enjoin completion of the dam and impoundment of the reservoir on the ground that those actions would violate the Act by directly causing the extinction of the species . . .").

162. *Hill v. Tenn. Valley Auth.*, 419 F. Supp. 753, 755, 759-60 (E.D. Tenn. 1976).

Appeals and overruled the district court.<sup>163</sup> Similar to *In re Aiken County*, the Court acknowledged that Congress's continued appropriations conflicted with prior legislation passed by Congress.<sup>164</sup> While the district court relied on congressional appropriations as evidence of Congress's intent to complete the construction of the Tellico Dam in spite of the ESA,<sup>165</sup> the Supreme Court held that the Appropriations Act did not implicitly repeal the ESA due to the presumption against implied repeals.<sup>166</sup>

The Court stated that the presumption against implied repeals applies with even greater force when the subsequent legislation is an appropriations act for several reasons. First, when voting on appropriations measures, legislators vote under the assumption that the funds will be used for lawful purposes.<sup>167</sup> Second, the Court noted that there was no evidence suggesting all members of Congress were aware of Tennessee Valley Authority's desire to continue construction of the Tellico Dam in spite of the ESA.<sup>168</sup> Lastly, the Court found that the Appropriations Committee's views represented only the views of the Committee members themselves, and not the legislative intent of Congress as a whole.<sup>169</sup>

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163. See *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1075 (6th Cir. 1977) (ordering an injunction on the building of Tellico Dam until Congress, through explicit legislation, exempted the Tellico Dam from compliance with the ESA).

164. *Hill*, 437 U.S. at 172-73. The Court also noted that Congress was likely aware that appropriating additional funding toward the Tellico Dam was in violation of the ESA, stating:

It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter.

*Id.* at 172.

165. *Hill*, 419 F. Supp. at 761-62 (“[W]e believe that additional funding of the Tellico Project and a House Committee’s direction to complete the project . . . is persuasive that such an interpretation of the Act is consistent with congressional intent.”).

166. *Hill*, 437 U.S. at 189. The Court referenced the “cardinal rule . . . that repeals by implication are not favored” and stated that the presumption against implied repeals applies with even greater force when the later legislation is an appropriations act. *Id.* at 189-90 (internal quotation marks omitted).

167. *Id.* at 190.

168. *Id.* at 192.

169. *Id.* at 193.

In a second case, *Calloway v. District of Columbia*, a rider in the District of Columbia Appropriations Act placed caps on the hourly rate and total compensation the District was able to pay prevailing attorneys in actions against D.C. Public Schools under the Individuals with Disabilities Education Act.<sup>170</sup> Before the Appropriations Act was enacted, several families with disabled children filed suit, arguing that the limitation of attorney's fees in the appropriations act conflicts with the Individuals with Disabilities Education Act's guarantee that parents of disabled children have a right to competent counsel if public schools do not comply with the Act.<sup>171</sup> The issue boiled down to whether, given the presumption that appropriations acts do not amend substantive law, Congress unambiguously expressed the intent to limit the courts' authority to award fees.<sup>172</sup> The court recognized the "potential incongruity of courts' awarding fees that the [Appropriations Act] prohibits the District from paying during the same fiscal year."<sup>173</sup> Following *Tennessee Valley Authority v. Hill*,<sup>174</sup> however, the court gave narrow effect to the Appropriations Act<sup>175</sup> and stated that it did not implicitly repeal portions of the Individuals with Disabilities Education Act.<sup>176</sup>

Criticisms of the appropriations process—that appropriations only have an effect on the upcoming fiscal year and that the

170. 216 F.3d 1, 4 (D.C. Cir. 2000). It is wise to look to the D.C. Circuit for case law on this issue as it is widely held to be the premier authority on administrative and agency law. See Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 131 (2013) (stating that the Circuit's caseload is "disproportionally weighted toward administrative law"). Further, the D.C. Circuit is the controlling circuit in *In re Aiken County*. *Aiken Cnty. III*, 725 F.3d 255 (D.C. Cir. 2013).

171. *Calloway*, 216 F.3d at 5. The Individuals with Disabilities Education Act guarantees that parents of disabled children will have the opportunity to participate in the identification, evaluation, and placement process of their children's public education options. 20 U.S.C. § 1415(b)(1) (2012). Parents who object to the identification, evaluation, or educational placement are entitled to an "impartial due process hearing." *Id.* § 1415(f)(1)(A). At the due process hearing, the parents have the right to be "accompanied and advised by counsel." *Id.* § 1415(h)(1).

172. *Calloway*, 216 F.3d at 9.

173. *Id.* at 10.

174. 437 U.S. at 190.

175. See *Calloway*, 216 F.3d at 9 ("As we have elsewhere observed, 'the established rule [is] that, when appropriations measures arguably conflict with the underlying authorizing legislation, their effect must be construed narrowly. Such measures have the limited and specific purpose of providing funds for authorized programs.'" (quoting *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984))).

176. *Id.* at 10.



appropriations process is hurried and opaque—have merit in certain cases.<sup>177</sup> In many cases, an appropriations act does not send a clear signal of congressional intent to repeal prior legislation, and in these situations, the presumption against implied repeals should apply to appropriations measures.<sup>178</sup> As seen in *In re Aiken County*,<sup>179</sup> *Tennessee Valley Authority*,<sup>180</sup> and *Calloway*,<sup>181</sup> vigorously applying the presumption against implied repeals to appropriations acts can at times lead to nonsensical results, but on rare occasions, courts have allowed common sense to prevail.<sup>182</sup>

### B. Overcoming the Odds: Beating the Presumption Against Implied Repeals

While *Tennessee Valley Authority v. Hill* shows just how difficult it can be, the presumption against implied repeals has been overcome before.<sup>183</sup> Significantly, the presumption against implied repeals was overcome in the 1973 case of *Friends of the Earth v. Armstrong*.<sup>184</sup> In this case, the Tenth Circuit found that an appropriations act repealed an earlier statute even though the appropriations act did not directly contradict the prior statute or explicitly state its intention to repeal the prior statute.<sup>185</sup> This case represented the first time that a federal court found that an appropriations act implicitly repealed a prior statute that did not require the expenditure of money.<sup>186</sup>

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177. See discussion *infra* Section II.B.

178. See generally *Hill*, 437 U.S. 153; *Calloway*, 216 F.3d 1.

179. *Aiken Cnty. III*, 725 F.3d 255, 269 (D.C. Cir. 2013) (Garland, J., dissenting) (stating that the presumption against implied repeals, as applied to this case, forces the court to do a “useless” thing (internal quotation marks omitted)).

180. *Hill*, 437 U.S. at 172-73 (acknowledging that it is “curious” that the snail darter could cause the permanent halting of an almost completed dam).

181. See *Calloway*, 216 F.3d at 10 (noting that the holding resulted in “potential incongruity”).

182. See discussion *infra* Section II.B.

183. See Petroski, *supra* note 24, at 532-40 (providing a detailed list of cases involving the presumption against implied repeals). Past cases in which implied repeals have occurred span from *Society for Propagation of Gospel in Foreign Parts v. Town of Pawlet*, 29 U.S. (4 Pet.) 480 (1830) to *United States v. Will*, 449 U.S. 200 (1980). *Id.*

184. 485 F.2d 1 (10th Cir. 1973).

185. *Id.* at 7.

186. *Environmental Law—Statutory Construction—Appropriations Act Repeals by Implication a Prior Substantive Enactment*, 54 B.U. L. REV. 457, 458 (1974) [hereinafter *Environmental Law*]; *Armstrong*, 485 F.2d at 9 (“This case at

The *Armstrong* litigation occurred after water from Lake Powell entered the Rainbow Bridge National Monument (Monument) in 1971.<sup>187</sup> Plaintiffs argued that the Colorado River Storage Project Act of 1956 (CRSPA)<sup>188</sup> required the Secretary of the Interior to take action—either by erecting a barrier dam or by operating the current dam at less-than-full capacity—to prevent water impounded in Lake Powell from spreading into the Monument.<sup>189</sup> The Secretary, however, pointed to subsequent appropriations actions by Congress that reduced funding toward the protection of the Monument, arguing that these actions implicitly repealed the portion of the CRSPA requiring the Secretary to take actions preventing water from spreading into the Monument.<sup>190</sup>

The district court, using the common argument that implicit repeals are by nature disfavored, ruled in favor of Plaintiffs, effectively requiring the Secretary to take actions preventing any future water impounded in Lake Powell from entering the Monument.<sup>191</sup> The court of appeals, however, reversed the district court's decision after finding that the CRSPA had been implicitly repealed by the appropriations acts.<sup>192</sup> The court believed that when considering the appropriations provisos in light of their legislative history, there was clear congressional intent to implicitly repeal the prior legislation.<sup>193</sup>

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issue here is significant, and different, however, from the cited cases, in that it does not involve a money provision in both statutes.”).

187. *Armstrong*, 485 F.2d at 3.

188. Pub. L. No. 87-483, 76 Stat. 96 (1962) (codified at 43 U.S.C. § 620 (2012)). The Act explicitly stated that “the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument” and “that no dam or reservoir constructed under the authorization of this chapter shall be within any national park or monument.” *Id.* §§ 620, 620b.

189. *Environmental Law*, *supra* note 186, at 460.

190. *Id.*

191. *Friends of the Earth v. Armstrong*, 360 F. Supp. 165, 194 (D. Utah 1973) (“Section 3 of the Colorado River Storage Project Act of 1956 (43 U.S.C. § 620b) . . . forbids the intrusion of waters from Lake Powell and the Glen Canyon unit into the Rainbow Bridge National Monument . . .”).

192. *Armstrong*, 485 F.2d at 8-9.

193. *Id.* at 9 (“Appropriation acts are just as effective a way to legislate as are ordinary bills relating to a particular subject. . . . In the case before us . . . the committee reports describe the considerations examined and evaluated by Congress and the reasons for the action taken. . . . This ‘repeal,’ if it should be called that, thus was straightforward, direct, and after hearings on the subject.”).

In a more recent decision, *Last Best Beef, LLC v. Dudas*, the Fourth Circuit Court of Appeals affirmed Congress's ability to amend substantive legislation through appropriations riders, as long as its intent to do so is clear.<sup>194</sup> From 2001 to 2004, Last Best Beef filed eight applications with the United States Patent and Trademark Office to trademark the phrase "The Last Best Place."<sup>195</sup> The Lanham Act provided that, with few exceptions, "[n]o trademark . . . shall be refused registration on the principal register on account of its nature."<sup>196</sup> In November 2005, however, President George W. Bush signed the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006 (Appropriations Act), prohibiting federal funds from being "used to register, issue, transfer, or enforce any trademark of the phrase 'Last Best Place.'"<sup>197</sup>

In 2006, Last Best Beef filed a complaint arguing that the Appropriations Act "improperly circumvented the Lanham Act."<sup>198</sup> The district court granted Last Best Beef summary judgment, stating that the Appropriations Act was "invalid legislation" and that it circumvented the Lanham Act when it insisted "any trademark for the phrase 'Last Best Place' be refused registration."<sup>199</sup> The district court relied heavily on the presumption against implied repeals when making its finding.<sup>200</sup>

The Fourth Circuit, however, overturned the district court, stating that "[w]hile the canon of statutory interpretation disfavoring implied repeals in appropriations bills is strong, . . . [i]t is not an absolute rule."<sup>201</sup> The court noted that unlike *Tennessee Valley Authority v. Hill*,<sup>202</sup> here, Congress clearly expressed its intention to repeal the Lanham Act due to the irreconcilable conflict between it and the Appropriations Act.<sup>203</sup> The Appropriations Act prevented, "in

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194. See *Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 335 (4th Cir. 2007).

195. *Id.* at 336.

196. 15 U.S.C. § 1052 (2006).

197. Pub. L. No. 109-108, § 206, 119 Stat. 2290, 2315 (codified at 15 U.S.C. § 1841 (Supp. III 2010)).

198. *Dudas*, 506 F.3d at 337.

199. *Last Best Beef, LLC v. Dudas*, 455 F. Supp. 2d 496, 499, 500 (E.D. Va. 2006).

200. *Id.* at 499 ("Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws." (quoting *Strawser v. Atkins*, 290 F.3d 720, 733 (4th Cir. 2002))).

201. *Dudas*, 506 F.3d at 338.

202. 437 U.S. 153 (1978). In *Hill*, the language of the appropriations act did not explicitly require the completion of the Tellico Dam. *Id.* at 189.

203. *Dudas*, 506 F.3d at 339.

absolute contradiction with the Lanham Act, *one* phrase from being trademarked.”<sup>204</sup> To hold otherwise and declare the Appropriations Act invalid would result in a *per se* rule that appropriations riders cannot amend earlier legislation, and the Fourth Circuit refused to make such a finding.<sup>205</sup> Given that courts have recognized that the presumption against implied repeals is not an absolute rule even when the subsequent statute is an appropriations act,<sup>206</sup> it is important to look at the different ways that courts analyze agency delays to determine the level of deference that an agency should be given when it interprets an appropriations act as implicitly repealing prior legislation and acts on this interpretation.<sup>207</sup>

### III. AGENCY DELAYS AND JUDICIAL REVIEW

Depending on the nature of and reason for the inaction, courts give agencies varying degrees of deference when reviewing a conscious decision not to act.<sup>208</sup> In the case of *In re Aiken County*, however, rather than treating the NRC’s decision to not spend the remaining \$11.1 million in funding as an agency delay, the court required the NRC to immediately comply with the statute and spend the remaining funds.<sup>209</sup> For the reasons set forth below, when an agency fails to act due to a lack of appropriations, a better approach is to give the agency’s decision a greater degree of deference.<sup>210</sup>

#### A. Judicial Review of Agency Inaction

Currently, confusion in the circuit courts exists regarding judicial review of agency inaction.<sup>211</sup> In *Heckler v. Chaney*,<sup>212</sup> “the

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204. *Id.*

205. *Id.* at 340.

206. *Id.* at 338.

207. See discussion *infra* Part III.

208. See Lehner, *supra* note 18, at 670 (“The intensity of regulatory oversight varies widely among the statutory schemes that govern administrative agencies.”).

209. *Aiken Cnty. III*, 725 F.3d 255, 267 (D.C. Cir. 2013) (“[U]nless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the Nuclear Regulatory Commission must promptly continue with the legally mandated licensing process.”).

210. See discussion *infra* Part IV.

211. See Biber, *supra* note 18, at 466-67 (discussing the “confused aspects to the doctrine of judicial review of agency inaction”).

212. 470 U.S. 821 (1985).

most important Supreme Court case to find non-reviewability under [APA] § 701(a),<sup>213</sup> the Court held that there is a presumption against judicial review of agency inaction when agencies decide not to institute enforcement proceedings against a party.<sup>214</sup> The Court noted that agencies' decisions not to enforce statutory violations involve balancing numerous factors that are within the agencies' expertise and that agencies are often in a better position than the Court to determine how best to allocate their resources.<sup>215</sup> As stated by Professor Michael Sant'Ambrogio, post-*Heckler*, "the Court has expanded the category of agency decisions shielded from judicial review because they are committed to agency discretion to include agency refusals to grant reconsideration of an action, agency employment termination decisions, and agency allocation of lump-sum appropriations."<sup>216</sup>

Still, in other situations, the Court treats agency inaction differently.<sup>217</sup> For instance, in *Massachusetts v. EPA*, the Court held that when agencies are deciding whether to engage in rulemaking, the *Heckler* presumption against judicial review of agency inaction does not apply.<sup>218</sup> Importantly, the Court has never indicated that the *Heckler* presumption against reviewability applies to agency delays.<sup>219</sup>

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213. Biber, *supra* note 18, at 485.

214. *Heckler*, 470 U.S. at 838 ("The general exception to reviewability provided by §701(a)(2) for action committed to agency discretion remains a narrow one, but within that exception are included agency refusals to institute investigative or enforcement proceedings . . . ." (internal citations and quotation marks omitted)).

215. *Id.* at 831. For instance, the agency must assess not only if a violation has occurred, but also "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*

216. Sant'Ambrogio, *supra* note 21, at 1407 (internal citations and quotation marks omitted).

217. See Lehner, *supra* note 18, at 669 (noting that the degree of deference "will depend upon the underlying configuration of the statute and other indications of policy preferences as well as upon the characteristics and past conduct of the challenged agency").

218. 549 U.S. 497, 527-28 (2007).

219. Sant'Ambrogio, *supra* note 21, at 1410 ("In contrast to its decisions with respect to some types of agency inaction, the Court has never suggested that agency delays as a category are not reviewable.").

## B. Judicial Review of Agency Delays

While the Court has never indicated that the *Heckler* presumption against reviewability applies to agency delays, it has done little else to clarify the subject. The Administrative Procedure Act (APA) mandates that “within a *reasonable time*, each agency shall proceed to conclude a matter presented to it.”<sup>220</sup> The APA also states that reviewing courts shall “compel agency action unlawfully withheld or *unreasonably delayed*.”<sup>221</sup> The Court has never provided guidance on what a “reasonable time” is or when an agency’s action is “unreasonably delayed.”<sup>222</sup> Usually, courts will avoid answering these questions when the organic statute does not provide a deadline for agency action.<sup>223</sup>

When the organic statute does contain a statutory deadline, some courts, including the *In re Aiken County* court, compel agency action regardless of the circumstances.<sup>224</sup> Other courts, however, use a statutory deadline as just one factor to consider when determining whether an agency delay is reasonable.<sup>225</sup> The trend among these courts is to review agency delays in both rulemaking and adjudications using the “TRAC” analysis,<sup>226</sup> which is a six-factor test developed by the D.C. Circuit Court of Appeals.<sup>227</sup> The factors to be considered under the TRAC analysis include (1) whether the time that the agency takes to make decisions is governed by a rule of reason; (2) whether the statute supplies content for the rule of reason if Congress provides a timetable or indication of the speed that the agency is expected to proceed in the organic statute; (3) whether

220. 5 U.S.C. § 555(b) (emphasis added).

221. *Id.* § 706(1) (emphasis added).

222. Sant’Ambrogio, *supra* note 21, at 1411.

223. DANIEL T. SHEDD, CONG. RESEARCH SERV., R43013, ADMINISTRATIVE AGENCIES AND CLAIMS OF UNREASONABLE DELAY: ANALYSIS OF COURT TREATMENT 3 (2013) (“When there is no statutory deadline for the agency action, courts tend to be more deferential to the agency’s priorities.”).

224. *Id.* at Summary (“Some courts have determined that a court has no choice but to compel agency action in the face of a missed statutory deadline. For these courts, no balancing is permitted when a deadline has been violated.”).

225. *Id.* (“However, other courts note that a statutory deadline is merely one of the factors to consider when determining whether the delay is unreasonable.”).

226. Sant’Ambrogio, *supra* note 21, at 1411 (“The most common approach used by the lower federal courts to review delays in both rulemaking proceedings and adjudications is the ‘TRAC analysis’ . . .”).

227. *Id.* (describing the TRAC analysis as “a multi-factor test that the D.C. Circuit stitched together from prior caselaw in *Telecommunications Research & Action Center v. FCC*”).

human health and welfare are at stake, making the agency delay more reasonable; (4) the effect that expediting delayed action will have on agency activities of a higher or competing priority; and (5) the nature and extent of interests prejudiced by the delay.<sup>228</sup> The court made sure to note that the sixth factor, whether any impropriety on behalf of the agency caused the delay, does not have to be present for a court to find a delay unreasonable.<sup>229</sup>

The six factors listed in the TRAC analysis are certainly a good starting point for determining when an agency's delay is reasonable, but the analysis is not without its flaws.<sup>230</sup> For instance, it fails to take into account whether the reason for the agency's delay was legitimate, whether the statutory mandate was specific or broad, and whether the decision imposes obligations on the agency in the face of limited resources or substantive action.<sup>231</sup> Given the lack of clarity in applying the TRAC factors, courts are able to reach a variety of conclusions that best suit their wishes.<sup>232</sup> Importantly, the TRAC analysis was developed for a situation that assumes a firm congressional commitment to the activity in question.<sup>233</sup> Therefore, in situations when congressional intent is not entirely clear, such as *In re Aiken County*, the TRAC analysis is a less than ideal test to use to determine whether an agency delay is unreasonable.<sup>234</sup>

### C. Judicial Review of Agency Action Under the *Chevron* Two-Step

While judicial review of agency inaction is complex and often criticized,<sup>235</sup> courts have much more guidance when reviewing an agency's decision to act based on its interpretation of a statute.<sup>236</sup>

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228. *TRAC v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

229. *Id.*

230. Sant' Ambrogio, *supra* note 21, at 1413.

231. *Id.* at 1414.

232. *Id.* at 1413-14 (noting that "courts weigh the individual harm caused by the delay against the burden on the agency, with inconsistent results").

233. *TRAC*, 750 F.2d at 79 (acknowledging that a "clear legislative preference" existed).

234. *See id.* While a clear legislative preference existed in *TRAC v. FCC*, 750 F.2d at 79, the lack of congressional appropriations in *Aiken County III*, 725 F.3d 255, 258 (D.C. Cir. 2013), makes the legislative preference much less clear.

235. *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1658 (2004) ("[T]he law governing judicial review of agency inaction has elicited criticism for decades.").

236. *See* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 204 (2004) ("When a party aggrieved by a federal government agency's interpretation of a statute or regulation seeks

There is perhaps no more famous administrative law case than that of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>237</sup> Under what has been described as the “*Chevron Two-Step*,”<sup>238</sup> federal courts frequently defer to agency expertise when reviewing statutes that apply to agencies.<sup>239</sup> The first part of the *Chevron Two-Step* requires courts to enforce congressional intent if “Congress has directly spoken to the precise question at issue.”<sup>240</sup> If Congress has not spoken to the precise question at issue, however, then courts must defer to the agency’s interpretation of the statute as long as that interpretation is reasonable.<sup>241</sup>

The decision in *Chevron* has been described as embodying a “very powerful pro-agency bias.”<sup>242</sup> In many instances, however, a “pro-agency bias” may not be an entirely bad thing, as the agency is better equipped to make a decision than the court is.<sup>243</sup> First, agencies are designed to be experts in their assigned field, whereas judges are widely regarded as generalists.<sup>244</sup> Therefore, as the Court in *Chevron* acknowledged, when a matter falls within the agency’s expertise, the agency is in a better position to make a decision.<sup>245</sup> Second, while

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judicial review, the reviewing court typically applies the *Chevron* doctrine . . . .” (footnote omitted)).

237. 467 U.S. 837 (1984). In fact, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* is “the most cited case in modern public law.” Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006).

238. Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1278 (2008).

239. *Id.*

240. *Chevron*, 467 U.S. at 842-43.

241. *Id.* at 843.

242. Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1619 (2006).

243. See David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 497 (2007) (“[A]gencies generally have better information and more expertise than . . . the Judiciary . . .”).

244. See Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 848 (2012) (“[T]he iconic American judge remains a generalist. She sits on a court of general jurisdiction and adjudicates whatever disputes happen to come before her.”); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 680-81 (1996) (stating that federal courts should provide greater deference to agencies given their expertise and experience).

245. 467 U.S. at 866 (“When a challenge . . . really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”).



courts are bound by precedent, agencies have more flexibility when making decisions.<sup>246</sup> Third, while Supreme Court Justices and many other judges across the country have life terms, agency heads are politically accountable to the electorate by way of the Executive branch.<sup>247</sup>

While much has been written about the *Chevron* Two-Step, there has been relatively little scholarship published examining the scope of the *Chevron* decision.<sup>248</sup> As the years have passed, however, the Supreme Court has been confronted with numerous cases concerning the reach of *Chevron*'s scope.<sup>249</sup> Slowly, the scope of *Chevron* has expanded into territories not initially imagined by the Court.<sup>250</sup> The case of *Chevron* itself involved an interpretation of an environmental law statute.<sup>251</sup> Beginning in 1985, the *Chevron* Two-Step began to appear in other environmental law cases, and it eventually spread to other areas of law.<sup>252</sup> Today, *Chevron* has

246. See Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1025 (2007) (noting the "Supreme Court's trend . . . towards providing agencies with ever greater temporal flexibility"). For an argument that agency flexibility has been diminished by the recent case of *Alaska Professional Hunters Ass'n v. Federal Aviation Administration*, 177 F.3d 1030 (D.C. Cir. 1999), see Matthew P. Downer, Note, *Tentative Interpretations: The Abracadabra of Administrative Rulemaking and the End of Alaska Hunters*, 67 VAND. L. REV. 875, 891-92 (2014).

247. Bradley Lipton, Note, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L.J. 2096, 2096 (2010) ("[A]gencies are more politically accountable than courts.").

248. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 835 (2001) ("Little effort [by the courts] has been made to spell out what . . . sorts of agency interpretations qualify for *Chevron* deference once an agency has been so charged. Academic commentators, with a few important exceptions, have also had little to say on the subject." (footnote omitted)).

249. See *Christensen v. Harris Cnty*, 529 U.S. 576, 587 (2000); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *United States v. Hagggar Apparel Co.*, 526 U.S. 380, 392-93 (1999).

250. See Merrill & Hickman, *supra* note 248, at 838.

251. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984). The Court decided to defer to the EPA's expertise when determining whether, under the Clean Air Act, a "'stationary source'" referred to an individual smoke stack or an entire industrial plant. *Id.* at 840, 865-66.

252. Merrill & Hickman, *supra* note 248, at 838-39; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (applying *Chevron* to environmental statutes); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985) (same); *Holly Farms Corp. v. Nat'l Labor Relations Bd.*, 517 U.S. 392, 398 (1996) (applying *Chevron* in a labor law context); *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 387 (1998) (applying *Chevron* in a tax law context).

appeared in so many different areas of law that it has been described to be “as ubiquitous as if Congress had written it into the APA.”<sup>253</sup> Given that *Chevron* deference has expanded into so many different areas of the law, a strong argument can be made that a modified version of the analysis is also appropriate when analyzing agency interpretations of appropriations acts.<sup>254</sup>

#### IV. THE YUCCA TWO-STEP

While it is far from becoming a trend, multiple circuit courts have used appropriations acts to implicitly repeal prior statutes, finding that the acts provided clear congressional intent to repeal the prior legislation.<sup>255</sup> An unsolved problem remains, however: How can the courts be confident of congressional intent when looking solely at an appropriations act, and if they are not confident in congressional intent, then should they immediately compel agency action? Prior case law has not applied the *Chevron* Two-Step in an attempt to answer these questions.<sup>256</sup> In order to find answers, while still acknowledging that in most cases it will be difficult to determine intent, courts should adopt a two-prong test, inspired by the *Chevron* Two-Step, that will eliminate the illogical conclusions that courts have felt obligated to find in cases such as *In re Aiken County*, *Tennessee Valley Authority v. Hill*, and *Calloway v. District of Columbia*.<sup>257</sup>

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253. Merrill & Hickman, *supra* note 248, at 839.

254. See discussion *infra* Part IV. There is a slight distinction between the *Chevron* Two-Step and the issue in *In re Aiken County*. In *Chevron*, the Court was deferring to an agency’s interpretation of a statute. 467 U.S. at 866. However, in *Aiken County III*, the issue revolved around an agency’s interpretation of an appropriations act. 725 F.3d 255, 259-60 (D.C. Cir. 2013). For reasons that will be discussed in Part IV, the *Chevron* Two-Step still provides a solid framework for determining whether an agency’s delay due to lack of appropriations is reasonable. See discussion *infra* Part IV.

255. See *Friends of the Earth v. Armstrong*, 485 F.2d 1, 7 (10th Cir. 1973); *Last Beef, LLC v. Dudas*, 506 F.3d 333, 335-36 (4th Cir. 2007).

256. See generally *Aiken Cnty. III*, 725 F.3d 255 (not applying *Chevron* deference to an agency delay caused by a lack of appropriations); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (same); *Calloway v. District of Columbia*, 216 F.3d 1 (D.C. Cir. 2000) (same).

257. See discussion *supra* Subsection II.A.2.

### A. Step One: Finding Clear Congressional Intent in Appropriations Acts

The first inquiry of this proposed test requires the use of common sense. This step requires courts to first look at the text of the prior statute and subsequent appropriations act.<sup>258</sup> If the two acts are in direct conflict, the inquiry ends immediately and the appropriations act governs.<sup>259</sup> However, going against established principles, even if the two acts are not in direct conflict, courts may still find that the subsequent appropriations act implicitly repeals the prior statute if the amount of funds appropriated “shocks the conscience.”<sup>260</sup>

#### 1. Finding Intent Through Textualism

If the appropriations act and the prior legislation are in direct conflict, or, put differently, “clearly repugnant as to vital matters,”<sup>261</sup> then the inquiry ends here, and the appropriations act governs. Similar to the current approach used when determining whether subsequent legislation implicitly repeals prior legislation, courts should look to the plain language of both the appropriations act and prior substantive legislation to see if there is a direct conflict.<sup>262</sup> This preliminary step allows for the result that occurred in *Last Beef, LLC v. Dudas*, where the Fourth Circuit held that “[w]here Congress chooses to amend substantive law in an appropriations rider, we are bound to follow Congress’s last word on the matter even in an appropriations law.”<sup>263</sup> This step is similar to the first inquiry in the *Chevron* doctrine analysis: whether Congress has spoken precisely to the issue at hand.<sup>264</sup> However, unlike the *Chevron* Two-Step, and perhaps more controversial, step one of this test proposes that in certain cases, actions can speak louder than words when determining

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258. See discussion *infra* Subsection IV.A.1.

259. See discussion *infra* Subsection IV.A.1.

260. See discussion *infra* Subsection IV.A.2.

261. See SINGER & SINGER, *supra* note 115, § 23:10.

262. *Id.* (stating that “[t]he presumption against implied repeals is overcome . . . by a showing that two acts are irreconcilable, clearly repugnant as to vital matters to which they relate, and so inconsistent that they cannot have concurrent operation”).

263. 506 F.3d 333, 339 (4th Cir. 2007) (quoting *Strawser v. Atkins*, 290 F.3d 720, 734 (4th Cir. 2002)).

264. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

if Congress clearly intended for the appropriations act to repeal the prior legislation.<sup>265</sup>

## 2. *Beyond the Text: The “Shocks-the-Conscience” Standard*

While the text of a statute is typically the best place to look for congressional intent, it is difficult to discern true congressional intent by mere text alone.<sup>266</sup> In order to avoid absurd results,<sup>267</sup> the first step of this test proposes that in addition to the text, courts should also look at the amount of money that either has been appropriated or not appropriated to a specific project to determine whether congressional intent is clear. Because it is difficult to place a precise numerical value on appropriations expenditures that will signal clear intent,<sup>268</sup> courts should look to constitutional law principles and adopt a “shocks-the-conscience” standard at step one.<sup>269</sup> If the amount of appropriations shocks the conscience, courts may find that the subsequent appropriations act implicitly repeals the prior statute.

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265. See discussion *infra* Subsection IV.A.2.

266. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389-90 (2003) (“Congress does not always accurately reduce its intentions to words because legislators necessarily draft statutes within the constraints of bounded foresight, limited resources, and imperfect language.”).

267. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 202-05 (1978) (Powell, J., dissenting). Here, Justice Powell raised a strong argument that to construe the appropriations act and the substantive legislation in the manner that the majority violated the statutory canon against absurdity. *Id.* Since the beginning, the Supreme Court has allowed that judges may deviate from statutory text when a specific application of it produces an absurd result. Manning, *supra* note 266, at 2388. “[S]tandard interpretive doctrine . . . defines an ‘absurd result’ as an outcome so contrary to perceived social values that Congress could not have ‘intended’ it.” *Id.* at 2390. The absurdity doctrine allows a court to find that the statutory text may differ from the legislature’s true intent. *Id.*

268. See *Hector v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996). In *Hector*, Judge Richard Posner argued that a rule that is determined based on a number is likely to be arbitrary. *Id.* For example, when a lower court ruled that a fence had to be eight feet high to provide secure containment for animals, he stated, “[t]here is no way to reason to an eight-foot perimeter-fence rule as opposed to a seven-and-a-half foot fence or a nine-foot fence or a ten-foot fence. None of these candidates for a rule is uniquely appropriate to, and in that sense derivable from, the duty of secure containment.” *Id.* The same argument could be made in this context if a precise numerical value determined congressional intent: for instance, if the rule is that \$1,000,000 in appropriations signals clear congressional intent, why not \$90,000?

269. See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998).

The Supreme Court introduced the shocks-the-conscience test in *Rochin v. California*.<sup>270</sup> Because this standard does not have set criteria to determine what exactly shocks the conscience, criticism of the test has emerged.<sup>271</sup> There is concern that this standard could provide for judicial overreaching without the need for explanation.<sup>272</sup> In *County of Sacramento v. Lewis*, however, the Supreme Court used the shocks-the-conscience standard differently than the *Rochin* Court.<sup>273</sup> Rather than allowing judges to make decisions based off of their emotions, the standard was used as a threshold step that precluded further action in regard to the claim unless “the behavior of the governmental officer [was] *so egregious, so outrageous*, that it may fairly be said to shock the contemporary conscience.”<sup>274</sup> When determining whether congressional intent to repeal prior legislation with an appropriations act is clear, courts should follow the approach used in *Lewis*.<sup>275</sup>

Given that it will be difficult to discern congressional intent based solely on an appropriations act,<sup>276</sup> that courts have shown a clear preference for explicit rather than implicit repeals of prior statutes,<sup>277</sup> and that the presumption against implied repeals has been said to apply “with even greater force” when it rests solely on an appropriations act,<sup>278</sup> as a policy matter, it makes sense to set the bar high when determining whether an appropriations act was meant to implicitly repeal a prior statute.<sup>279</sup> As courts must consider a

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270. 342 U.S. 165, 172-74 (1952) (adopting a shocks-the-conscience test to determine when substantive due process rights are violated).

271. See Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981, 991-92 (2000) (noting the objection that the shocks-the-conscience test could simply boil down to “whether the trier of fact finds the challenged action particularly objectionable, without indicating what standards, if any, the trier of fact is to consider in making that determination”).

272. *Lewis*, 523 U.S. at 865 (Scalia, J., concurring) (arguing that by using a shocks-the-conscience test, judges are engaging “not [in] judicial review but judicial governance”).

273. Chesney, *supra* note 271, at 992.

274. *Id.* at 993 (emphasis added) (quoting *Lewis*, 523 U.S. at 847 n.8 (majority opinion)).

275. 523 U.S. 833.

276. See discussion *supra* Section II.A.

277. See McCubbins & Rodriguez, *supra* note 25, at 688.

278. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (italics omitted).

279. See *Lewis*, 523 U.S. at 865 (Scalia, J., concurring). If it were easy for judges to find that Congress meant to implicitly repeal prior legislation, the type of judicial overreaching that Justice Scalia was concerned about in *County of Sacramento v. Lewis* could come to fruition. *Id.*

multitude of factors when determining whether Congress intended to implicitly repeal prior legislation,<sup>280</sup> assigning a specific dollar amount that signals clear congressional intent makes little sense.<sup>281</sup> Because the shocks-the-conscience test sets the bar high for judges to determine that Congress intended to repeal prior legislation,<sup>282</sup> yet does not require a precise numerical amount to determine when this occurs, it is an ideal fit in this context.

While most situations will not pass the shocks-the-conscience threshold, requiring this test at step one forces judges to at least consider whether Congress meant to implicitly repeal prior legislation when it passed an appropriations act.<sup>283</sup> In the case of *In re Aiken County*, the lack of appropriations would likely not be enough to pass the shocks-the-conscience threshold and implicitly repeal the prior substantive legislation.<sup>284</sup> Political pressure is the primary reason that funding toward Yucca Mountain has ceased in recent years, and when a new Congress comes in, it could decide to begin appropriating funds toward Yucca Mountain again.<sup>285</sup> While a plausible argument can be made that it was Congress's intent to repeal the prior legislation,<sup>286</sup> the point of the shocks-the-conscience

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280. See McCubbins & Rodriguez, *supra* note 25, at 691-94 (discussing "what constitutes the appropriate measure of adequate legislative deliberation" (internal quotation marks omitted)). While the amount of money appropriated is certainly a telling factor as to congressional intent, other factors, such as amounts appropriated in previous years, total appropriations budgets, and whether a new Congress would vote differently on the appropriations, must all be taken into consideration. *Id.*

281. See discussion *supra* note 268 and accompanying text.

282. See Matthew D. Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 437, 475 (2001) ("[A] criticism of the shocks the conscience test is that it is simply too strict a test. . . . Under the shocks the conscience test, only the most extreme and egregious conduct will be sufficient to trigger the protections of the Due Process Clause.").

283. As Matthew D. McCubbins and Daniel B. Rodriguez discussed, the concerns about finding congressional intent through an appropriations act may not be as serious as some scholars have suggested. McCubbins & Rodriguez, *supra* note 25, at 695-97. Given the discussion by McCubbins and Rodriguez, it is important that courts at least consider whether Congress meant to implicitly repeal prior legislation, and the shocks-the-conscious test achieves this goal. *Id.*

284. *Aiken Cnty. III*, 725 F.3d 255, 259-60 (D.C. Cir. 2013).

285. See Easley, *supra* note 44, at 673 (noting that while President George W. Bush supported the funding, President Obama vowed that he would "end the notion of Yucca Mountain" (internal quotation marks omitted)).

286. See *supra* note 8 and accompanying text (noting that appropriations toward Yucca Mountain declined from \$572 million to \$0).

test's high threshold is that congressional intent must be absolutely clear. When congressional intent is less than perfectly clear, a better approach is to determine whether the delay is reasonable rather than immediately compelling action or permanently repealing a prior statute.<sup>287</sup>

## B. Step Two: When Is Agency Action Reasonable?

The difficulty of finding clear congressional intent, particularly through an appropriations act, can be seen in the first prong of the “Yucca Two-Step.”<sup>288</sup> In *In re Aiken County*, an argument could be made that Congress's dwindling appropriations toward the Yucca Mountain licensing application, through numbers alone, signaled clear congressional intent that Yucca Mountain was no longer a viable option for the country's nuclear waste repository.<sup>289</sup> Given the low probability that a court will find clear congressional intent to repeal prior legislation through an appropriations act alone,<sup>290</sup> however, the second step of this test—whether an agency's action is reasonable<sup>291</sup>—becomes much more important.<sup>292</sup>

In the case of *In re Aiken County*, the NRC failed to take statutorily mandated action.<sup>293</sup> The NRC was not arguing that it would never take the statutorily mandated action, but rather that it would not take the action at that particular time due to the lack of appropriated funds.<sup>294</sup> Therefore, the question at step two of this

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287. See discussion *infra* Section IV.B.

288. See discussion *supra* Section IV.A.

289. See *supra* note 8 and accompanying text (noting that the congressional budget that once set aside \$572 million for research relating to Yucca Mountain dwindled to \$0 by 2011).

290. See discussion *supra* Section II.A.

291. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). When Congress has not directly spoken to the precise question at issue, “the question for the court is whether the agency's answer is based on a permissible construction of the statute.” *Id.*

292. See Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 31 (1998) (showing that when the court decides the issue at step one, the agency's behavior is upheld 42% of the time, while when the court decides the issue at step two, the agency's behavior is upheld 89% of the time).

293. See discussion *supra* Part II. The statutory mandate required the NRC to act on the DOE's license application to store nuclear waste at Yucca Mountain. *Aiken Cnty. II*, No. 11-1271, 2012 WL 3140360, at \*1 (D.C. Cir. Aug. 3, 2012) (Kavanaugh, J., concurring).

294. See discussion *supra* note 100 and accompanying text.

analysis becomes, “under what circumstances is an agency delay due to appropriations, or the lack thereof, reasonable?” Lower federal courts typically look to the TRAC analysis to determine whether agency delay is reasonable.<sup>295</sup> Because the TRAC analysis presupposes a firm congressional commitment to the activity in question, however, in cases where congressional intent is not entirely clear, the TRAC analysis provides little guidance.<sup>296</sup> Therefore, courts should consider a new, three-prong balancing test when assessing whether an agency delay due to lack of appropriations is reasonable: (1) whether a legitimate reason for the agency delay exists; (2) the additional benefits of an agency delay; and (3) the additional costs of an agency delay.<sup>297</sup>

### 1. *Legitimacy of Agency Delays: A Burden Shifting Approach*

One of the problems with the original TRAC analysis is that it does not distinguish between legitimate and illegitimate causes of agency delay.<sup>298</sup> As a threshold matter, the agency should bear the burden of proving that there is a legitimate reason for its inaction.<sup>299</sup>

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295. Sant’Ambrogio, *supra* note 21, at 1411.

296. See discussion *supra* note 233 and accompanying text.

297. See discussion *infra* Subsection IV.B.1. In a recent article, Bret Kupfer also analyzed whether a more sensible outcome was possible in *In re Aiken County*. Kupfer, *supra* note 9, at 331. Kupfer proposed a four-factor test to determine when an agency, due to a lack of appropriations, should not be required to follow a statutory mandate:

(1) whether general appropriated funds may be used to fulfill the statutory duty; (2) whether Congress is unlikely to appropriate sufficient funds in the future that would render spending the remaining funds beneficial to fulfilling the statutory mandate; (3) whether starting and stopping actions to address the statutory mandate creates added costs; and (4) whether mandamus would negatively implicate the agency’s other duties.

*Id.* at 359. Kupfer’s article, however, fails to address the possibility that the presumption against implied repeals can be overcome solely through an appropriations act, prohibiting the outcome of cases such as *Last Beef, LLC v. Dudas*, 506 F.3d 333, 335-36 (4th Cir. 2007) and *Friends of the Earth v. Armstrong*, 485 F.2d 1, 9-10 (10th Cir. 1973), where the courts held that appropriations acts signaled clear congressional intent to repeal prior legislation. Judicial efficiency will result from looking to the presumption against implied repeals and including a first step to attempt to find clear congressional intent before getting into a multifactor test to determine whether agency action is reasonable.

298. Sant’Ambrogio, *supra* note 21, at 1414.

299. A burden shifting approach has been seen in several different areas of the law. For example, in Title VII disparate treatment claims, the “McDonnell Douglas burden-shifting framework” first requires an employer to state a legitimate, nondiscriminatory reason for the adverse employment action. 14A C.J.S. *Civil*



Once this hurdle is cleared, the challenger would have to show that, given the remaining factors discussed below, and by a preponderance of the evidence, the agency delay is still unreasonable.<sup>300</sup> In *In re Aiken County*, the NRC would have little difficulty demonstrating that a legitimate reason existed for its delay in spending the remaining \$11.1 million, as the court acknowledged that this amount was “wholly insufficient to complete the processing of the application.”<sup>301</sup> The Supreme Court itself has acknowledged that in the face of insufficient funds, agencies are better equipped than courts to determine the best uses for the limited funding,<sup>302</sup> and therefore, unless the remaining two factors<sup>303</sup> suggest otherwise, the NRC’s delay should be deemed reasonable.

## 2. Additional Benefits of Limited Agency Action

Additional benefits may exist that justify allowing an agency delay. It is important to consider whether “[t]he next administration will benefit from [any] work if [the present administration] decides to proceed with regulation in the area.”<sup>304</sup> Given that the agency is in a much better position than the court to determine whether the money would be put toward a productive use,<sup>305</sup> if the agency in good faith<sup>306</sup> believes that spending the remaining funds would not be

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*Rights* § 215 (2013). The burden is then shifted to the plaintiff that the defendant’s reason was just pretext for discrimination, through a preponderance of the evidence. *Id.*

300. See discussion *infra* Subsection IV.B.2.

301. *Aiken Cnty. III*, 725 F.3d 255, 269 (D.C. Cir. 2013) (Garland, J., dissenting).

302. *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (stating that agencies are “far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities” (quoting *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985))).

303. See discussion *infra* Subsections IV.B.2-3.

304. Michael Sant’Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 406 (2014).

305. See Oldfather, *supra* note 244, at 848 (“[T]he iconic American judge remains a generalist. She sits on a court of general jurisdiction and adjudicates whatever disputes happen to come before her.”); Manning, *supra* note 244, at 680-81 (stating that federal courts should provide greater deference to agencies given their expertise and experience). No judge would know the benefit of utilizing the \$11.1 million in remaining funds better than the NRC would. See Manning, *supra* note 244, at 680-81.

306. See discussion *supra* Subsection IV.B.1. A good faith requirement is necessary in situations such as *In re Aiken County* due to the political controversy surrounding the issue. See discussion *supra* Subsection IV.B.1.

beneficial, then the court should yield to the agency unless a challenger can demonstrate the benefit.<sup>307</sup> In the case of *In re Aiken County*, it was not disputed that the \$11.1 million in remaining funds was insufficient to complete the licensing process.<sup>308</sup> The D.C. Circuit, however, found it important that *some* funding remained to conduct the licensing process.<sup>309</sup> The majority, however, failed to consider whether any benefit would come from spending the remaining funds.<sup>310</sup>

In *In re Aiken County*, one can think of several possible benefits that could result from using the \$11.1 million in funding toward Yucca Mountain. For example, the money could be spent to research storage methods for future sites or to assess the best transportation methods for moving nuclear waste from one location to another. Unlike in *Tennessee Valley Authority* where construction of the Tellico Dam had never halted,<sup>311</sup> in *In re Aiken County*, the NRC had shut down “the licensing program, dismantled the computer system upon which it depended, shipped the documents to storage, and reassigned the program’s personnel to projects that did have congressional funding.”<sup>312</sup> The NRC stated that a significant part of the \$11.1 million in remaining funds would be spent simply getting all of the materials back in place.<sup>313</sup> Unless the challengers to this action could demonstrate that some tangible benefit would result from the NRC spending the money, the D.C. Circuit should respect the NRC’s decision to withhold spending.

### 3. *Additional Costs of Compelling Immediate Agency Action*

To balance out any additional benefits that limited agency action may have, courts should also consider any additional costs—outside of spending the funds alone—that limited agency action may

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307. Due to the burden-shifting approach of the Yucca Two-Step, at the second step, the challenger has the burden of demonstrating the benefits of spending the remaining funds. See discussion *supra* Subsection IV.B.1.

308. *Aiken Cnty. III*, 725 F.3d 255, 269 (D.C. Cir. 2013) (Garland, J., dissenting).

309. *Id.* at 258 (majority opinion).

310. *Id.* at 269 (Garland, J., dissenting) (stating that “granting the writ in this case will indeed direct the Nuclear Regulatory Commission to do ‘a useless thing’”).

311. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 157-58 (1978).

312. *Aiken Cnty. III*, 725 F.3d at 270.

313. *Id.*

have.<sup>314</sup> Agency delays can cause multiple problems affecting more than just the intended beneficiaries of the agency action.<sup>315</sup> These delays can “impose unintended costs on intended beneficiaries and unintended benefits on those intended to bear the costs of regulation.”<sup>316</sup> Further, the longer that it takes for an agency to decide on a specific course of action, the more inefficient the agency becomes, as resources that could be spent taking action are instead wasted reviewing old findings and training new personnel.<sup>317</sup>

In *In re Aiken County*, the Petitioners who are living near nuclear waste that should be stored at Yucca Mountain are bearing unintended costs.<sup>318</sup> While Petitioners are bearing unintended costs, these costs would not be remedied by compelling the NRC to spend the remaining \$11.1 million to continue working on the licensing process.<sup>319</sup> At this stage of the test, the court would have to consider what other consequences would arise by forcing the NRC to spend the \$11.1 million.<sup>320</sup> By forcing the NRC to spend valuable time and money completing the licensing process for Yucca Mountain, a site that by all indications will never be used as the country’s nuclear waste repository, the country will make no progress toward finding a viable alternative to Yucca Mountain, and the Petitioners will be stuck with the nuclear waste in their backyards for an even longer period of time.

## CONCLUSION

Currently, the courts are applying a one-size-fits-all test when reviewing agency delays based on a lack of appropriations.<sup>321</sup> No

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314. Sant’Ambrogio, *supra* note 21, at 1399 (“The failure by agencies to implement statutory mandates obstructs the bestowal of economic and social goods on intended beneficiaries of legislative action.”).

315. *Id.* at 1400.

316. *Id.* at 1399.

317. *Id.* at 1401-02.

318. See discussion *supra* Part II. The reason that Petitioners brought suit in the first place is because the nuclear waste that was supposed to be stored at Yucca Mountain was stored near their homes and workplaces. See discussion *supra* Part II.

319. See discussion *supra* Subsection IV.A.2.

320. See Kupfer, *supra* note 9, at 362 (arguing that minimal consequences would result from ordering the NRC to spend the remaining funds because “the NWPA required all appropriations from the Waste Fund to be used for a nuclear repository and Yucca Mountain is the only possible site”).

321. See generally *Aiken Cnty. III*, 725 F.3d 255 (D.C. Cir. 2013) (applying the presumption against implied repeals as a hard-and-fast rule); Calloway v.

matter how little funding is left, or how useless spending the remaining funds will be, courts are still compelling agency action.<sup>322</sup> A large reason for this is that courts are hesitant to go against the well-established presumption against implied repeals, especially when the subsequent statute is an appropriations act.<sup>323</sup> While there are certainly good reasons that the presumption against implied repeals exists, it also clouds courts' ability to see the entire picture.<sup>324</sup>

To fix these problems and avoid nonsensical judgments, courts should adopt the Yucca Two-Step.<sup>325</sup> The first step of this test requires courts to consider congressional intent.<sup>326</sup> While it is rare that an appropriations act will clearly demonstrate congressional intent to repeal prior substantive law, it may happen more often than one may think, and it is important to at least consider the possibility.<sup>327</sup> The second step of this test looks to determine whether the agency delay was reasonable.<sup>328</sup> Because the TRAC analysis presupposes a firm congressional commitment to the activity in question, a modified approach is used to determine whether an agency delay is reasonable in this context.<sup>329</sup> As a threshold matter, the agency must prove that there is a legitimate reason for its delay.<sup>330</sup> The burden then shifts to the challenger to prove that additional benefits will result from limited agency action.<sup>331</sup> Courts must also consider any additional consequences of the agency's delay.<sup>332</sup> By taking a common sense approach and giving agencies a greater degree of deference, courts will not feel compelled to order useless agency action, resulting in both time and money saved.<sup>333</sup>

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District of Columbia, 216 F.3d 1 (D.C. Cir. 2000) (same); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (same).

322. *Aiken Cnty. III*, 725 F.3d at 269-70 (Garland, J., dissenting).

323. See discussion *supra* Part II.

324. See discussion *supra* Section II.A.

325. See discussion *supra* Part IV.

326. See discussion *supra* Subsection IV.A.1.

327. See *generally* McCubbins & Rodriguez, *supra* note 25, at 686-89.

328. See discussion *supra* Subsection IV.B.2.

329. See discussion *supra* Section III.A.

330. See discussion *supra* Section IV.A.

331. See discussion *supra* Section IV.B.

332. See discussion *supra* Section IV.B.

333. See *supra* note 6 and accompanying text.