THE JURISDICTION OF FEDERAL COURTS IN ADMINISTRATIVE CASES: DEVELOPMENTS*

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TABLE OF CONTENTS

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I thank the Administrative Conference of the United States for supporting the research leading to this article, which is based on a study done for the Conference in the fall of 1988. For their helpful comments, I particularly thank the Conference's members and staff and my faculty colleagues. Thanks to William Schaefer for expert research assistance.

INTRODUCTION

Judicial review of agency decisions, a staple of administrative law, is once again the subject of considerable controversy.[1] To a significant extent, the resurgence of attention paid to this foundational issue may be traced to recent actions by courts. The Supreme Court, for instance, has taken major steps in limiting judicial review of challenges to agency inaction in certain circumstances.[2] Also, the Court has sent a strong signal favoring judicial deference to agency constructions of their authorizing statutes, fueling the long-standing controversy about the appropriate judicial role in assessing agency judgments about their own discretion.[3] In the midst of such developments, commentators have resumed debates about the benefits and limits of judicial review generally, especially as compared to the oversight of administration by the "political" branches of government, the executive and the legislature.[4]

One can identify patterns in the debates indicating that while certain judicial review subjects have come to the foreground, others have remained in the background. One topic remaining largely in the background is the choice between the courts of appeals and the district courts for initial review of challenged agency action.[5] One

[1]For discussion of recent trends in judicial review of agency decision making, see Wald, *The Contribution of the D.C. Circuit to Administrative Law,* 40 ADMIN. L. REV. 507, 508–530 (1988) (Chief Judge Wald's presentation to a meeting of the ABA's Section of Administrative Law, recently renamed the Section of Administrative Law and Regulatory Practice). Chief Judge Wald spoke of three periods in D.C. Circuit case law during the past twenty years: the period of burgeoning regulation in the 1970s, when basic principles of "hard look" review were forged; the period of deregulation in the early 1980s; and the recent period of "nonregulation", when the review of agency inaction or delay came to the forefront of judicial attention.

For a view of the tendency of courts to shift between an "activist" and a more deferential stance toward agencies, see Rabin, *Federal Regulation in Historical Perspective,* 38 STAN. L. REV. 1189 (1986). For Rabin's discussion of periods roughly comparable to those discussed by Chief Judge Wald, see *id.* at 1295–1315, 1321–25.

[2]*See* Heckler v. Chaney, 470 U.S. 821 (1985). *See generally* Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985); Note, *Judicial Review of Administrative Rulemaking and Enforcement Discretion: The Effect of a Presumption of Unreviewability,* 55 GEO. WASH. L. REV. 596 (1987).

[3]*See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S 837 (1984). *See generally* Breyer, *Judicial Review of Questions of Law and Policy,* 38 ADMIN. L. REV. 363 (1986); Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron's *Step Two,* 2 ADMIN. L.J. 255 (1988); Starr, *Judicial Review in the Post-*Chevron *Era,* 3 YALE J. ON REG. 183 (1986).

[4]*See, e.g.,* Pierce, *The Role of Constitutional and Political Theory in Administrative Law,* 64 TEX. L. REV. 469 (1985). For a discussion of ultimately unsuccessful efforts in the early 1980s to broaden the scope of judicial review of agencies by amending 5 U.S.C. § 706 (1982), see Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate,* 1984 WIS. L. REV. 385, 407–08 (and sources cited therein).

[5]*See generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23:5 (2d ed. 1983); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 157 (1965); 13 B. C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3568 (2d ed. 1984).

might imagine that this matter would be thrust into the limelight because of its huge importance to litigators and its broader implications for the relationships between courts and agencies. Yet despite important recent developments—which are the subject of this article—appellate court versus district court jurisdiction has generally not joined other judicial review topics in the first rank of contention.[6]

One reason for this is that the legal doctrine governing court of appeals versus district court jurisdiction has settled on certain major principles. On the whole, the district courts possess original federal jurisdiction, unless some statute pertaining to one or a group of agencies assigns certain classes of challenges directly to the courts of appeals. In the latter event, the task of analysis is to discern the reach of the direct review statute. To be sure, difficult questions of interpretation can and do arise, but the basic legal inquiry—what did Congress provide?—is in broad outlines uncontroversial. All of this raises the question: what is there left to debate, at least on a level that is not merely technical?

Recently, in the leading decision of *Telecommunications Research and Action Center v. Federal Communications Commission* (hereinafter *TRAC*),[7] the District of Columbia Circuit Court of Appeals posited a number of premises that, taken together, generate more than enough fodder for fundamental controversy about an emerging aspect of district court versus court of appeals jurisdiction. The particular context of *TRAC* involved a challenge to agency delay. This preliminary challenge was not governed specifically by the relevant statutes dealing with final agency actions. In its jurisdictional discussion, therefore, *TRAC* needed to address a question that is not obviously answered under traditional principles: namely, how to treat a challenge that is not covered by a direct review statute which applies to final orders, when a final action under the relevant law would be directly reviewable in the courts of appeals? Given the two main choices—to say that the preliminary challenge stands on its own and should go to the district courts, or to stretch the policies of exclusive appellate review to sweep the action into the courts of appeals—the D.C. Circuit adopted the latter in a broad ruling. At bottom, the court took the view that when a statute assigns a final agency action to the courts of appeals, and when a preliminary challenge such as to unreasonable agency delay is brought, the court of appeals has

[6]For exceptions, see Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980 (1975).

[7]750 F.2d 70 (D.C. Cir. 1984).

exclusive jurisdiction to hear the preliminary claim, even though the agency's statute itself does not specifically provide for that result.[8]

This innovation in doctrine does create the occasion to reconsider the principles and policies implicated in the choice of judicial forum. I will seek to do so in this discussion, in which I advance a perspective that is largely critical of *TRAC*'s method of analysis and substantive result. In one sense, of course, we owe *TRAC* a great debt, for it focuses on issues that often had been submerged and evaded. Yet as to *TRAC*'s analysis and holding in favor of exclusive appellate jurisdiction in the preliminary context of that case, many questions remain.

In the following four parts of this article, I will address, respectively, four main questions. First, in order to clarify the doctrine and to highlight *TRAC*'s novelty, I will examine *TRAC*'s relation to otherwise existing jurisdictional principles.

Second, as a leading decision *TRAC* carries the burden of justifying its result with legal analysis that is reasonably persuasive. I will consider whether this methodological aim has been achieved. I will argue that in fact *TRAC* employs an unduly abstract and formalistic analysis and that, given those characteristics, it is open to serious question. My objective is not just to critique *TRAC*, but also to highlight an alternative form of complex purposive analysis that goes much further in accommodating the competing values underlying the issue of court of appeals versus district court jurisdiction.

Third, one needs to question *TRAC*'s basic holding in favor of exclusive appellate jurisdiction. In terms of its result, how does *TRAC* fit with established doctrinal principles and broader policies inhabiting this area? I will argue that *TRAC*'s doctrine is shot through with ambiguity to a degree that should call into doubt its overall thrust. Of course, any leading decision raises new questions. My point, however, is that fundamental difficulties surround *TRAC* so as to generate deep concerns about its direction. In addition, I will suggest that the decision's blanket preference for exclusive appellate power runs contrary to major policy considerations in this field.

Fourth, one needs to ask about alternatives to *TRAC*. If it were the best of the available options, concerns otherwise raised in this comment would be of much lesser magnitude. However, there is a readily available alternative approach which, in my view, coheres more closely with well-established jurisdictional principles and responds more

[8] *See id.* at 75.

directly to competing policy considerations underlying the choice of judicial forum. At least, the alternative helps to throw into clearer relief what is unique and contestable about *TRAC*'s contribution to modern jurisdictional debate.

Although the general topic of district court versus court of appeals jurisdiction is unlikely soon to become a zone of widespread and pervasive contention, given that many principles in this field are relatively well-settled, the particular area of debate represented by *TRAC* ought not to be overlooked in the midst of other controversies about judicial review. With this in mind, my broader reasons for discussing *TRAC* are twofold. First, *TRAC* does represent a significant development in jurisdictional analysis, and as such it warrants a full-length study of its contribution and methodology as well as its doctrinal and policy-oriented foundations. Second, and more generally, this discussion aims to place into fuller relief the competing values and institutional assumptions that are central to this key area of administrative law.

I. THE CONTRIBUTION OF *TELECOMMUNICATIONS RESEARCH AND ACTION CENTER v. FCC* TO JURISDICTIONAL PRINCIPLES

A. Basic Principles

As is well-known, the federal courts are courts of limited subject matter jurisdiction: they have the power granted to them by law.[9] The general subject matter jurisdiction statute, 28 U.S.C. § 1331 (1982), assigns original jurisdiction to the federal district courts. Since administrative challenges raise federal questions,[10] all other things being equal those challenges are channelled to the trial courts of the federal system.

[9]Insurance Corp. v. Compagnie Des Bauxites, 456 U.S. 694, 701–02 (1982) ("The validity of an order of a federal court depends upon that court having jurisdiction over . . . the subject matter. Federal courts are courts of limited jurisdiction. Subject matter jurisdiction . . . is an Art. III as well as a statutory requirement; it functions as a restriction on federal power. . . ."); L. JAFFE, *supra* note 5, at 156; C. WRIGHT, THE LAW OF FEDERAL COURTS 103 (4th ed. 1983); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

[10]*See* 28 U.S.C. § 1331 (1982). A 1976 amendment to the general federal question jurisdiction provision established that no amount in controversy was required in suits "against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Pub. L. No. 94–574, 90 Stat. 2721 (1976). "Finally in 1980 Congress acted again and removed completely the requirement of an amount in controversy for suits brought under § 1331." C. WRIGHT, A. MILLER, & E. COOPER *supra* note 5, at § 3561.1, at 17.

However, Congress has altered the normal pathway to court in numerous settings by providing for initial review in the courts of appeals. The original model of this modification is the Federal Trade Commission Act of 1914.[11] That Act's legislative history makes clear that its aim was to avoid duplicating trial-type proceedings in both the agency and trial court. The court's judicial review function is described as one of reviewing issues of law, not of making findings of fact, and the findings are to be based on records assembled before the agency.[12] This approach is generalized in the Administrative Orders Review Act.[13] The 1950 legislative history of that statute, which assigns the orders of numerous agencies to initial review by courts of appeals, speaks of the need to avoid making two records, one before the agency and another before the district court, and "thus going over the same ground twice."[14]

To be sure, these two statutes—the FTC Act and the Administrative Orders Review Act—were adopted at considerably different periods in American administrative history. The former represents the early stage of modern administrative development, well before those major changes in our constitutional law during the New Deal that ultimately legitimized a broad-ranging administrative state.[15] The latter repre-

[11] 15 U.S.C. § 45(c) (1982) (authorizing a "petition for review" of FTC actions in the courts of appeals). *See* L. JAFFE, *supra* note 5, at 157.

[12] *See* H.R. REP. No. 1142, 63d Cong., 2d Sess. 19 (1914) (Conference report on the FTC Act of 1914):

> In order to obtain the speediest settlement of disputed questions, it is provided that the commission shall apply for the enforcement of its orders directly to the circuit court of appeals. The findings of the commission as to the facts are to be conclusive. The court's function is restricted to passing on questions of law. The court will determine such questions on the record in the proceeding before the commission.

[13] *See* 28 U.S.C. §§ 2341–53 (1982).

[14] The Administrative Orders Review Act's legislative history confirms that it sought to advance the values of expedition and efficiency in the judicial system. *See* H.R. Rep. No. 2122, 81st Cong., 2d sess. 3–4 (1950) (discussing rationale for substituting review of designated orders by courts of appeals instead of by three-judge district courts):

> [t]he submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court on review, and thus going over the same ground twice. Under the Administrative Procedure Act . . . , the record before the agencies will be made in such a way that all questions for the determination of the courts on review, and the facts bearing upon them, will be presented and the rights of the parties will be fully protected.

and S. REP. No. 2618, 81st Cong., 2d Sess. 4–5 (1950):

> The pattern used here is the one established for review of orders of the Federal Trade Commission in 1914 . . . and followed by other laws since then in relation to other agencies. . . . The proposed method of review has important advantages of simplicity and expedition . . . in the disposition of a considerable class of business of the Federal courts.

[15] For a general discussion, see Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

sents the period of reform after World War II and the 1946 passage of the Administrative Procedure Act,[16] when the task of procedural review loomed large on the judicial horizon.[17] Nevertheless, they both share the common sense judgment that duplication of process to no purpose can and should be avoided, at least when an agency's orders have been entered on a record and are to be reviewed by a court. A corollary of this is to promote enforcement of federal law by cutting down the time needed for judicial review. Channelling cases immediately to courts of appeals also reinforces any existing patterns of appellate deference to the expertise of an agency.[18]

The largest problem created by so-called special (or direct) review statutes has been in discerning their application to cases not definitively within the provision's terms. Should "order" be read to include a final agency rule, despite the traditional APA distinction between orders and rules? Should agency decisions relatively more inchoate than final "orders" nevertheless be read to be covered by statutes assigning orders to the courts of appeals? Such questions have occupied a large and continually growing body of doctrine.[19]

In recent years, given a willingness by courts to review a limited class of challenges prior to entry of absolutely final orders, a new question has arisen. When agency decision making cannot be stretched to fit the concept of an order or other item to be reviewed initially in the courts of appeals, should a challenge to such decision making be remitted to the general jurisdiction of the district courts, or should the courts of appeals still exercise jurisdiction as an initial matter? The case law has not been clear on this point. *TRAC* sought to

[16]5 U.S.C. §§ 551–59, 701–06 (1982).

[17]For a discussion of procedural review, see Shapiro and Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decision*, 1987 DUKE L.J. 387, 404–10.

[18]Of course, district court review remains in many instances. *See, e.g.*, 42 U.S.C. § 405(g) (1982) (calling for district court review of Social Security Act claims). Professor Davis has stated that the 1980 annual report of the Administrative Office of United States Courts noted 2,950 "Reviews of Administrative Agency Cases" by the courts of appeals. K. DAVIS, *supra* note 5, § 23:3, at 131. A corresponding total for the district courts was not available, as no such general reporting category has been established. Yet a suggestive comparison may be derived from considering, for instance, the following subtotals of cases decided by district courts: 9,043 social security cases; 23,287 "prisoner petitions" (with no indication of the number involving review of administrative action); 3,271 tax suits; 12,944 civil rights cases; 8,640 cases involving "labor laws"; 3,783 cases involving patents, copyrights or trademarks; and 627 Freedom of Information Act cases. *Id.* Although it is difficult to make a specific comparison without greater knowledge of the issues in these lawsuits, Professor Davis has estimated that the ratio of administrative actions decided by district courts to those decided by courts of appeals was "five or more times" to one. *Id.*

[19]*See* Davis, *supra* note 5, § 23:5, at 133–34.

make it clear by generally favoring court of appeals review in preliminary contexts not specifically covered by special review provisions.[20]

B. *TRAC*'s Analysis and Significance

1. *Statement of the Case*

TRAC emerged from a dispute between the FCC and several not-for-profit public interest organizations concerning the pace of the FCC's determination whether the American Telephone and Telegraph Company (AT&T) had to reimburse ratepayers for allegedly unlawful overcharges. The plaintiffs charged that the FCC had unreasonably delayed its decision. Plaintiffs petitioned the court of appeals for a writ of mandamus to compel the FCC to reach closure on the matter. The court of appeals raised the question of its subject matter jurisdiction,[21] asking the parties to address the following question:

> [W]hether a petition to compel allegedly unreasonably delayed agency action properly lies before this Court or before a United States District Court, or whether these courts have concurrent jurisdiction, when any final agency decision in the matter would be directly reviewable in this Court.[22]

By framing the issue in this manner, the court focused attention on the fact that under the relevant statutes, a final order by the FCC would be subject to court of appeals jurisdiction. When that is the case, the court asked, who has jurisdiction in a doubtful situation over preliminary challenges?

Interestingly, only one of the two main parties in this case expressed a comprehensive position on the jurisdictional issue. The FCC argued that the court of appeals had jurisdiction over the claim of unreasonable delay in this situation and that it was exclusive.[23] Plaintiff's attorney did not elaborate a view beyond claiming that the court of

[20] *TRAC*, 750 F.2d 70, 75 (D.C. Cir. 1984).

[21] *See id.* at 74 n.22. A lack of subject matter jurisdiction is an issue that can be raised "at any time during the life of a lawsuit by either party or by the trial or appellate court on its own motion." V C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1063, at 224 (1987). *See also* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

[22] Telecommunications Research & Action Center v. FCC, No. 84–1035 (D.C. Cir. June 12, 1984) (order requesting parties to brief jurisdictional issues in *TRAC*).

[23] The FCC argued in an earlier case, ultimately dismissed as moot, that "[t]he Court should rule that it has exclusive authority in appropriate circumstances to issue writs of mandamus at least against agencies such as the FCC under the pertinent special review statutes, the All Writs Act, and the APA." Reply Brief of Federal Communications Commission on Petition for a Writ of Mandamus at 5, *In re* National Treasury Employees Union, No. 84–5010 (D.C. Cir. 1984). The FCC followed that view in *TRAC*. *See* Brief for Federal Communications Commission at 13–15, TRAC v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (Nos. 84–1035, 84-5077).

appeals had jurisdiction.[24] The two intervenors—AT&T and GTE Service Corporation—agreed that the court of appeals had jurisdiction, but differed on the question of its exclusivity. GTE thought that there was exclusive power,[25] while AT&T argued there was not.[26]

Faced with this array of positions, the court of appeals essentially adopted the FCC view, holding both that it had jurisdiction and that its power was exclusive. Regarding jurisdiction, the court noted that there was no final order over which it could assume direct power under the FCC's statutes. Delay is not tantamount to an order, at least as viewed in *TRAC*. But this did not defeat the court's jurisdiction, as it proceeded under the All Writs Act, a venerable statute providing that "all courts established by an Act of Congresss may issue all writs necessary or appropriate in aid of their respective jurisdiction. . . ."[27]

The All Writs Act analysis rested on the idea that the court needed to assert power over the unreasonable delay claim in order to protect its future jurisdiction. As such, the court was acting "in aid of" its authority over final orders when it entertained this suit for preliminary relief. Although the court did little to elaborate upon this reasoning, it indicated concern that it might be prevented from ever reviewing a challenge to a final FCC order, assuming that the FCC continued simply to delay and never entered such an order. To prevent ultimate frustration of its power of review, the court reasoned that it had warrant now to adjudicate the delay challenge.[28]

So far, nothing is extraordinary about *TRAC*. The use of the All Writs Act as a basis for jurisdiction, while not entirely uncontroversial,[29] seems a reasonable interpretation.[30] What makes the analysis

[24]Petitioner opted to rely upon amicus briefs filed in *In re* National Treasury Employees Union, No. 84–5010 (D.C. Cir. 1984). *See* Petitioners' Brief Supporting Petition for Mandamus and Petition for Review at 2, TRAC v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (Nos. 84–1035, 84-5077).

[25]*See* Brief for Intervenor GTE Service Corporation at 7-12, TRAC v. FCC, Nos. 84–1035, 84–5077.

[26]*See* Brief for Intervenor American Tel. & Tel. Co. at 16, TRAC v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (Nos. 84–1035, 84–5077) ("this Court has jurisdiction . . . although this jurisidiction is not exclusive in the courts of appeals but is also within the authority of the district court in appropriate circumstances").

[27]28 U.S.C. § 1651(a) (1982).

[28]750 F.2d at 76.

[29]*See* FTC v. Dean Foods Co., 384 U.S. 597, 615 (1966) (Fortas, J., dissenting) (in which the Justice strongly objected to the majority's approval of the All Writs Act as a basis for jurisdiction in a preliminary context). For a discussion of *Dean Foods*, *see infra* notes 125–29.

[30]*See* 384 U.S. at 597. *See also* United States v. United States District Court, 334 U.S. 258 (1948); Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943); McClellan v. Carland, 217 U.S. 268 (1910); Potomac Elec. Power Co. v. ICC, 702 F.2d 1026 (D.C. Cir. 1983). For general support of the use of the All Writs Act as a predicate for appellate jurisdiction, see 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE

special is the further claim that the court of appeals' jurisdiction is exclusive. Although the court worked hard to tie this holding to existing doctrine, nothing should obscure the novelty of this aspect of *TRAC*.

The court started with the settled idea that when a final order is to be reviewed initially by a court of appeals because of some statutory provision to that effect, the otherwise-existing jurisdiction of the district courts is presumed to be cut off. This judge-made principle has the advantage of giving deference to a legislative judgment about forum allocation, and has been widely supported on that basis.[31]

But the *TRAC* opinion took another step that involved a leap beyond established principles. *TRAC* reasoned that it would be "anomalous" to conclude that district courts lack jurisdiction over final orders when courts of appeals have initial review power over such orders, and not also to conclude that the district courts lack jurisdiction when the courts of appeals have authority under the All Writs Act in aid of their future jurisdiction.[32] In effect, the court

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AND PROCEDURE: JURISDICTION § 3942, at 320 (1977) ("Avowedly interlocutory intervention under the All Writs Act might be expanded with considerable profit.").

[31]This principle has been invoked in a variety of circumstances. *See, e.g.*, Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 419–23 (1965); Macauley v. Waterman S.S. Corp., 327 U.S. 540, 543–45 (1946); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 48–50 (1938); Louisville & Nashville R.R. Co. v. Donovan, 713 F.2d 1243, 1245–46 (6th Cir. 1983); Compensation Dep't v. Marshall, 667 F.2d 336, 340 (3d Cir. 1981); Assure Competitive Transp. Inc. v. United States, 629 F.2d 467, 471 (7th Cir. 1980); Virginia Elec. & Power Co. v. Costle, 566 F.2d 446 (4th Cir. 1977); Investment Co. Inst. v. Board of Governors, Federal Reserve System, 551 F.2d 1270 (D.C. Cir. 1977); Anaconda Co. v. Ruckelshaus 482 F.2d 1301 (9th Cir. 1973); UMC Indus., Inc. v. Seaborg, 439 F.2d 953, 955 (9th Cir. 1971); United States v. Southern Ry. Co., 380 F.2d 49, 53–54 (5th Cir. 1967). *But see* Sebben v. Brock, 815 F.2d 475, 478 (8th Cir. 1987) (holding that district court retains some residuum of mandamus power, despite an apparently applicable direct review scheme, in narrow circumstances where claimant shows either patent violation of agency authority or manifest infringement of substantial rights irremediable by statutory review and where agency has a clear nondiscretionary duty to act); Louisville & Nashville R.R. Co. v. Donovan, 713 F.2d 1243, 1246 (6th Cir. 1983); Nader v. Volpe, 466 F.2d 261 (D.C. Cir. 1972).

[32]*See* 750 F.2d at 77:

> By lodging review of agency action in the Courts of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power. It would be anomalous to hold that this grant of authority only strips the District Court of general federal question jurisdiction . . . when the Circuit Court has present jurisdiction under a special review statute, but not when the Circuit Court has immediate jurisdiction under the All Writs Act in aid of its future statutory review power.

and 78 n.36:

> It would be highly anomalous for us to hold that remand to the agency or appointment of a special master cannot cure evidence deficiencies in the record of ongoing agency proceedings when the Supreme Court has said they are quite adequate for review of the same issues after final agency order.

analogized the All Writs Act as a source of appellate power to a special review provision assigning a case initially to the courts of appeals.

Why would a result contrary to *TRAC*'s be anomalous? The court's answer was that the broad policy reasons for consolidating cases in the courts of appeals are equally strong as to both final orders and preliminary challenges. More particularly, initial review by the courts of appeals, it was argued, can prevent unnecessary duplication of adjudicatory process, promote judicial economy, eliminate attendant delay and expense for the parties, and—perhaps above all—ratify the particular expertise of appellate tribunals in difficult administrative cases. It bears noting that the opinion's policy analysis is relatively brief, even cryptic, as if to suggest that exclusive appellate power is clearly the more reasonable course.[33]

TRAC pithily considered the implications of its ruling. In response to the claim that original review by the court of appeals might be legally inadequate because of that court's unfamiliarity with the taking of evidence, *TRAC* noted that the court can remand to the agency for factual development or it can appoint a special master.[34] For support, *TRAC* relied on a recent Supreme Court decision that noted these powers of the courts of appeals in the review of final agency action.[35]

TRAC's jurisdictional holding was formulated as follows: where a statute commits review of final administrative action to the court of appeals, "any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals."[36] *TRAC* noted that this holding was approved by the entire circuit.[37]

2. *Importance of the Case*

TRAC is important on at least three levels. First, it dealt with a jurisdictional question that had not been resolved in prior case

[33]*See* 750 F.2d at 77–78.

[34]*Id.* at 78.

[35]*See* FCC v. ITT World Communications, Inc., 466 U.S. 463 (1984). *TRAC* acknowledged that *ITT* dealt with final agency action and, therefore, was not dispositive. 750 F.2d at 78 n. 36. Nevertheless, the court found *ITT* persuasive, stating that:

> [i]t would be highly anomalous for us to hold that remand to the agency or appointment of a special master cannot cure evidence deficiencies in the record of ongoing agency proceedings when the Supreme Court has said that they are quite adequate for review of the same issues after final agency order. *Id.*

[36]750 F.2d at 78–79. This same language, with the addition of underscoring the word "exclusive," appears earlier in the opinion at 75.

[37]*Id.* at 75 n.24.

law.[38] *TRAC* came in the wake of numerous decisions that seemed to take for granted either district court[39] or court of appeals[40] jurisdiction over challenges to agency delay or inaction. However, these earlier cases did not expressly settle the jurisdictional issue. *TRAC* found in this divergent set of precedents a "state of disarray."[41] As an attempt to resolve it, *TRAC* inevitably is a significant step.

Second, *TRAC*'s own terms and implications are extremely wide-ranging. Its holding is not limited to FCC cases, to delay cases, or to agency adjudications. Moreover, there is nothing particularly special about the FCC statutes involved in *TRAC* that would lead one to limit the decision to certain statutory contexts. The FCC statutes speak broadly of "all final orders" and "any order," much in the language of a host of other special review provisions.[42] Furthermore, later cases

[38]*TRAC*'s approach was not unprecedented, however, for it paralleled a suggestion made in a concurring opinion in Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1179 (D.C. Cir. 1979) (Leventhal, J., concurring), *cert. denied*, 447 U.S. 921 (1980). The plaintiff in that case sought disqualification of the FTC Chairman in a pending rule making proceeding. The case was brought in the district court, which exercised jurisdiction. The court of appeals reaffirmed the district court's power, reasoning that "where the final agency decision may be reviewed does not by itself determine the court in which a plaintiff seeking interlocutory relief may pursue his cause of action." *Id.* at 1158. This reasoning was questioned in a separate concurring opinion by Judge Leventhal, who wrote: "I posit a total lack of jurisdiction in the district court to consider the merits of plaintiff's case in any way or to any extent." *Id.* at 1179. Relying on FTC v. Dean Foods Co., 384 U.S. 597 (1966), Judge Leventhal suggested that the court of appeals had exclusive power. He acknowledged that his view, which he did not much elaborate, was "novel" and "not argued." 627 F.2d at 1179. *TRAC* in essence resurrected Judge Leventhal's position and made it the law of the D.C. Circuit. *See* 750 F.2d at 76 n.28, and at 77 n.30 (citing with approval Judge Leventhal's concurrence).

[39]*See, e.g.*, Public Citizen Health Research Group v. Commissioner of Food and Drug Admin., 740 F.2d 21, 34–35 (D.C. Cir. 1984) (raising no question about the district court's jurisdiction in deciding to remand the case to the trial court for the purpose of gathering additional evidence); Public Citizen Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983) (not questioning original jurisdiction of district court); Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1157 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (holding that district court has jurisdiction over nonfrivolous constitutional claims of agency bias and prejudgment).

[40]*See, e.g.*, Potomac Elec. Power Co. v. ICC, 702 F.2d 1026, 1032–33 (D.C. Cir. 1983) (initially brought in court of appeals); MCI Telecommunications Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1980) (initially brought in court of appeals, jurisdiction not questioned); Association of Nat'l Advertisers, v. FTC, 627 F.2d 1151, 1179 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) (Leventhal, J., concurring) (arguing that jurisdiction to compel agency action lies exclusively in the appellate court that has jurisdiction to review on merits); Action for Children's Television v. FCC, 546 F. Supp. 872, 874–75 (D.D.C. 1982) (holding in favor of court of appeals' jurisdiction).

[41]750 F.2d at 75. The court further said that there were "inconsistencies" among its prior decisions. *Id.*

[42]28 U.S.C. § 2342(a) (1982) provides that the "court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47. . . ." 47 U.S.C. § 402(a) (1982) makes reviewable in the courts of appeals "[a]ny proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act."

have applied *TRAC* to a variety of settings in which many different types of challenges to agency decision making have been made in preliminary contexts.[43] These include constitutional challenges such as to alleged agency bias and prejudgment,[44] procedural challenges un-

[43]Of course, any challenge to preliminary agency decision making must be reviewable for *TRAC* to apply. Among other things, agency decision making must have achieved a status of "finality" that would permit a court with jurisdiction to review the matter. *See, e.g.*, Bethesda-Chevy Chase Broadcasters, Inc. v. FCC, 385 F.2d 967, 968 (D.C. Cir. 1967) (quoting Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948): "[T]o be final an order must 'impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process' "); CIBA-Geigy Corp. v. EPA, 607 F. Supp. 1467, 1469 (D.D.C. 1985) ("An agency's decision is final if (1) it is definitive or or there are no further agency procedures, (2) the action has legal force or great practical impact, and (3) judicial review would be efficient or would serve to enforce the regulatory scheme.").

The finality doctrine is related to, yet distinct from, other key notions concerning the timing of judicial review: ripeness and exhaustion. *See* Public Citizen Health Research Group v. FDA, 740 F.2d 21, 30 (D.C. Cir. 1984) ("Ripeness is primarily concerned with ensuring that issues are in a posture fit for *judicial* review. . . . Finality is primarily concerned with protecting the integrity of the *administrative* process."). The finality doctrine differs from the exhaustion requirement in that the former may create an issue even if there are no pending agency procedures as such to exhaust. *See generally* L. JAFFE, *supra* note 5, at 418, quoting Isbrandtsen Co. v. United States, 211 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954) (Finality depends " 'upon a realistic appraisal of the consequences of such action'; the test is the 'irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow.' ").

[44]An interlocutory challenge to alleged agency bias was covered by *TRAC*'s jurisdictional principles in that decision's companion case, Air Line Pilots Ass'n, Int'l v. CAB, 750 F.2d 81 (D.C. Cir. 1984) (hereinafter *ALPA*). In *ALPA* the airline pilots claimed that bias as well as unreasonable delay infected the CAB's process for determining whether certain employees had lost their jobs because of a "qualifying dislocation," which could trigger unemployment assistance under 49 U.S.C. § 1552 (1982). The Board began receiving applications for such determinations in January 1979, but by October 1983, it had taken no action on them.

After asserting jurisdiction, the district court dismissed for failure to state a claim for which relief may be granted. The court of appeals asked the parties to address the issue of subject matter jurisdiction. On the strength of *TRAC*, the court of appeals reversed on the ground that the case sought relief that could "affect our future statutory power of review over final agency action. . . ." 750 F.2d at 84. The court underscored that the bias claim "has equal power to affect our future jurisdiction over final agency action" as does an unreasonable delay claim. *Id.* at 84.

In another case involving a claim of bias, Public Util. Comm'r v. Bonneville Power Admin., 767 F.2d 622 (9th Cir. 1985), the Ninth Circuit followed *TRAC*. In that case the Public Utility Commissioner of Oregon and three investor-owned utilities challenged the constitutionality of ongoing proceedings of the Bonneville Power Administration to revise certain rate formulas. The plaintiffs argued that the Administrator had an unalterably closed mind as to the outcome and, accordingly, the proceeding violated plaintiffs' right to due process. The district court dismissed the action for lack of subject matter jurisdiction. 583 F. Supp. 752, 753 (D. Ore. 1984). Plaintiffs appealed. On the strength of *TRAC*, the Ninth Circuit affirmed the dismissal below. The court of appeals noted that the relevant statute assigned to it exclusive jurisdiction over final actions by the Administrator. *See* 767 F.2d at 625–26. It then applied *TRAC* in concluding that there is exclusive appellate jurisdiction over this preliminary challenge to the constitutionality of agency proceedings. *See id.* at 626–27.

der statutory provisions,[45] and substantive challenges to an agency's authority[46] as well as claims under the "arbitrary" and "capricious" standard of review.[47] The already considerable body of post-*TRAC* caselaw is continually expanding.[48]

[45]In Community Nutrition Inst. v. Novitch, 583 F. Supp. 294 (D.D.C. 1984), *aff'd sub. nom.* Community Nutrition Inst. v. Young, 773 F.2d 1356 (D.C. Cir. 1985), *cert. denied,* 475 U.S. 1123 (1986), the plaintiff sought an order of the district court requiring the Food and Drug Administration to hold a public hearing concerning the use of the food additive aspartame (commonly known as NutraSweet or Equal). The district court denied plaintiff's motions to stay the approval of aspartame. Thereafter, the FDA rejected plaintiff's request for a hearing. At that point, the district court granted defendant's motion to dismiss on the ground that the final agency ruling on the application for a hearing was reviewable exclusively by the court of appeals. On appeal, the question was whether the district court correctly held that it lacked jurisdiction as soon as the agency had ruled on plaintiff's request for a hearing. The D.C. Circuit agreed that the final agency ruling was exclusively reviewable by an appellate court. Community Nutrition Inst. v. Young, 773 F.2d 1356 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986).

The court of appeals also concluded that the district court had erred in asserting jurisdiction over the case before the agency had entered the final order. It reasoned that under *TRAC*, the district court never had jurisdiction over the case. *See id.* at 1361. The plaintiff's challenge to ongoing agency process was considered a plain example of a situation that "might affect" ultimate appellate review. As in other instances, the court of appeals did not discuss in detail the analytical links in this chain of argument. Yet the court concluded that under *TRAC*, "[t]he jurisdiction to review agency inaction lies exclusively in this court." *Id.*

[46]In Independent Bankers Ass'n of America v. Conover, 603 F. Supp. 948 (D.D.C. 1985), a bankers' association challenged the Comptroller of the Currency's preliminary approval of charters for certain proposed national banks. Plaintiff argued that the Federal Reserve Board, rather than the Comptroller, was the agency authorized to review the proposed charters under relevant banking statutes. The bankers asked the district court, *inter alia*, to refer the matter to the Federal Reserve Board for its advice on the applicability of its statutory authority.

The district court ruled that it had no power to issue directions to the Board since that entity's orders were subject to direct review by the court of appeals. The court cited *TRAC* for the proposition that where a statute commits agency action to review by the court of appeals, "any suit that might affect that future jurisdiction" is exclusively reviewable in such court. *Id.* at 956. The district court reasoned that if it were to direct the Board to take action, it would be affecting the court of appeals' future jurisdiction because it would in effect be requiring a final order by the Board. Such an order is to be reviewed exclusively by the appellate court. Therefore, the district court denied the motion for an order of referral. *See id.* at 956–57.

[47]In UAW v. Donovan, 590 F. Supp. 747 (D.D.C. 1984), *aff'd*, 756 F.2d 162 (D.C. Cir. 1985), certain labor organizations challenged as arbitrary and capricious the Occupational Safety and Health Administration's failure to regulate exposure to formaldehyde in the workplace. The district court declined to direct the agency to regulate. Yet it did require the agency to reconsider its refusal either to issue an emergency temporary standard or to institute permanent rule making proceedings. Also, the court ordered OSHA to develop a timetable for completing its reconsideration.

TRAC was decided after the district court acted. In reaction to *TRAC*, the district court transferred the case to the court of appeals. The appellate tribunal accepted jurisdiction, albeit without much discussion. It noted that "where a statute commits final agency action to review by the court of appeals, the appellate court has exclusive jurisdiction to hear suits seeking relief that might affect its future statutory power of review." UAW v. Donovan, 756 F.2d 162, 163 (D.C. Cir. 1985). Standards issued by OSHA are exclusively reviewable by the court of appeals. If a district court ordered either a temporary emergency standard or permanent rule making, the court of appeals reasoned, the district court would be requiring action that would precipitate direct appellate review. Such action triggering direct review was held to affect the court of appeals' jurisdiction, and thus to be covered by *TRAC*.

Third, *TRAC* is important for its method of analyzing forum allocation questions as well as for its implications for judicial review generally. These two topics will be considered in turn in the following two sections.

[48]*See, e.g.*, Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987) (Plaintiff challenged EPA's delay in completing rule making; the court of appeals held, *inter alia*, that the district court did not have jurisdiction, in significant part relying on *TRAC*); Oil, Chem. & Atomic Workers Int'l v. Zegeer, 768 F.2d 1480, 1483 (D.C. Cir. 1985) (confirming on basis of *TRAC* that court of appeals has exclusive power over claims by a labor organization and health group alleging unreasonable agency delay in regulation of miners' exposure to products of radon decomposition); Suburban O'Hare Comm'n v. Dole, 603 F. Supp. 1013, 1031 (N.D. Ill. 1985) (Plaintiffs challenged final adjudicatory decision by the FAA approving Chicago's master plan for construction and operation of commercial air carrier facilities; the district court held that there was exclusive appellate power over this matter, citing *TRAC* for the proposition that the relative inability of the court of appeals to take evidence does not, without more, divest that court of statutory jurisdiction); Zantop Int'l Airlines, Inc. v. Engen, 601 F. Supp. 667, 669 (D.D.C. 1985) (Plaintiff sought relief with respect to allegedly improper amendment, modification, or suspension of operating certificate under Federal Aviation Act; the district court held that the court of appeals had exclusive jurisdiction under *TRAC* since any relief granted might affect the court of appeals' future jurisdiction); *In re* Global Int'l Airways Corp., 48 Bankr. 849, 852 (W.D. Mo. 1985) (Plaintiff in bankruptcy case challenged the application of certain noise regulations; in concluding that the court of appeals had exclusive jurisdiction, the district court relied significantly on *TRAC* for its discussion of the respective powers of appellate and district courts). *See also* Moss v. Arnold, 654 F. Supp. 19, 22 (S.D. Ohio 1986).

Courts have also relied on *TRAC* in other situations. *See, e.g., In re* GTE Service Corp., 762 F.2d 1024, 1027 (D.C. Cir. 1985) (plaintiffs challenged FCC decision in a refund proceeding; the court of appeals held that pleading could not be entertained as a motion for stay because it was not accompanied by petition to review the underlying order, and that the pleading, regarded as petition for a writ of mandamus, should be denied because of available remedy pursuant to the Communications Act; the court contrasted *TRAC* with this case, noting that in *TRAC* a petition for writ of mandamus pursuant to the All Writs Act was deemed appropriate); New York v. Thomas, 613 F. Supp. 1472, 1477–78 (D.D.C. 1985) (plaintiffs brought action to require EPA to notify states to revise state implementation plans to abate damage to Canada allegedly traceable to emissions from the Midwest; the court, in the course of granting plaintiff's motion for summary judgment, contrasted this case with *TRAC* in concluding that because the statutes did not confer exclusive power on the court of appeals, *TRAC* was inapplicable); Ciba-Geigy Corp. v. EPA, 607 F. Supp. 1467, 1469 (D.D.C. 1985) (Plaintiff sought relief against future enforcement action by EPA regarding labeling of products containing a certain pesticide; in holding that there was no final agency action to review, the court cited *TRAC* for the proposition that where a statute commits review of agency action to the court of appeals, any suit seeking relief that might affect the circuit court's future jurisdiction is subject to the exclusive review of the court of appeals; the court was unable to determine the appropriate application of this principle in the absence of final agency action, and it dismissed the complaint). *See also* United Technologies Corp. v. EPA, 821 F.2d 714, 721 (D.C. Cir. 1987); Cutler v. Hayes, 818 F.2d 879, 887 n. 61 (D.C. Cir. 1987); American Fed'n of Gov't Employees Local 1928, v. Federal Labor Relations Auth., 630 F. Supp. 947, 950 (D.D.C. 1986); *In re* Amtol Corp., 57 Bankr. 724, 727 (Bankr. N.D. Ohio 1986); United Transp. Union v. Norfolk & Western Ry. Co., 627 F. Supp. 1008, 1015 (D.D.C. 1985).

II. A METHODOLOGICAL CRITIQUE OF TRAC

In this part I will focus on the methodological side of the jurisdictional debate represented by *TRAC*. To be sure, no absolute distinction should be drawn between a decision's method of reasoning and its substantive result, for often the result is only as compelling as the reasoning leading to it. I will be considering whether *TRAC*'s mode of argument satisfies basic criteria of methodological completeness, or whether it misses important factors, oversimplifies relevant considerations, or without overt justification changes the terms of legal debate in ways that seem problematic. After discussing general principles, I will suggest that *TRAC* does suffer from these deficiencies.

A. General Concepts

Because forum allocation questions are matters of statutory construction, the well-recognized tension between "formalist" and "purposive" modes of construction might be expected to play a major role in this context, as indeed it does. In the simplest cases, a "plain language" rendering of a jurisdictional statute may suffice.[49] Yet in more difficult cases, courts tend to move to a purposive analysis that focuses on the aims or objectives, stated or implied, of a particular jurisdictional allocation. This means that they are concerned with assessing the ends that would, or would not, be advanced by assigning original review to one or the other level of court.[50] On a purposive view, the language of statutory allocations is frequently supplemented by judicial assessments of the institutional wisdom of different results as filtered through the courts' understandings of the aims served by judicial review.[51]

A prime example of the importance of purposive reasoning about jurisdiction is found in modern cases interpreting statutes calling for the review of agency "orders," as applied to the review of rules. Traditionally, a formalistic argument was made that the review of an

[49]There are many instances in which courts rely on what they see as the plain language of jurisdictional provisions in reaching their results. *See, e.g.*, Ohio Citizens for Responsible Energy, Inc. v. NRC, 803 F.2d 258 (6th Cir. 1986) ("final order" means granting or denying NRC license, not order denying motion to reopen hearing); Citizens for a Safe Environment v. AEC, 489 F.2d 1018 (3d Cir. 1973) (narrowly interpreting reach of "final order" in jurisdictional statute). *Cf.* New England Tel. and Tel. Co. v. Public Util. Comm'n, 742 F.2d 1 (1st Cir. 1984).

[50]*See, e.g.*, Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985); Harrison v. PPG Indus., Inc., 446 U.S. 578 (1980); Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965); Foti v. INS, 375 U.S. 217 (1963). Purposive analysis of special review statutes has been praised by commentators. *See, e.g.*, L. JAFFE, *supra* note 5, at 159 ("In the absence of a conscious legislative choice, a court should ordinarily be able to skirt the shallows of literalism. . . .").

[51]*Cf.* K. DAVIS, *supra* note 5, § 23:5, at 134 ("[t]he complexity of the present law stems almost entirely from judicial departures from statutes, even when statutes on their face are reasonably clear").

"order" should not be seen to encompass a rule on the ground that the word "order" denotes something different from "rule." This distinction rested partly on the general contrast in the Administrative Procedure Act between rules eventuating from rule making and orders that complete adjudications.[52] The distinction was buttressed by the notion that appellate review of an order would follow a quasi-judicial proceeding and could proceed on the basis of an agency record, whereas appellate review of rules would be more difficult because they are not necessarily grounded on complete and tested records.[53]

This formalistic view has come under attack in the D.C. Circuit and elsewhere on the basis of straightforwardly purposive legal reasoning.[54] Courts have come to emphasize that the aims of appellate review apply at least as much, if not more so, to rules as to orders. Rules, after all, are less likely to depend on highly particularized factual assessments. There is thus less reason to suppose that the special competence of district courts with factual inquiries would be important with respect to the review of rules.

Furthermore, courts have observed that rules must rest on a "concise" general statement of basis and purpose.[55] That should be adequate in most cases, so the reasoning goes, to provide a reference point for judicial review. And if it is not, courts can remand to the agency for further explanation or other supplementation of the record.[56] Should that occur, only time would be lost, and the role of the courts of appeals as reviewing tribunals would be preserved.

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[52]*Compare* 5 U.S.C. § 551(4) (1982) (defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . .") *with* 5 U.S.C. § 551(6) (1982) (defining "order" as "the whole or part of a final disposition . . . of an agency in a matter other than rule making but including licensing").

[53]*See* United Gas Pipe Line Co. v. Federal Power Comm'n, 181 F.2d 796, 798–99 (D.C. Cir.), *cert. denied*, 340 U.S. 827 (1950). *See also* PBW Stock Exch. v. SEC, 485 F.2d 718 (3d Cir. 1973), *cert. denied*, 416 U.S. 969 (1974); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 176–77 (1973).

[54]*See* Investment Co. Inst. v. Board of Governors of Fed. Reserve Sys., 551 F.2d 1270, 1276 (D.C. Cir. 1977) ("[T]he general approach taken by *United Gas Pipe Line* is no longer good law in the circuit."); Deutsche Lufthansa Aktiengesellschaft v. CAB, 479 F.2d 912, 915–16 (D.C. Cir. 1973); Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

[55]City of Rochester v. Bond, 603 F.2d 927, 933 n.26 (D.C. Cir. 1979); Investment Co. Inst. v. Board of Governors of Fed. Reserve Sys., 551 F.2d 1270, 1278 (D.C. Cir. 1977); Deutsche Lufthansa Aktiengesellschaft v. CAB, 479 F.2d at 916 ("It is the availability of a record for review and not the holding of a quasi judicial hearing which is now the jurisdictional touchstone."); City of Chicago v. FPC, 458 F.2d 731, 740–41 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). *See generally* Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). For the statutory requirement, see 5 U.S.C. § 553 (1982).

[56]470 U.S. at 744; FTC v. ITT World Communications, Inc., 466 U.S. 463, 469 (1984); Harrison v. PPG Indus., 446 U.S. 578, 593–94 (1980).

Accordingly, the modern order/rule cases confirm that courts often look beyond the literal language to the underlying purposes of direct review statutes. As post-realists, courts have fashioned an approach to jurisdictional inquiry that has the potential of being practical and sensitive to competing policies arising in particular cases.

B. TRAC's Method

It remains to ask where *TRAC* sits within the modern tradition of purposive jurisdictional analysis. To answer that question, it is necessary to distinguish two sorts of purposive analysis. These may be called "abstract" and "complex" purposive inquiry. The differences between them highlight the fact that purposive reasoning can be carried out abstractly and formalistically, or it can be applied with complexity and attention to the full range of competing policies informing a doctrinal area. In my view, the weakness of *TRAC*'s method is that it adopts the abstract purposive approach. It is thereby subject to criticism as incomplete, oversimplified, and reductionist.

To make this argument, I will first set out more fully the contrast between the two types of purposive analysis. I will then contend that *TRAC* embraces the abstract mode of such inquiry. I will highlight the weaknesses of *TRAC*'s approach by contrasting it with examples of complex purposive reasoning about jurisdiction.

1. *Two Types of Purposive Analysis*

Again, the chief contrast to stress is between abstract and complex purposive analysis. Abstract inquiry is exemplified by looking with considerable generality at the objectives served by original court of appeals review, and by applying those objectives immediately to situations without closely examining the potentially distinguishing features of the underlying situations that give rise to cases. A complex inquiry is also purposive in that it concentrates on the aims advanced by different allocational results allowed by a statute. Yet it is distinct because it attends closely to the context in which a particular jurisdictional issue arises. It seeks to apply with care the competing policies that are associated with multiple features of administrative problems and that point for and against appellate review in concrete cases.

Abstract purposive reasoning about jurisdiction does have certain advantages. In particular, such an approach significantly simplifies legal analysis. After all, it is relatively easy for a court to vindicate the presumed, even if not always stated, aims advanced by direct appellate review—namely, by consolidating actions in the courts of appeals.

To elaborate, abstract purposive argument invokes such objectives of consolidation as reducing the litigation delays suffered by parties in

two-tier review (assuming an appeal is to be taken).[57] It similarly seeks to avoid whatever waste of judicial resources attend two-tier review.[58] Furthermore, consolidation in the appellate tribunal can be said to lessen the possibility of conflicting judicial applications of jurisdictional principles, for the courts of appeals can harmonize the law of a circuit in a way that district courts cannot.[59] Also, consolidation can be said to serve the goal of channelling administrative cases to courts with special expertise resulting from repeated exposure to administrative cases, as well as the special authoritativeness attaching to multi-member panels.[60]

A single-minded emphasis on such abstractly-stated aims surely would simplify the doctrine. Yet this is not necessarily a virtue. Abstract purposive reasoning stresses the goals of consolidation in the appellate courts without recognizing that they are situated in a complex fabric of competing ideas that often point in different directions.

In particular, notwithstanding the general arguments noted above in favor of consolidating review in appellate tribunals, countervailing policies counsel restraint. First of all, Congress' commands as to jurisdiction should be followed, including in situations where an abstract argument to the contrary can be made. Moreover, various practical considerations require caution about sweeping cases wholesale into the courts of appeals.

To begin, because the dockets of appellate tribunals are particularly overloaded, and because the courts must meet in threes, appellate fora have less ability to expand effectively to meet the challenge of a burgeoning workload.[61] For issues of relatively less legal or policy importance in our administrative system, it appears doubtful that the time and resources of appellate courts should necessarily be drawn upon initially. To be sure, no litigant believes that his or her case is of limited legal or policy importance. Yet that should not foreclose our

[57] *See* C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 30, § 3940, at 302.
[58] *See id.*
[59] *See id.* at 302–03.
[60] *See id.* at 303.
[61] For a discussion of the problems of congestion and delay in the courts, see H. ZEISEL, H. KALVEN & B. BUCHHOLZ, DELAY IN THE COURT (2d ed. 1959). For consideration of the particular problems facing appellate courts, see C. WRIGHT, A. MILLER & E. COOPER, *supra* note 2, § 3506. "The last two decades have seen a precipitous increase in the workload of the courts of appeals. It was said in 1973 that those courts were 'in a state of crisis' and the situation has worsened since." *Id.* at 24 (quoting H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 31 (1973)). "District-court filings rose 64% between 1960 and 1972, courts-of-appeals filings a whopping 273% . . ." D. CURRIE, FEDERAL COURTS 831 (3d ed. 1982). *See also* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) (reprinted at 67 F.R.D. 195 (1975); Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29 (1968); *Federal Appellate Justice in an Era of Growing Demand*, 59 CORNELL L. REV. 571 (1974).

making general distinctions among types of cases based on our awareness of such differences.[62]

Furthermore, appellate tribunals do have certain special characteristics, such as collegial and deliberative decisionmaking, that attune them to certain types of issues. In particular, such courts are well-attuned to decide major questions of law arising in administrative settings. But these same courts may not be as well-suited for other matters, including those involving the development of an agency record or detailed factual inquiries that may have to precede the application of law to a case.[63]

In all, it is unduly one-sided to engage in an abstract application of policies favoring appellate consolidation without carefully weighing them in relation to competing arguments and aims. What is called for instead, in my view, is a complex purposive inquiry into jurisdictional questions.

2. TRAC's *Use of Abstract Purposive Reasoning*

Unfortunately, *TRAC* exemplifies an abstract purposive analysis of jurisdiction. This point becomes clear as one traces *TRAC*'s argument for exclusive appellate review.

TRAC's initial point of reference is the following question: which level of court would review the agency action if and when it becomes final? In *TRAC*, the FCC was in the midst of an administrative process that, if completed, would have eventuated in a final order. The key issue thus was which level of court would review the final order itself? Since it would be reviewable exclusively in a court of appeals, *TRAC* reasoned that the preliminary challenge also should be reviewable exclusively in a court of appeals.[64]

As noted earlier, *TRAC* seeks support in a well-established precept concerning the exclusivity of appellate review in a situation different from *TRAC*'s. The traditional precept is that even though a statute has not provided specifically that appellate power is exclusive, when the statute vests review of final agency decisions in the courts of appeals, it thereby cuts off the original jurisdiction of other courts over such actions.[65] This precept has achieved wide application. The leading

[62]The relative importance of the issues raised in a case is a significant factor in the jurisdictional analysis proposed by the Administrative Conference of the United States in 1976. *See infra* text accompanying notes 84–89.

[63]*See infra* text accompanying notes 150–57.

[64]*See* 750 F.2d at 77–79.

[65]*See* Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 422 (1965); Compensation Dep't of District Five v. Marshall, 667 F.2d 336, 340 (3d Cir. 1981); Assure Competitive Transp., Inc. v. United States, 629 F.2d 467, 471 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981); City of Rochester v. Bond, 603 F.2d 927, 935 (D.C. Cir. 1979); Virginia Elec. & Power Co. v. Costle, 566 F.2d 446 (4th Cir. 1977); Investment Co. Inst. v. Board of Governors of the Fed. Reserve Sys., 551 F.2d 1270, 1278–79 (D.C. Cir. 1977); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973); UMC Indus. v. Seaborg, 439 F.2d 953, 955 (9th Cir. 1971).

Supreme Court case dealing with this principle is *Whitney National Bank v. Bank of New Orleans and Trust Co.*[66]

In *Whitney National Bank* certain banks had brought an action seeking a district court order barring the Comptroller of the Currency from issuing a certificate permitting a new bank to open. The statutes provided both for the Comptroller to issue a certificate and, under other provisions, for the Federal Reserve Board to review the matter. The latter's decision was to be reviewed exclusively in the courts of appeals. Given the statutory design calling for a Board decision and exclusive review of it by an appellate tribunal, the Supreme Court concluded that the district court was ousted of jurisdiction. In the Court's eyes, to permit the district court to address the matter would undercut the statutory scheme of Board decision followed by appellate review.[67] Moreover, general policies favoring consolidation of review in the courts of appeals were seen to support such an interpretation. Accordingly, channelling the action to the court of appeals was said to prevent unnecessary duplication and possibly conflicting judicial decision making.[68]

Numerous decisions since *Whitney National Bank* have confirmed the exclusivity of appellate power when a statute provides for direct review of final agency actions.[69] Yet it is worth repeating that this principle has evolved in relation to *final* administrative decisions—decisions, as noted earlier, that are distinct from the preliminary setting of *TRAC*. *TRAC*'s extension of the exclusivity principle ultimately rests on an abstract purposive argument about the aims of consolidating actions in the courts of appeals. Indeed, the general objectives discussed in a different context in *Whitney National Bank*—avoidance of duplication and potential judicial conflict—are central to *TRAC*'s rationale in favor of exclusive appellate review.[70]

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[66]379 U.S. 411 (1965).

[67]*See id.* at 420:

> [T]he Congress . . . provid[ed] for review in the courts of appeal based on the facts found by the Board supported by substantive evidence. We think these congressional actions point clearly to the conclusion that it intended that challenges to Board approval of the organization and operation of a new bank by a bank holding company be pursued solely as provided in the statute.

[68]*See id.* at 422.

[69]*See* cases cited *supra* note 65. "[A]n impressive line of authority supports the . . . proposition that, even where Congress has not expressly conferred jurisdiction, a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction in all cases covered by the special statute." Investment Co. Inst. v. Board of Governors of Fed. Reserve Sys., 551 F.2d 1270, 1279–80 (D.C. Cir. 1977).

[70]*See* 750 F.2d at 78:

> [T]here are compelling policy reasons for holding that the jurisdiction of the Court of Appeals is exclusive. Appellate courts develop an expertise concerning the agencies assigned them for review. Exclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise. In addition, exclusive jurisdiction eliminates duplicative and potentially conflicting review, . . .

A key problem with *TRAC*'s abstract reasoning is that it lacks any sure footing in the FCC statute that is central to the exclusivity conclusion. The statute refers simply to "all final orders" and "any order" of the agency.[71] Whatever else might be in doubt about *TRAC*, delay is not treated as within the normally understood range of meanings attributable to "order." Indeed, *TRAC*'s reliance on the All Writs Act as the basis of its power shows that the court was not seeking to stretch the meaning of "order" to include delay. The real thrust gained from the FCC statute is its supposed support for the claim of the exclusivity of jurisdiction otherwise derived. That claim, once more, rests on abstract purposive argumentation.

In fact, *TRAC*'s central support is the assumption that it would be "anomalous" not to realize the purposes of direct review in the context of delay, given that those purposes would be realized by appellate review of a final order.[72] This assumption ignores any differences between challenges to formally final actions, on the one hand, and claims relating to preliminary matters, on the other hand. *TRAC*'s assumption is especially troubling in view of the importance of carefully applying the competing policies that underlie jurisdictional questions to the particular contexts giving rise to them.

Why exactly is it "anomalous" to hold both that a final agency order is to be reviewed exclusively in the court of appeals and that a preliminary matter is not to be so reviewed? There is nothing illogical about such a contrast. Moreover, the two contexts are legally distinguishable. Congress had not spoken specifically about non-final matters such as delay, but it had spoken about final action eventuating in an order. Is another distinction really needed?

TRAC's one-sidedness becomes patent as one recognizes that its analysis would always support consolidation of review in the courts of appeals. In fact, *TRAC*'s argument has a distinctly tautologous character. After all, reasoning based solely on the aims of consolidation at the appellate level will inevitably tend toward consolidation at the appellate level, regardless whether the various purposes behind allocations will truly be served. This is especially troubling given that jurisdictional statutes in particular are to be read with special care.[73]

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and the delay and expense incidental thereto."

Cf. Whitney Nat'l Bank v. Bank of New Orleans and Trust Co., 379 U.S. 411, 422 (1965).

[71] *See* 750 F.2d at 75 nn.25–26.

[72] *TRAC*'s "anomaly" language is quoted in full in note 32 *supra*.

[73] The Supreme Court has admonished that statutes creating special review procedures should be "construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." Cheng Fan Kwok v. INS, 392 U.S. 206, 212 (1968). *See also* Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 492 n.9 (D.C. Cir. 1984) (federal courts must "scrupulously observe the precise jurisdictional limits prescribed by Congress"). To be sure, scrupulous interpretation is not inconsistent with a multi-factored purposive analysis of direct review provisions. *See* L. JAFFE, *supra* note 5,

As to *TRAC*'s policy arguments, to say that they call automatically for the collapse of any contrast between preliminary and final matters in relation to exclusive appellate review is to disregard practical differences between the two settings. It is not unlikely that in a preliminary context such as in *TRAC*, the record relevant to a challenge will be relatively less developed and available than in the context of final agency action. The discovery and fact-finding capacities of a trial court may be especially useful for addressing a preliminary dispute. There is thus a reasonable basis for differentiating between the review of preliminary and final actions. Quite simply, the former may be more appropriately reviewed by a district court as an original matter.[74]

A supporter of *TRAC*'s reasoning might respond by abstractly invoking the purposes of consolidation in appellate courts that arguably are furthered by *TRAC*.[75] This response is less of an argument than a conclusion. Moreover, on closer analysis, those very purposes may not even be served by *TRAC*'s approach. Take the aim of respecting the special expertise of the appellate courts. The idea is that when a relatively smaller group of appellate judges repeatedly reviews certain types of agency orders, the judges develop a degree of familiarity with the agency, its mission, and its limitations, and such "expertise" is a value to be preserved.[76] Whatever the weight of this rationale for appellate review, the rationale seems strained when applied to preliminary challenges that may well involve action, inaction, or delay that is not fully grounded in an agency record. In such instances, the "expertise" argument appears to cut the other way—namely, in favor of trial-court-supervised inquiry prior to the application of norms of law to a given situation.[77] At the very least,

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at 158–59; Note, *supra* note 6, at 984–85 (arguing that careful purposive interpretation of direct review provisions is appropriate when statutory distinction is not grounded in discernible legislative policy).

[74]*See* PBW Stock Exchange, Inc. v. SEC, 485 F.2d 718, 733 (3d Cir. 1973) (review is "better resolved by a forum whose function is fact-finding, a function which the court of appeals in the first instance is singularly ill-equipped to perform"); Indiana & Michigan Elec. v. EPA, 733 F.2d 489, 490 (7th Cir. 1984); Public Citizen Health Research Group v. Commissioner, Food & Drug Admin., 740 F.2d 21, 34–35 (D.C. Cir. 1984).

[75]*See generally* 750 F.2d at 78.

[76]Professors Currie and Goodman have observed that "apart from the qualifications he brings to the bench, the appellate judge is better equipped by his judicial experience as a whole for the task of reviewing administrative action. . . [A] circuit judge has greater opportunity than a district judge to familiarize himself with the substantive law" of administrative areas. Currie & Goodman, *supra* note 6, at 13. *See also* C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *supra* note 30, § 3940, at 303. *But see* Florida Power & Light Co. v. Lorion, 470 U.S. 729, 750 (1985) (Stevens, J., dissenting) (suggesting that the assumption that the court of appeals is a more expert review forum is "debatable at best").

[77]For a discussion of the strengths of the district court in matters of discovery and conducting trial-type proceedings, see Susquehanna Valley Alliance v. Three Mile

different types of judicial "expertise" need to be analyzed, whereas *TRAC* limits its discussion to matters of expertise that are peculiar to courts of appeals.

To summarize, my point is not to cast doubt on purposive construction of forum allocation provisions. Rather, it is to call into question the unduly abstract and one-sided analysis displayed in *TRAC*.

3. *The Contrast Between* TRAC *and Complex Purposive Reasoning*

Having viewed *TRAC* as an example of abstract purposive reasoning about jurisdiction, it remains to show what a more complex analysis would look like. As it happens, we have leading examples of such an approach. Their insights emerge from the notion that since original jurisdiction in our federal system normally resides in the district courts, one requires a reasonably compelling justification for departing from such a scheme. The justifications turn on interpreting relevant statutes in view of the respective competencies of the district and appellate courts.

The most prominent representative of such an approach is a report on forum allocation prepared by Professors David Currie and Frank Goodman[78] in the mid-1970s for the Administrative Conference of the United States.[79] Currie and Goodman engaged in a complex assessment of the appropriateness of appellate, as opposed to trial, review. It assessed the respective mix of legal and factual issues in various types of cases, the importance of the issues raised, and the respective fact-finding as opposed to law-resolving capacities of the reviewing courts.

Currie and Goodman particularly distinguished on-the-record decision making, informal rule making, and informal adjudication. After a detailed analysis they concluded, with respect to on-the-record decision making, that direct appellate review seemed sensible as a general matter. After all, in these cases there is a fully developed agency record.

As to "informal" notice-and-comment rule making involving issues of legal importance likely to end up in a court of appeals, Currie and

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Island Nuclear Reactor, 619 F.2d 231, 241 (3d Cir. 1980) (in declining to adopt an All Writs Act argument in favor of court of appeals' power over NEPA challenge, the court concluded that "[w]hile the court of appeals can devise procedures for the preparation of a record . . . the district court has both procedures and facilities at hand for that task"); PPG Indus. v. Harrison, 587 F.2d 237, 245 (5th Cir. 1979), *rev'd* 446 U.S. 578 (1980) (discussing superior discovery procedures available in district court); PBW Stock Exch. v. SEC, 485 F.2d 718 (3d Cir. 1973); Texas v. EPA, 499 F.2d 289, 321–22 (5th Cir. 1974) (Clark and Boyle, J.J., concurring specially).

[78]*See generally* Currie & Goodman, *supra* note 6.

[79]*See infra* text accompanying notes 84–89 for a discussion of the Administrative Conference recommendation based on Currie and Goodman's report.

Goodman also concluded that direct appellate review is presumptively appropriate.[80] They considered that, in such cases, there generally is no need for extensive fact finding. Also, such cases have a primarily legal significance, and issues of law are traditionally suited for resolution by the courts of appeals.[81]

However, with respect to "informal adjudication"—the vast residual category into which the bulk of administrative action falls—Currie and Goodman concluded that the absence of a formal administrative record justified a presumption in favor of initial district court review.[82] As to informal adjudications involving no significant fact-finding burden, the authors indicated that direct appellate review might in some instances be appropriate.[83]

Although Currie and Goodman's study concentrated on the review of final—not preliminary—agency action, its balancing of an array of competing factors illustrates the sort of complex analysis missing from *TRAC*. In adopting a recommendation based on Currie and Goodman's report, the Administrative Conference confirmed the importance of a complex approach.[84]

The Administrative Conference agreed with Currie and Goodman that formal adjudications and formal rules generally should be made directly reviewable by the courts of appeals.[85] The Conference allowed for district court review of formal administrative action when it is of a type that "rarely involves issues of law or of broad social or economic impact warranting routine review by a multimember court" and when district court review would "significantly reduce the workload of the appellate courts."[86] The latter condition—significant reduction in the workload of appellate courts—depends on there not being frequent appeals from district court decisions in the area.[87]

With respect to "informal" rules, the Conference concluded that direct appellate review would be appropriate when an initial district

[80] *See* Currie & Goodman, *supra* note 6, at 49–52.

[81] *See id.* at 49 ("[T]he absence of a trial-type record may not present as substantial an obstacle to direct court of appeals review as might appear at first blush. Often the sole issues will involve pure statutory construction.").

[82] *See id.* at 57:

> The absence of a formal adjudicatory record justifies, we think, a presumption in favor of district court review. Without such a record, a judicial trial will very often be necessary to determine either the basis upon which the administrator acted or the facts relevant to an evaluation of his action. Furthermore, even where the issues raised are strictly legal, a district court opinion may, in the absence of a formal opinion at the administrative level, be useful to the circuit court in organizing the case for appellate review.

[83] *See generally id.* at 60.

[84] The Choice of Forum for Judicial Review of Administrative Action, 1 C.F.R. § 305.75–3 (1988).

[85] *See id.* (Recommendation 1).

[86] *Id.*

[87] *See id.* (Recommendation 2).

court decision about the rule's validity would ordinarily be appealed or "the public interest requires prompt, authoritative determination of the validity of the rule."[88]

With regard to informal actions other than rules, the Conference recommended that they generally should be reviewed in the first instance by the district courts. This presumption would be overcome only if all of the following conditions obtained: that the actions typically involve "issues of law or of broad social or economic impact"; that they do not usually require "an evidentiary trial at the judicial level to determine either the underlying facts or the grounds on which the agency based its actions"; and that they are either few in number or, if numerous, "would in most cases be likely to reach the appellate courts eventually" by appeal from district court judgments.[89]

To summarize, it is important to engage in a textured, balanced investigation of competing considerations that bear on district court versus appellate court jurisdiction. In contrast to such an approach, *TRAC*'s method seems remarkably one-sided and abstract.

III. A SUBSTANTIVE CRITIQUE OF *TRAC*

In this part, I will focus on the substantive side of the jurisdictional debate represented by *TRAC*. By "substantive" I mean the result reached and its implications for courts, private litigants, and agencies, as well as its broader associations with ongoing debates about jurisdiction. I will ask whether *TRAC* has achieved a workable resolution of the cross-currents in the law, or whether it instead represents an unstable compromise that will be subject to continued challenge in light of contending values, interests, and visions relating to jurisdiction. I believe the latter is the case.

A. Doctrinal Implications: The Limits of *TRAC*'s Holding

I will discuss central limits of *TRAC*'s doctrine in two main respects. First, *TRAC* stretches so far beyond prior law as to challenge certain established principles of jurisdiction. Second, as a new approach, *TRAC*'s holding raises serious questions about its meaning and scope that it does not begin to answer. I will consider each matter in turn.

[88] *Id.* (Recommendation 5(b)).

[89] *Id.* (Recommendation 6(b)). The Conference suggested that "[i]nformal orders issued by agencies that mainly engage in formal adjudication and the formal orders which are now subject by statute to direct review by the courts of appeals will normally satisfy these conditions and should therefore be reviewable by the courts of appeals." *Id.* (Recommendation 6(b)(iii)).

1. TRAC *and Established Principles*

Once again, a central precept in this area of law is that when Congress has not indicated a design to channel a claim to the courts of appeals, that claim falls within the general federal question jurisdiction.[90] This means that in the absence of a special review provision, the federal district courts retain initial power to review challenged administrative action.

TRAC does not follow this precept. There is, after all, no doubt in *TRAC* that no special review provision was thought specifically to apply. Appellate jurisdiction rested on the All Writs Act. This means that in *TRAC* there was no directly applicable judicial review provision channelling the relevant class of claims initially to the courts of appeals.[91] At a minimum, where no direct review provision specifically applies, it seems that the district courts should retain jurisdiction. That is, under normal understandings, when no direct review provision ousts the district courts, one would expect there to be no ouster and thus no exclusive appellate power.

TRAC's main response to this basic point is that the policies favoring exclusive appellate review still seem pertinent.[92] It is well-established, however, that applicable statutory language, not just general policy, generally governs.[93] The D.C. Circuit in a recent decision expressed well the appropriate hesitancy of courts to rewrite jurisdictional provisions. It held, *inter alia,* that the absence of a special review provision in the relevant section of an agency's organic statute meant that the district courts retained their jurisdiction: "this court simply is not at liberty to displace, or to improve upon, the jurisdictional choices of Congress."[94] The same approach should apply here. Thus, without questioning *TRAC*'s use of the All Writs Act to uphold appellate power, one can and should on traditional grounds question *TRAC*'s leap to the conclusion of exclusive appellate jurisdiction.

2. TRAC *as a New Statement of Jurisdictional Doctrine*

As a new statement of jurisdictional doctrine, *TRAC* suffers from a number of fundamental problems. To show this, it may be useful to break down *TRAC*'s holding into its three main parts, as follows. *First, TRAC* refers to situations in which a final agency action under an

[90] *See* sources cited *supra* note 65.

[91] *See supra* notes 27–30 and accompanying text.

[92] *See* 750 F.2d 70, 77–78. *TRAC* notes that the district court lacks jurisdiction under the All Writs Act and the mandamus statute. That does not, however, establish lack of jurisdiction under the general federal question jurisdiction statute. *See id.* at 77.

[93] *See, e.g.*, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (turning to principles of deference to agency construction of statutes only after looking to the language of the statutes).

[94] Five Flags Pipe Line Co. v. Department of Transp., 854 F.2d 1438, 1441 (D.C. Cir. 1988).

agency's organic statutes would be reviewed initially by the courts of appeals. *Second, TRAC* concerns preliminary challenges to agency activity under those statutes. *Third,* such preliminary challenges are said to be within the exclusive jurisdiction of the courts of appeals if judicial relief in response to the challenges "might affect" the appellate court's future jurisdiction. Each of these three elements of *TRAC*'s holding is subject to considerable confusion.

To be sure, any leading decision is likely to foster some debate about its details. The point here is that *TRAC* advances a fundamentally problematical three-part holding that generates serious and unresolved questions about its applicability and reach.

a. WHERE ARE FINAL AGENCY ACTIONS TO BE REVIEWED?

The first aspect of *TRAC*'s doctrine noted above relies on principles other than those elaborated in *TRAC* to determine where a final agency action should be reviewed initially. This question, however, is often not easily resolved. The cases are full of controversies about which court has jurisdiction over final agency actions not expressly covered by some special review provision.[95]

In addition, *TRAC* wrongly assumes that in every case, after sufficient analysis, one should in principle be able to determine where a final action—when it occurs—should be reviewed. That is not possible when a statute treats different types of final actions differently, and when the plaintiff sues the agency before the case has matured sufficiently to indicate which type of final action is to be expected.

For instance, the Occupational Safety and Health Administration may decide to issue "standards," which are reviewable in the courts of appeals, or it may issue "regulations," which are reviewable in the district courts.[96] If a challenge is brought before the agency has decided which action to take, it will not be possible to predict where a final agency action should be reviewed. Such jurisdictional uncertainty also may occur as to preliminary challenges involving Food and Drug Administration approval of new drug applications under the Food, Drug and Cosmetic Act.[97] When the FDA refuses to approve an application, the statute authorizes the applicant to appeal directly to

[95]*See* cases collected in K. DAVIS, *supra* note 5.

[96]*See, e.g.,* American Indus. Health Council v. Marshall, 494 F. Supp. 941 (S.D. Tex. 1980) (Secretary's generic cancer policy was held to be an occupational safety and health standard under 29 U.S.C. §§ 652(8), 655 (1975); jurisdiction to review such policy lay in the court of appeals rather than in the district courts). Standards are made reviewable in the courts of appeals by 29 U.S.C. § 655(f) (1982). For the distinction between "standard" and "regulation," see, e.g., Louisiana Chemical Ass'n v. Bingham, 657 F.2d 777, 779–85 (5th Cir. 1981).

[97]*See* 21 U.S.C. § 355 (1982 & Supp. IV 1986).

the courts of appeals.[98] However, this provision does not apply to parties challenging FDA approval of a new drug application, who thus are to proceed in the district courts.[99] A preliminary challenge could be brought before the ultimate jurisdictional pathway has been established. In such cases, *TRAC*'s holding requires a court to determine whether it can hear the preliminary challenge to agency decision making by making a premature jurisdictional analysis based on speculation about the nature of the ultimate agency action.

b. WHAT DOES IT MEAN TO SUPPOSE THAT A PRELIMINARY CHALLENGE IS "UNDER" AN AGENCY'S ORGANIC STATUTE?

The second aspect of *TRAC*'s doctrine is the following: *TRAC* applies to preliminary challenges brought under an agency's statutes as to which a judgment can be made concerning where a final administrative decision should be reviewed. This could mean that agency action must be authorized by its organic statutes and, in that sense, must be "under" those statutes. However, if the holding is read more narrowly, there is the possibility of eliminating from *TRAC*'s scope challenges brought "under" other norms, such as constitutional challenges that do not specifically allege a violation of an agency's organic statutes.

This possibility has been the focus of a heated and continuing controversy. In fact, in *Ticor Title Insurance Co. v. FTC.*,[100] the district court held that constitutional issues are not covered by *TRAC*'s exclusivity holding.

In *Ticor* the plaintiff challenged an FTC enforcement action. The plaintiff argued that the agency's activity violated the principle of the separation of powers. In particular, the plaintiff claimed that the heads of agencies with enforcement powers like the FTC's must, as a constitutional matter, be executive officers who are subject to removal at will by the President. The FTC's officers, like those of other so-called independent agencies, are not so removable.[101] Thus, the plaintiff contended that the agency's basic authority to act was lacking and the proceeding against it should be ordered terminated.[102]

An initial issue in *Ticor* was whether the district court had jurisdiction to hear the matter. The district court concluded that even though

[98]21 U.S.C. § 355(h) (1982).

[99]Again, when a special review provision does not apply, district court jurisdiction remains. 21 U.S.C. § 355(h) (1982) applies to an agency order "refusing or withdrawing approval of an application."

[100]625 F. Supp. 747 (D.D.C. 1986), *aff'd*, 814 F.2d 731 (D.C Cir. 1987).

[101]*See* Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[102]*See* 625 F. Supp. at 748 ("Plaintiffs subsequently brought this action, seeking a declaration that the delegation of law enforcement powers to the FTC is unconstitutional because the Commissioners are given the exclusive power to initiate enforcement proceedings, and are not subject to the President's supervisory control.").

TRAC's language is broad, it should not be applied here because the suit raised a constitutional question. The district court reasoned that *TRAC*'s real concern was to assure that when a statute allocates cases to the courts of appeals, the "class of claims covered by the statutory grant of review power" should be the exclusive preserve of those courts. This purpose was considered not to encompass purely constitutional challenges.[103]

In an effort to clarify its meaning, the district court drew a line between challenges dealing with "the manner in which agency process was implemented"—which it deemed to fall within *TRAC*'s purview—and separate constitutional claims.[104] *Ticor* suggested that it would "strain credulity" to read *TRAC* in the broadest possible terms to preclude district court review whenever a challenge is raised about some statute under which final action would be reviewed exclusively in a court of appeals.[105] Such a reading would in the district court's view "cut a swathe through this Court's jurisdiction akin to Sherman's march through Georgia."[106]

Ticor's effort to limit *TRAC*'s scope raises obvious issues. First, the limit it not stated in *TRAC* itself. Second, the distinction between challenges dealing with "the manner in which agency process was implemented" and constitutional challenges may often be tenuous at best. For example, what should be done with a bias claim, which is a species of constitutional due process argumentation but also is directed at the reliability of agency process? Third, what happens when a constitutional claim is joined to a statutory claim that all concede could trigger *TRAC?*

Despite these questions, the *Ticor* interpretation has borne fruit. In *First Commodity Corporation v. Commodity Futures Trading Commission,*[107] the U.S. District Court for the District of Massachusetts followed *Ticor.* In *First Commodity* a broker challenged a reparations program administered by the CFTC. The plaintiff made two arguments: first, that the agency was so biased as to have violated due process and, second, that the reparations program contravened Article III on the theory that it effectively gave judicial power to an entity which is not an Article III tribunal.[108] The district court bifurcated the two claims. The due process/bias claim was held to be within the exclusive domain of the court of appeals following *TRAC* and its companion case, *Air Line Pilots Association v. CAB.*[109] The Article III claim, however, was held to

[103]*Id.* at 749.
[104]*See id.*
[105]*Id.* at 750.
[106]*Id.*
[107]644 F. Supp. 597 (D. Mass. 1986).
[108]*See id.* at 598.
[109]750 F.2d 81 (D.C. Cir. 1984).

be distinguishable. It was seen as a "separate" constitutional claim that, under *Ticor*'s reasoning, should not be included within the exclusive power of the court of appeals.[110]

This effort to place some clear limit on *TRAC*'s scope has not won unanimous approval. Another judge on the U.S. District Court for the District of Columbia, in *Jamison v. FTC*,[111] concluded that constitutional claims involving the first and fifth amendments fell within *TRAC*'s ambit, and gave two reasons for rejecting *Ticor*'s reasoning. First, *Jamison* stressed that due process/bias claims already had been held to be covered by *TRAC*.[112] That was seen to indicate that the weight of authority had rejected a hard-and-fast line between constitutional and statutory claims. Second, and more centrally, *Jamison* underscored that making a constitutional claim exception to *TRAC*'s jurisdictional principles would "cripple the purposes of the *TRAC* doctrine."[113] All that a party would have to do to avoid *TRAC*, on one view, would be to attach a constitutional claim to the argument. This expedient, *Jamison* urged, is far too easy and obvious a way to gut *TRAC*'s purpose of allocating review decisively to the court of appeals.[114]

One might have hoped for clarification about the effect of assigning constitutional claims in preliminary settings to appellate courts: whether this does to district courts what Sherman's march did to Georgia or, alternately, whether a failure to so assign cases would unacceptably cripple *TRAC*. Yet the D.C. Circuit avoided taking a clear position when it decided *Ticor* on appeal and affirmed the lower court's judgment on another basis.[115]

Judge Edwards was careful to note that, given his disposition of the case on exhaustion grounds, he did not need to pass on contentions relating to a "constitutional" exception to *TRAC*'s application.[116] He

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[110]*See* 644 F. Supp. at 600:

> Plaintiff's claim that the reparation program violates Article III of the Constitution stands on a different footing. . . . Although consideration of the merits of First Commodity's claim may have some effect on future appellate jurisdiction, I agree . . . that the holding of *TRAC* is limited to claims seeking review of agency process, and does not encompass constitutional challenges to [an] agency's enabling statute.

[111]628 F. Supp. 1548 (D.D.C. 1986).

[112]*See id.* at 1551 n.2.

[113]*Id.* at 1551.

[114]*See id.*

[115]Ticor Title Ins. Co. v. FTC, 814 F.2d 731, 744 (D.C. Cir. 1987) ("I would also vacate that portion of the District Court's opinion and holding pertaining to jurisdiction under 28 U.S.C. § 1331 (1982)."). *See generally* Flynt v. Weinberger, 762 F.2d 134 (D.C. Cir. 1985).

[116]814 F.2d at 743:

> Because I would hold that the appellants' constitutional claim may not be raised in federal court until the appellants have exhausted their administrative remedies, I need not reach an issue considered at some length by the District Court; namely, whether the District Court would have had jurisdiction under the general federal

underscored that *TRAC* itself did not mention the matter.[117] The issue was left open by his statement that "I need not stop to consider here whether a constitutional challenge could ever be so separate from the underlying agency proceedings that the district court would have jurisdiction under section 1331."[118] He took some comfort from the expectation that a "separate" constitutional challenge would not likely be subject to review in any event prior to the conclusion of agency proceedings, by which time any exclusive review statute would be directly applicable.[119] In contrast, in a separate opinion in the *Ticor* appeal, Judge Green took the opportunity to agree with the district court's views about *TRAC* and to conclude that challenges to the constitutionality of an agency's enabling statute should not be seen to fall within that decision's ambit.[120]

C. WHAT DOES *TRAC*'S "MIGHT AFFECT" QUALIFIER MEAN?

The third element of *TRAC*'s doctrine is repeated in each of the court's summations of its holding: a preliminary challenge otherwise meeting *TRAC*'s conditions is subject to exclusive appellate jurisdiction if relief in relation to it "might affect" the appellate court's future jurisdiction.[121] The question arises as to what exactly the "might affect" qualifier means.

To be sure, the quoted language could have no real meaning. To put the point somewhat differently, the "might affect" test may be no test at all. An alternative possibility is that the "might affect" concept was intended to have content. But *TRAC* is so vague about this point that it is difficult to discern what exactly that content is.

The first possibility derives from the remarkable generality of *TRAC*'s holding. On its own terms, without placing it in context or otherwise limiting it to the purposes for which *TRAC* was written, the holding could be read to cover any preliminary challenge to agency behavior so long as final administrative action would be subject to exclusive appellate review. After all, in virtually any contest, a district court might take some action that could change the position of the parties, alter the agency's plans or proceedings, or otherwise transform events in ways that could have some effect on a subsequent court of appeals decision.

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question statute, 28 U.S.C. § 1331 (1982), to entertain a constitutional challenge to the exercise of law enforcement powers by the FTC.

[117] *See id.*

[118] *Id.*

[119] *See id.* at 743–44.

[120] *Id.* at 757–58 (Green, J., concurring) ("I subscribe to the view set forth by the District Court in this case, that *TRAC* is inapplicable to cases involving challenges to the constitutionality of an agency's enabling statute.").

[121] 750 F.2d at 75, 78–79.

A chief problem with this possibility is that it disregards the court's textual statement of the reasons for its holding. The court clearly indicated that it sought to "protect" the jurisdiction of the court of appeals in the face of some risk that its jurisdiction might be seriously jeopardized.[122] Thus, *TRAC* quoted another decision to the effect that when a matter is within the jurisdiction of a higher court, a writ "may issue in aid of the appellate jurisdiction *which might otherwise be defeated.*"[123] Moreover, *TRAC* stated that "[b]ecause the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay *in order to protect its future jurisdiction.*"[124] These passages indicate that the court sought to "protect" against the "defeat" of appellate power. To be faithful to the court's stated rationale, it seems necessary to determine when the rationale would apply, and not simply to assume that it would apply in every case.

Therefore, the second possibility seems the more reasonable one: that *TRAC* sought to limit the scope of its holding with respect to preliminary actions in some meaningful and ascertainable way. The question then becomes whether the attempted limitation holds up under analysis.

Again, the main limit on the holding seems to be that *TRAC* is seeking to protect against the defeat of appellate jurisdiction altogether. This construction is consistent with *TRAC*'s reliance on a leading Supreme Court authority applying the All Writs Act to preliminary settings, *FTC v. Dean Foods Company.*[125] In that case, the FTC had initiated administrative proceedings under the antitrust statutes to prevent the consummation of a merger agreement among certain competitors in the sale of packaged milk. The agency sought a judicial order to maintain the status quo until the agency could determine the legality of the proposed merger. The court of appeals dismissed the petition on the ground that the FTC had not entered a cease and desist order, and therefore the court had no authority to assert review power over the case.[126] The Supreme Court reversed.

For the Supreme Court in *Dean Foods,* the All Writs Act provided a basis for the court of appeals to act in order to protect its potential jurisdiction over a future order by the FTC.[127] Specifically, the Act

[122]*Id.* at 76.

[123]*Id.* (emphasis added) (quoting McClellan v. Carland, 217 U.S. 268, 280 (1910)).

[124]*Id.* (emphasis added).

[125]384 U.S. 597 (1966).

[126]FTC v. Dean Foods, Inc., 356 F.2d 481, 482 (7th Cir. 1966).

[127]*See* 384 U.S. at 603:

> The All Writs Act . . . empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The exercise of this power "is in the nature of appellate

was seen to support appellate jurisdiction on the ground that declining to exercise power might alter the effectiveness of judicial review at a later time.[128] This was so because if the proposed merger were allowed to go forward, any subsequent agency order against it might be able to be reviewed in only a limited fashion by the court of appeals. This assumed, for instance, that certain of the corporate assets might already have been sold by the time of judicial review. In effect, the Court thought that waiting might leave the court of appeals with a *fait accompli*. For this reason, the Supreme Court upheld the court of appeals' jurisdiction to hear the matter in aid of its ultimate power of review.[129]

As construed in *TRAC, Dean Foods* is seen to support the proposition that a court can proceed under the All Writs Act if the alternative of not acting might result in frustration of the court's review power.[130] As noted earlier, *TRAC* considered that this principle applied directly to its own situation of allegedly unreasonable agency delay. The idea was that if the FCC in fact was delaying unreasonably, and if it continued to do so without redirection by the court, then there would be the possibility that no final order would ever be issued. This could ultimately defeat the prospect of direct appellate review of agency action. To avert that possibility, the court reasoned that it was necessary or appropriate for it to assert jurisdiction over the matter.[131]

If one views the preceding line of reasoning as lending some meaningful substance to the "might affect" language in *TRAC*'s exclusivity holding, one can argue that *TRAC*'s "might affect" test is appropriately constrained and sufficiently clear. After all, under such a construction the court of appeals could be seen simply to be claiming exclusive prerogatives in cases in which, if it did not act, it might be utterly foreclosed from acting in the future. Taken on its own terms, that sort of justification of exclusive appellate power hardly seems grasping or unlimited.

However, things are not so simple. While it is true that the concepts quoted above appear in *TRAC*, it should not be thought that they

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jurisdiction" where directed to an inferior court . . . and extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later projected [citations omitted].

[128]*See id.* at 605.

[129]*See id.* at 605. Justice Fortas in dissent argued that the majority's view "burdens the court of appeals with a fact-finding duty which they are unable to perform. . . ." *Id.* at 615 (Fortas, J., dissenting). Justice Fortas questioned the majority's use of the All Writs Act, stating that it had been "abused." In his view, Congress had limited appellate jurisdiction to situations where an order had been entered, and of course one had not been entered in *Dean Foods*. *See id.* at 622. These arguments, if accepted, would undercut *TRAC*'s jurisdictional analysis at its core. Yet *Dean Foods* remains the law.

[130]*See* 750 F.2d at 76.

[131]*Id.*

offer a simple answer to any concern about the apparent vagueness and grandiosity of *TRAC*'s exclusivity holding. To the contrary, upon analysis a "protect against the defeat" gloss on *TRAC*'s exclusivity formula suffers from serious problems.

The difficulties with this limiting gloss become clear when one presses the notion that the exercise of judicial power now is needed to "protect" against the "defeat" of appellate jurisdiction later. Why exactly is that the case? Is it not true that in most situations, if the courts of appeals do not exercise power, the district courts will retain general federal question jurisdiction?[132] And if a district court decides a case, might not the losing party appeal the decision to a court of appeals? The only real question about this alternative method of reaching the court of appeals involves the intentions of the losing party. To be sure, if there is no appeal, the appellate court cannot exercise power. But that means simply that the inability to exercise appellate power would turn on a choice of the parties not to seek review. That is, of course, the usual reality, and it hardly seems to be the sort of "defeat" of appellate authority that *TRAC* has in mind.

Is there any reason why this obvious alternative to direct appellate review is insufficient? To make a case that it is, one would have to establish that direct appellate review is somehow distinctly superior to ordinary review on appeal from a district court judgment. If that were the case, then one could claim that frustration of direct review is itself the point—and that the availability of review on appeal is not as satisfactory. However, such an argument is at best tenuous.

From the point of view of the courts of appeals, there is very little difference in their role in relation to agency decision making in the two contexts of immediate review and review on appeal. It might be suggested that differences do exist in the standards of review applied to issues of fact involved in agency, as opposed to judicial, decision making. Yet any verbal distinctions seem minimal in their impact.[133] Moreover, it can be argued that appellate courts have slightly more leeway with respect to the findings of trial judges than they do with respect to the findings of agencies, as to which special administrative

[132]*See* 28 U.S.C. § 1331 (1982); K. DAVIS, *supra* note 5, § 23:3 at 129 ("[T]he appropriate district court always has jurisdiction to review any reviewable action of a federal agency unless a specific statute is interpreted to withdraw the jurisdiction conferred on the district court by § 1331.") (emphasis deleted).

[133]The standard of review under the Administrative Procedure Act for issues of fact involving on-the-record adjudication or rulemaking is the "substantial evidence" standard. Universal Camera Corp. v. NLRB, 340 U.S 474 (1951); 5 U.S.C. 706(2)(E) (1982). The standard of review of findings of fact made by a district court is a "clearly erroneous" standard. *See, e.g.*, FED. R. CIV. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous. . . ."). The actual difference in these formulae, as applied, may be doubted. *See* L. JAFFE, *supra* note 5, at 615 ("I know, however, that there are conscientious judges who find difficulty in deriving for themselves the distinction between 'clearly erroneous' and the present 'substantial evidence' rule.").

expertise may be presumed to have played a role.[134] If that is the case, then the ordinary route to appellate review from the district courts might well give the appellate courts more—or certainly not less—leeway than direct review straight from the agencies. In any event, any small differences in the role of the courts of appeals that may inhere in review on appeal from district court judgments about agency actions—as opposed to appellate review directly of agency actions—do not provide a basis for the claim that direct review is somehow so superior that it must be "protected" at all costs.

Furthermore, if the argument is that direct appellate review is superior to ordinary review on appeal because the former vindicates all of the purposes normally associated with it, then there is an undeniable problem of tautology. One cannot convincingly say that the reason to protect direct appellate review at all costs is because that would vindicate the purposes of such review. While that is no doubt true, it is equally true, as noted earlier, that there are countervailing purposes to be considered. Surely the task for analysis is to look at the entire configuration of policies without simply prefiguring the result in one's premises.

One surely would wish that this confusion in *TRAC* had been addressed satisfactorily in post-*TRAC* case law. However, the doubts about what "might affect" means run so deep that later cases simply compound them.

In particular, the post-*TRAC* cases confirm that *TRAC* is not confined to situations in which the exercise of appellate power is somehow necessary to prevent the total defeat of the court's ultimate jurisdiction. Several decisions involve situations, as in *TRAC* itself, in which plaintiffs asked district courts to issue orders that would precipitate agency decision making which, if it continued to fruition, would lead to final agency actions reviewable exclusively in the courts of appeals. In these cases, courts, including the D.C. Circuit, have opined that *TRAC* shifts the action to the exclusive domain of the courts of appeals. This has been the result even though what the district courts had been asked to do cannot reasonably be characterized as preventing the courts of appeals from hearing challenges to agency actions. Indeed, the district courts were asked to initiate a chain of events that would, if culminated, lead directly to court of appeals review. Yet this, too, has been commonly seen to fall within the scope of *TRAC*'s "might affect" test.

[134] As Professor Jaffe put the point:

> If there be a distinction between review of a trial court and an agency, it may rest on the special experience of the agency, which may help out an otherwise faltering finding. In reviewing a trial court, an appellate court operates with roughly the same tools and so need not and should not discount its apprehension of clear error.

L. JAFFE, *supra* note 5, at 615–16.

Thus, in *Independent Bankers Association v. Conover,*[135] the district court was asked to direct the Federal Reserve Board to decide whether to approve the charters of certain banks. The district court reasoned that it had no power to issue such an order on the ground that it "might affect" the court of appeals' future jurisdiction. This was so because, in effect, the court would be ordering the Federal Reserve Board to take action, and under the relevant statute such action was reviewable exclusively in the court of appeals.[136] Likewise, in *UAW v. Donovan,*[137] the plaintiffs sought an order requiring the issuance of a health and safety standard. The D.C. Circuit concluded that this challenge was within its exclusive review power. The court considered that because an order requiring the agency to issue a standard would prompt action precipitating direct review, the challenge fell within the "might affect" test and *TRAC* was applicable.[138]

In addition, the "might affect" test has not been limited contextually to situations in which the plaintiff has sought an order that would precipitate action to be directly reviewed. It has been extended to cases in which the district court has been asked to alter the processes of decision making—such as by requiring a hearing or recusal of an official—well before finalization of agency action that would be reviewed by an appellate court.

One example of this extension of the "might affect" concept is *Community Nutritional Institute v. Young.*[139] There the plaintiff sought an order of the district court requiring a hearing. The court of appeals reasoned that the district court never had jurisdiction, even prior to the agency's issuance of a final denial of the hearing request, on the ground that a procedural challenge to ongoing agency process "might affect" the court of appeals' jurisdiction.[140]

Another example is *TRAC*'s companion case, *Air Line Pilots Association v. CAB,*[141] (hereinafter *ALPA*) which involved a bias claim as well as a delay claim against the agency. *ALPA* opined that the bias claim "has equal power" to affect the future jurisdiction of the appellate court as does the delay claim.[142] However, there is a difference. If a delay claim such as in *TRAC* is redressed, the court's order will dictate agency action that would be subject to direct appellate review. If a bias claim such as in *ALPA* is redressed, the court's order will call for

[135]Independent Bankers Ass'n of Am. v. Conover, 603 F. Supp. 948 (D.D.C. 1985) (discussed in note 46 *supra*).
[136]*Id.* at 956–57.
[137]756 F.2d 162 (D.C. Cir. 1985) (discussed in note 47 *supra*).
[138]*Id.* at 163.
[139]773 F.2d 1356 (D.C. Cir. 1985) (discussed in note 45 *supra*).
[140]*Id.* at 1361.
[141]750 F.2d 81 (D.C. Cir. 1984) (discussed in note 44 *supra*). *See also* Public Util. Comm'r v. Bonneville Power Admin., 767 F.2d 622 (9th Cir. 1985).
[142]750 F.2d at 84.

recusal of an official, but will not itself dictate agency action subject to direct appellate review. Nonetheless, *ALPA* concluded as to the bias claim that district court review "might affect" the court of appeals' jurisdiction.[143]

Accordingly, as one looks carefully at the factual contexts of cases following *TRAC*, the difficulties of discerning a meaningful limit to the "might affect" language multiply. From the cases, one might infer that *TRAC*'s formula should indeed be seen to include nearly any claim raising a question involving a statute that provides for review of final action in a court of appeals. If that is a proper reading, all a litigant would have to do to preclude district court jurisdiction would be to invoke such a statute and seek relief in relation to it.[144] This potentially enormous sweep of the "might affect" language prompted one court to complain that the phrase "could mean anything, or, since any final administrative action is subject to plenary review by the Court of Appeals, it could mean nothing."[145]

To summarize this section's discussion, the exact meaning and scope of *TRAC*'s jurisdictional doctrine, in its three main aspects, are open to basic doubt and controversy. As a new statement of doctrine, *TRAC* has raised more questions than it could have sought to answer.

B. Policy Implications: The Tenuousness of *TRAC*'s Result

Despite its doctrinal weaknesses, the most likely result of following *TRAC* remains clear enough: it is to prefer exclusive court of appeals' jurisdiction in preliminary settings. A defender of *TRAC* might assert that even if its doctrine is subject to question, a presumption in favor of such exclusive review remains a good one.

I will respond to that view in this part by arguing that *TRAC*'s penchant for exclusive appellate power is in tension with basic values and institutional understandings underlying jurisdictional inquiry. At bottom, the problem is that *TRAC* reverses the presumption supported by complex purposive analysis, namely, that district courts are

[143]*See id.* at 84–85.

[144]One might argue that *TRAC* applies if a party simply raises any argument that in some way implicates a statute providing for direct review of final action. However, *TRAC* refers to "any suit seeking relief that might affect" the court of appeals' ultimate jurisdiction. 750 F.2d at 78. The touchstone seems to be that relief by a district court might alter the position of the appellate court. For a decision holding that the district court is not ousted of jurisdiction under *TRAC* when issues arise about the applicability of a statute under which review would be exclusively in the courts of appeals, so long as no agency procedure under that statute has yet occurred, see City of Kansas City, Mo. v. HUD, No. 86-3513, at 3–4 n.4 (D.D.C., August 6, 1987) (In deciding whether one of two statutes applies, Judge Sporkin stated: "I am not reviewing any agency action under a statutory provision providing exclusive judicial review in the Court of Appeals (Section 111 [of the Housing and Community Development Act, 42 U.S.C. § 5311 (1982)]), since all of the parties agree that no Section 111 procedure has taken place.").

[145]Zantop Int'l Airlines v. Engen, 601 F. Supp. 667, 669 (D.D.C. 1985).

more appropriate fora for resolving the kinds of disputes likely to arise in preliminary settings. At a minimum, I will suggest that there is no clear and unproblematical advantage to court of appeals review that would justify a sweeping rule of exclusive appellate power.

This part will proceed in two steps. First, I will discuss the main policy arguments for appellate and district court review and consider their applicability to the *TRAC* context. Then, having noted *TRAC*'s substantive problems, I will respond to rejoinders likely to be heard from its supporters.

1. *Competing Values and TRAC*

To begin, imagine a claim of unreasonable agency delay. The agency has not reached any final decision, and there is no formalized administrative record encapsulating the reasons for and basis of a decision. In some such cases the agency has given no explanation for the alleged delay. In other situations the agency's explanation will raise doubts of a factual nature that are not resolved on the basis of materials available to the parties. The judicial inquiry—is the delay arbitrary and capricious or is it reasonable and not subject to judicial relief?[146]—requires an understanding of the record, the agency's explanation, and pertinent facts. If the case is swept into a court of appeals, *TRAC* indicates that the court could remand to the agency for an explanation or development of the record. Alternatively, and presumably more rarely, the court could appoint a special master to hear arguments about the facts and to report to the court. Both of these possibilities presuppose that the court of appeals itself is not set up to engage in a record-oriented inquiry on its own. By tradition, organization, and competence, the courts of appeals are simply not fora designed for airing and testing arguments primarily concerned with the factual underpinnings of an agency's decision making process.

Consider in this context the major policies relevant to forum allocation determinations. These might be summarized as policies favoring court of appeals review and policies favoring district court review.

In favor of court of appeals review are the policies against unnecessary delay, duplication, and waste of judicial resources, and the policies supporting the use of appellate expertise and the special capacities of appellate courts to harmonize the law of a circuit.[147] Are

[146]Courts ask whether delay is so unreasonable as to be arbitrary and capricious. The arbitrary and capricious standard also is used in other contexts, including the review of issues of fact arising in an informal agency process. *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 803 (1978); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Motor Vehicle Mfrs. Ass'n v. EPA, 768 F.2d 385, 389 n.6 (D.C. Cir. 1985).

[147]For a discussion of the importance of the policies favoring appellate review, and the need to ask carefully whether they apply with force in a particular situation, *see*

these policies served by channelling preliminary challenges such as in *TRAC* exclusively to the courts of appeals?

The arguments about delay, duplication, and waste presuppose that the administrative process has already yielded a product that is similar in kind, if not identical, to the product that would be produced in a trial court. This may well be the case with respect to a final order based on a record encapsulating the evidence, the findings of fact, and the conclusions of law relevant to a particular decision. In such a circumstance, there is strong appeal to the position that there may be no need for another trial-level process. After all, would it not tend to repeat the kind of process already conducted in an agency, thereby delaying review and perhaps wasting limited judicial resources?[148] But this is not the situation of *TRAC*-type delay claims. How can one say there will be duplication and waste of time when the original trial-level process, eventuating in a record and final decision, has not been completed or perhaps even initiated at the administrative level?

The arguments about appellate expertise and the appellate court's ability to harmonize the law of a circuit also seem to miss the mark. Both arguments presuppose that the key role of appellate adjudication is to address difficult questions of law in an effort to resolve disputes about them and thereby to clarify obligations under statutory and other norms. To be sure, there is no hard-and-fast line between "legal," "policy," and "factual" questions, and many administrative law cases involve "mixed" issues.[149] Nevertheless, the role of appellate tribunals, given their special expertise, is to focus not on the elaboration of facts but on the development and application of law. The arguments about expertise and intracircuit consistency do not have their greatest force in contexts where primary and initial doubt

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744–45 (1985). *Lorion* involved a challenge to a final NRC decision denying a petition to institute agency proceedings. The issue was whether the NRC decision was covered by a statute giving the courts of appeals direct review power over final orders granting, suspending, revoking, or amending any license. The argument was made that since there had been no "proceeding" (the issue was whether to institute proceedings), there could be no order in a proceeding as described in the statute, and hence the court of appeals had no power. The Supreme Court viewed the statutory language as indefinite on this point, and concluded that the purposes of appellate review pointed toward such review. The Court stressed the standard litany of reasons for avoiding a formalistic rendering of the terms of a direct review provision—particularly including the avoidance of duplication and bifurcation of review. The Court noted that the NRC decision rested on a 547-page record, which the Court thought was adequate for the exercise of direct appellate review. It should also be stressed that the Court was interpreting the reach of a direct review provision itself, and was not constructing an argument for appellate power based on the All Writs Act. Given these factors, *Lorion* is distinguishable from *TRAC*.

[148]*See* Currie & Goodman, *supra* note 6, at 5–6.

[149]For one of many possible examples of the difficulties of distinguishing "legal" from "factual" issues in administrative cases, *see* United States v. Fifty-Three Eclectus Parrots, 685 F.2d 1131 (9th Cir. 1982).

revolves around the basic record of, or facts underlying, agency decision making.

One also should recall that earlier commentators—such as Currie and Goodman—supported a presumption in favor of district court review of informal adjudications, the major residual category of administrative decision making.[150] The idea was that such decisions are not normally based on a developed record, and thus the dangers of duplication between agency and court are minimized. This rationale also should apply to preliminary challenges against allegedly unreasonable delay when there is no developed agency record. The idea is not that the agency can give no explanation; the notion is that the plaintiff or court may wish to probe an explanation that is not fully developed or supported.

The conditions stated for overcoming the presumption of district court review of informal adjudications also do not seem to apply.[151] The main questions raised by a preliminary challenge to delay are likely to be rather context-specific. Moreover, it is difficult to assume in advance that no further development of the grounds of decision making would be needed with respect to a challenge to preliminary—and inchoate—agency behavior.[152]

As one turns to policies favoring initial district court review, one encounters the following main arguments. The district courts should be used as necessary to address and resolve questions about an agency's record that may involve factual issues. They have special ability to absorb a burgeoning caseload given that their numbers are so much greater than appellate courts. Their very organization and self-conception allow them to respond more fully to the kinds of arguments and motions likely to be raised in preliminary settings.[153]

The first point, of course, is central to the extent that preliminary challenges, such as those to alleged delay, are likely to raise factual questions about the justification given for delay. It is no secret that district courts are expert in the substantive and procedural law

[150]*See supra* text accompanying notes 82–83, 89.

[151]*See supra* note 89 (These conditions include the following: the actions typically involve "issues of law or of broad social or economic impact"; the actions do not usually require "an evidentiary trial at the judicial level to determine either the underlying facts or the grounds on which the agency based its actions"; and the actions are either few in number or, if numerous, "would in most cases be likely to reach the appellate courts eventually" by appeal from district court judgments.).

[152]Granted, this is a somewhat broader rendering of the Conference's reference to an "evidentiary trial," but the underlying idea—would the district court be useful to fulfill record-enhancement functions?—remains central. Of the three conditions mentioned for overcoming the district-court preference, only the third seems to obtain: there are rather few cases specifically involving *TRAC*-type circumstances. *See supra* note 151.

[153]*See* Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 241 (3d Cir. 1980) (suggesting district court is better situated efficiently to prepare record); Sources cited *supra* note 77. *See also* Currie & Goodman, *supra* note 6, at 7–10.

concerning fact development. They are also accustomed to the give-and-take of a motions practice. Precisely because they sit in panels of one, not three, they can respond more quickly to inquiries about a record than an appellate tribunal, even assuming an appellate court would consider the matter directly.[154]

The concern about the respective caseloads of district and appellate tribunals also lends some support to the notion that district courts are more appropriate fora for initial review of preliminary challenges to administrative decision making. Although both levels of the federal judiciary are overloaded, the problem has been seen as particularly serious at the appellate level, where the courts have less flexibility for expansion given that they sit in panels of three.[155] To that extent, *TRAC*'s penchant for exclusive appellate review flies in the face of broader institutional considerations about caseload.

Finally, we come back to the litigant raising a preliminary challenge to agency decision making. What effects will the factors discussed thus far likely have on the litigant's case? At a minimum, it will be difficult to raise arguments based primarily on factual questions. Any opportunities for discovery within the limits allowed under existing law will plainly be reduced further if a litigant must appear initially in a court of appeals.[156]

The speed of decision making in district courts may well also be greater than in appellate courts, which take understandable pride in their collegial and deliberative processes.[157] There is particular irony

[154]*See* H. FRIENDLY, *supra* note 53, at 29–31, 40–46; Currie & Goodman, *supra* note 6, at 7–10.

[155]*See* sources cited *supra* note 61.

[156]To be sure, judicial review of administrative decisions is normally conducted on the agency record submitted to the court for review. *See, e.g.*, Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); Camp v. Pitts, 411 U.S. 138, 142–43 (1973) (per curiam); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). But this presupposes there is a record to review. In a delay context, for instance, there may be no developed record.

In such a preliminary setting, the question could arise whether the litigant challenging agency behavior will be able to achieve some limited discovery. In authorizing discovery in *Overton Park*, the Supreme Court departed from the rule of *United States v. Morgan*, 313 U.S. 409, 422 (1941), which stated in broad language that one should not "probe the mental processes" of administrative decision making. 401 U.S. at 420. To the extent that there is a tension between *Overton Park* and *Morgan*, it has been explained on the basis that in *Morgan* there was an administrative record and a formal agency decision, whereas in *Overton Park* there was no such record and formal process and the relevant facts had to be generated in order for review to proceed. *See* National Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1145 (2d Cir. 1974); S. BREYER & S. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 624 (2d ed. 1985). This rationale generally would seem to apply to cases raising *TRAC* issues: preliminary challenges arise prior to the development of a complete record and final decision. *Cf.* National Courier Ass'n v. Board of Governors of Fed. Reserve Sys., 516 F.2d 1229, 1242 (D.C. Cir. 1975) ("Unless he has left no other record of the reasons for his decision, the mental processes of an administrator may not be probed.").

[157]*See* sources cited *supra* note 154.

in the fact that *TRAC* seems to foster delay in the resolution of claims of agency delay. The thrust of such claims, of course, is that quicker decision making is required. Whether or not a court agrees with the claim, shifting it from district courts to the courts of appeals seems likely to postpone its resolution, given that panels of three judges tend to act more deliberately in their decisional processes.

All of these considerations, taken together, create a serious possibility that the interests of justice will not be served by *TRAC*'s forum preference. To the extent that a litigant seeks to raise the type of questions for which district courts are especially suited, and yet the litigants are forced exclusively into the courts of appeals, the parties may be blocked in practical effect from raising their challenges. At bottom, the fact that *TRAC* strains against many institutional policies that govern in this area has a dangerous implication: litigation is likely to be skewed, and opportunities to raise claims denied, by virtue of a narrow jurisdictional holding based on tenuous analysis.

2. *Responses to TRAC's Supporters*

TRAC's supporters might seek to respond at least in part to these objections by arguing that, on balance, the remand and special master possibilities are good enough to ameliorate any problems resulting from *TRAC*'s penchant for exclusive appellate review.[158] The difficulty with these suggestions as omnibus solutions is that remands and masters involve considerable costs of their own. One might imagine initially that eliminating two-tier judicial review would result in greater savings. But the relative lack of fact-finding capacity in the appellate courts, and the delays resulting from remands and masters, must lead one to question that initial assumption. Why not channel actions to the courts most able efficiently to probe or develop a record when it is possible that such probing or development may well be required? Why use burdensome remand techniques that might force agencies to adopt fact-finding procedures that could conceivably impair the efficiency of the administrative process? And why rely on special masters who, after all, will seldom be employed, given the natural disinclination of courts of appeals to interrupt their review of a case in such fashion?[159]

[158]*See* 750 F.2d at 78.

[159]It may appear, at first blush, that elimination of two-tier review would result in significant savings. *See* Harrison v. PPG Indus., 446 U.S. 578, 593–94 (1980) ("The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal."). *See generally* Currie & Goodman, *supra* note 6, at 48–50. Yet the relative lack of fact-finding capacity in the appellate court (and the possible use of remands or special masters) forces one to question the actual savings involved as compared with initial district court review. *See id.* at 11 ("Sending these issues back to the agency or to a master can cause delay. . . ."), 60 ("If frequently employed, however, the remand

Moreover, it bears underscoring that *TRAC*'s discussion of remands and special masters is addressed to a concern distinct from the ultimate advisability of such techniques. The discussion arises in response to an argument that courts of appeals will not be able to provide legally adequate review. This is an important contention because the Administrative Procedure Act states that when a "special statutory review proceeding" is inadequate, "a court of competent jurisdiction" is to exercise power over the action.[160] The district court, acting under its general federal question power, would be a "court of competent jurisdiction." Therefore, it is necessary for *TRAC* to determine whether court of appeals review is legally inadequate. *TRAC* notes rightly that courts of appeals can use remands or special masters and that such possibilities help to defeat a claim of alleged inadequacy of review.[161] All of this, however, does not go to the heart of the matter here. It is one thing to say that appellate review is not statutorily inadequate, and quite another to claim that it is not the less appropriate type of review, at least as compared with review by district courts. To put the point directly, upholding the legal adequacy of court of appeals review does not establish its desirability.

Without suggesting that appellate review would be inadequate, then, one can suggest that in some cases district court review should be preferred as an initial matter. It is ultimately unsurprising that such preference would have special weight in the context of preliminary challenges, where there may be particular ambiguity about the basis of the agency's decision or lack of decision.

One might anticipate other responses from *TRAC*'s supporters. Some might argue that district courts will be less favorably inclined to the agencies than will courts of appeals, which may be more sympathetic to the problems of administration. Other litigants might take the view that whichever level of court they are most familiar and comfortable with is the level that should hear their cases. These argu-

technique could force agencies to adopt burdensome fact-finding procedures that Congress did not see fit to impose and that could seriously impair the efficiency of the administrative process."). For discussion of costs associated with special masters, *see* Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 417–23 (1986). *See also Panel Discussion on the Expanding Role of U.S. Magistrates and Masters*, 47 ANTITRUST L.J. 1253 (1979).

[160] 5 U.S.C. § 703 (1982).

[161] 750 F.2d at 78:

> We find untenable any suggestion that appellate review of nonfinal agency action may be inadequate due to Courts of Appeals' inability to take evidence. This precise argument was recently rejected by the Supreme Court in *ITT*, where the Court held that, if an agency record is insufficient, the Court of Appeals may either remand the record to the agency for further development or appoint a special master under 28 U.S.C. § 2347(b)(3).

See also FCC v. ITT World Communications, Inc., 466 U.S. 463 (1984).

ments ring with a high degree of result orientation. They also seem largely to cancel out one another.

For instance, it is true that proceeding in district court might open up the possibilities of status conferences and some court-supervised probing of the record. If one takes the position that these are always bad, then one will not be well-attuned to challenging *TRAC*. However, on what conceivable grounds could they always be bad? To assert that is to prejudge in general whether there is ever a need for the kind of supervision of a case that a district judge can muster.

In addition, to assert the likelihood of a parade of horribles from reversing *TRAC*—such as massive delay, wasted resources, appeals without limit—is to forget that there is no showing these things occurred in the pre-*TRAC* universe. Indeed, just as the competencies of district courts can be useful in preliminary settings, there is no indication they were misused by courts prior to *TRAC*'s ruling.

It might be suggested that litigants themselves are somehow chastened by having to bring preliminary challenges initially in the courts of appeals, assuming that review of final agency actions would be brought in such courts. The idea is that if a plaintiff can bring a preliminary claim in a district court, it is more likely to be frivolous, poorly grounded, or otherwise less than meritorious than if the plaintiff had to bring the action before the court that would hear a challenge to final action.

This prediction about litigant behavior is difficult to assess. Is it not as likely that a litigant bent on bringing what everyone else would concede to be "frivolous" litigation will do so no matter what forum is available? In any event, it seems unlikely that district judges will be well-disposed to frivolity in their courts. Can we not trust district judges to deal appropriately with "frivolous" claims?

Moreover, there is no showing that the delay occasioned by bringing and losing a "frivolous" preliminary challenge in a district court would create a sufficient incentive for serious misuse of the jurisdictional possibility. Even if this suggestion presents an important concern, the category of cases to which it might pertain is least likely to include challenges to unreasonable agency delay, the very context in which *TRAC* was written. This is so because as to an unreasonable delay challenge, the litigant by definition is seeking expedited decision making, not the reverse.

To summarize, *TRAC*'s result is not only subject to doctrinal critique. Its penchant for exclusive appellate jurisdiction also raises serious questions of policy. This is especially so in the context of preliminary challenges such as to agency delay, as to which the capacities of district courts are particularly relevant and their procedures and institutional positions are notably well-suited.

IV. AN ALTERNATIVE TO TRAC

In this part, I will sketch an alternative to *TRAC*'s jurisdictional approach that builds on the critique contained in the earlier sections of this article.

First, despite all of the reasons for challenging *TRAC*'s preference for exclusive appellate review of preliminary challenges, one would be poorly advised to adopt the mirror image of *TRAC*, namely, exclusive district court review. That is also a one-sided approach, insensitive to competing concerns and more rigid than necessary to meet the needs of jurisdictional inquiry. It also ignores the All Writs Act, which does provide jurisdiction to a court of appeals in a *TRAC*-type setting if the court should choose to use it. Instead of exclusive review, I propose the alternative of concurrent power.

The central argument for concurrent jurisdiction is as follows. First, it is generally accepted that direct appellate review provisions do not bar district court review as an initial matter in cases to which those provisions do not apply.[162] As noted above, the direct review statute in *TRAC* does not specifically apply to a preliminary challenge to allegedly unreasonable agency delay.[163] Accordingly, general federal question jurisdiction should remain in such a case.

Moreover, if one accepts *TRAC*'s All Writs Act analysis, it is possible for a court of appeals to exercise its power to issue a writ in aid of its prospective jurisdiction.[164] In appropriate circumstances, then, each level of court could assert a separate statutory basis for jurisdiction.

One might make two sorts of replies. First, one might rely on the fact that courts often say that concurrent jurisdiction is disfavored. Second, one might claim that a scheme of concurrent power would be unworkable as a practical matter.

As to the first point, remarks critical of concurrent power generally appear in cases interpreting a particular direct review statute. In such a case the court must ask whether a specific agency decision is covered by a special review provision. If it is not, it follows that the federal question at issue could go to a district court, even though other claims under the same statute might go to the appellate court. That kind of bifurcated jurisdiction is disfavored, at least when complex purposive

[162] *See* sources cited *supra* note 65.

[163] *See supra* text accompanying note 27.

[164] The fact that a case might more appropriately be handled by a district court does not, by itself, rob an appellate court of any jurisdiction acquired under a statute. *See* 4 K. DAVIS, *supra* note 5, § 23:5, at 136 ("[T]he need for taking evidence never defeats whatever jurisdiction [the court of appeals] may have, because 28 U.S.C. § 2347 has ample provisions for referring a case either to the agency or to a district court for the taking of evidence.").

analysis supports consolidation of the different challenges in the courts of appeals.[165]

However, such a line of analysis is not directly applicable to *TRAC*. *TRAC*, again, does not just involve the interpretation of a direct review statute. It therefore does not raise a simple problem of potential bifurcation of review under the same law. To say that there may be concurrent power in a *TRAC*-type situation—under the All Writs Act for the appellate court and under 28 U.S.C. § 1331 for the district court—is not to "bifurcate" review. It is rather to recognize two distinct lines of statutory authority providing alternative bases of judicial review. After all, one cannot "bifurcate" what is already completely distinct.

Accordingly, what creates the possibility of concurrent power in *TRAC*-type situations is the coincidence of separate statutory theories, one of which applies to district courts and the other to courts of appeals. The real task for legal analysis is not to read out of existence one or the other of the available theories, but to allocate jurisdiction as allowed by law in keeping with general principles of complex purposive inquiry.

As to the second point noted above, a scheme of concurrent power of the courts of appeals and the district courts is not unworkable. First of all, the number of cases in which concurrent power could exist is quite limited. A large body of cases would be governed by established doctrine, long antedating *TRAC*, that when a special review statute channels an action to a court of appeals, that statute cuts off district court review under general grants of federal jurisdiction.[166] Moreover, when agency action is not covered by a special review provision, the normal presumption is that the matter should be heard originally in the district courts.[167] The new situation raised by *TRAC* is when a court concludes that a preliminary challenge is not covered by a special review provision—thus precluding immediate consolidation in the courts of appeals—even though the All Writs Act does provide

[165]*See, e.g.*, Foti v. INS, 375 U.S. 217, 232 (1963) (considering bifurcation of judicial review under § 106(a) of the Immigration and Nationality Act between appellate district courts to be "inconvenient" and "undesirable"); *In re* Certain Complaints under Investigation, 783 F.2d 1488, 1497 (11th Cir. 1986) ("[W]e are disinclined to find concurrent jurisdiction absent express congressional authorization."); City of Rochester v. Bond, 603 F.2d 927, 936 (D.C. Cir. 1979) ("The policy behind having a special review procedure in the first place . . . disfavors bifurcating jurisdiction over various substantive grounds between district courts and the court of appeals."); Sun Enterprises, Ltd. v. Train, 532 F.2d 280, 287 (2d Cir. 1976) (In discussing the applicability of a direct review provision, the court noted that "there is a strong presumption against the availability of simultaneous review in both the district court and the court of appeals."); Oljato Chapter of Navajo Tribes v. Train, 515 F.2d 654, 660 (D.C. Cir. 1975) ("[B]ifurcated jurisdiction between District Court and Court of Appeals over identical litigation is not favored.").

[166]*See* sources cited *supra* note 65.

[167]*See* 28 U.S.C. § 1331 (1982).

power for it to hear the challenge. At the same time, since a special review provision does not apply, the traditional understanding remains that the district court retains general federal question jurisdiction.

Moreover, the arguments herein against *TRAC*'s penchant for exclusive appellate review tend to support a presumption that, in preliminary settings like *TRAC*'s, the district courts should ordinarily be the fora of original review. This is so for two reasons. First, again, when a special review provision does not apply, the normal understanding is that power resides in the district courts. In addition, the main policies in this area point toward such review in the usual case of a preliminary challenge. These include policies favoring the possible testing and elaboration of the record underlying a preliminary action and the relatively greater competence of district courts in such an enterprise. A presumption in favor of original district court review in *TRAC*-type settings would not eliminate the possibility of appellate power being exercised under the All Writs Act. Yet such exercise of power would tend to be exceptional, not normal.

The proposed approach is not to be confused with proceeding case-by-case without unifying guidance as to when a preliminary matter in general should be heard originally. With the proposed alternative to *TRAC*, we have an approach of workable simplicity that nonetheless acknowledges the concurrence of competing jurisdictional premises.

CONCLUSION

As noted in part I, *TRAC* represents a major development in jurisdictional law. *TRAC*'s innovation can be understood as the combination of two lines of authority that created a new doctrine. The first line, represented by *Whitney National Bank,*[168] establishes that when a direct review statute applies, it normally supports exclusive appellate power and ousts the district courts of general federal question jurisdiction. The second line, represented by *Dean Foods,*[169] permits a court of appeals, when "necessary or appropriate," to assert power over a preliminary challenge on the basis of the All Writs Act's grant of authority to protect the court's ultimate jurisdiction. *TRAC* combines these two principles to create a new precept. Hence, *TRAC* concludes that when the All Writs Act provides appellate power over an administrative challenge, and when final agency action (if and when it occurs) would be reviewed exclusively by the courts of appeals, then the power derived from the All Writs Act is also

[168]Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965).
[169]FTC v. Dean Foods Co., 384 U.S. 597 (1966).

exclusive. This reasoning extends the long-settled exclusivity principle concerning direct review statutes to situations where the All Writs Act is the necessary predicate for review, so long as a direct review provision would have applied if there had existed a covered final agency action.

As noted in part II above, the analysis leading to *TRAC*'s result is deeply problematical. It represents a style of abstract reasoning about the aims of appellate review that disregards a host of countervailing policies that should be addressed when jurisdictional questions arise. The court's invocation of the notion of an "anomaly" said to result from failing to treat preliminary decision making the same as final agency action is indicative of its abstract style of reasoning. Why is it so anomalous to see the two situations as distinct, given that they are in fact distinct, and that well-established policies concerning the competencies of different levels of the federal judiciary support a contrast between inchoate and final agency decision making? More generally, why speak in terms of would-be anomalies at all, as if to suggest that the question in *TRAC* is one of formal reasoning rather than a complex task of applying competing institutional policies to the facts?

As noted in part III above, *TRAC*'s formula for exclusive appellate power—which exists when final agency action would be reviewed under an agency's statutes exclusively by the courts of appeals, and when a suit seeks relief that "might affect" the court of appeals' ultimate review power—raises formidable difficulties of its own. First of all, it strains at established jurisdictional principles. Moreover, as new doctrine, *TRAC* generates basic doubts as to each of the three main elements of its jurisdictional holding.

First, it is often not clear where final actions are to be reviewed. *TRAC*'s analysis, read by itself, appears to assume the contrary.

Second, it is not clear whether a challenge to administrative behavior just needs to be "under" an agency's statute in some broad sense or whether *TRAC* should be read to apply only to claims specifically based on an alleged violation of the agency's organic statute. The latter possibility has generated considerable debate about *TRAC*'s scope.

Third, the "might affect" test in *TRAC* is so vague that, when combined with the opinion's abstract style of legal reasoning, the test could be seen to sweep within its scope nearly any preliminary challenge to administrative decision making. Such massive displacement of the district courts can be avoided only if a meaningful limit is placed on the scope of *TRAC*'s exclusivity principle. Yet no such limit was established by *TRAC* or has been settled upon in subsequent cases. To the contrary, basic confusion surrounds the concept of what "might affect" the courts of appeals' ultimate review power.

In addition, *TRAC* raises further additional questions when viewed in light of the policies that inform complex jurisdictional reasoning. In particular, *TRAC* does not take account of important functional differences between the courts of appeals and the trial courts in the key area of testing or expanding the record underlying a challenged agency decision. *TRAC* creates the risk that justice will not be served: given the limits of the forum to which they have been exclusively assigned, litigants will be less able to raise record-oriented issues.

As noted in part IV above, what we need instead of *TRAC* is a recognition of the concurrent power of the courts of appeals and the district courts in *TRAC*-type situations. In this context we could use a presumption in favor of the district court's original review in preliminary settings. Such an approach would satisfy the policies that inhabit this field and create a meaningful degree of clarity.[170]

[170]The approach suggested in the text can be compared with that adopted by the Administrative Conference of the United States in the fall of 1988. Initially, at a June 1988 plenary session of the Conference, the Committee on Judicial Review favored the concurrent jurisdiction of the courts of appeals and the district courts over claims of alleged agency delay and inaction. However, this initial recommendation was withdrawn by the Chair of the Committee on Judicial Review after floor debate indicated to the Chair that the Conference was disinclined to engage in such a critique of D.C. Circuit doctrine.

During the summer of 1988, the Committee on Judicial Review proceeded to consider a more modest approach that, while questioning aspects of *TRAC*, did not seek comprehensively to assess the D.C. Circuit analysis. The final recommendation, Judicial Review of Preliminary Challenges to Agency Action, was presented to, and adopted by majority vote at, a September 1988 plenary session (reprinted at 53 Fed. Reg. 39,585 (Oct. 11, 1988), to be added at 1 C.F.R. § 305.88-6). It included the following key provisions.

First, the Conference noted that *TRAC*, on its own terms, cannot apply when a preliminary challenge to agency decision making is brought before the nature of the agency's final action has been determined, and therefore before it is clear where final action will be reviewed (For related discussion, *see supra* notes 95–99 and accompanying text). In such a circumstance, the Conference quite reasonably recommended that it be made clear that such a challenge be able to be brought in either level of court, district or appellate, which might have jurisdiction over a final agency action. *See* Recommendation 1(c) of No. 88–6, *supra*.

Second, the Conference took notice of the delays that can occur by moving claims—such as to agency delay itself—from district to appellate court (for the same point, *see supra* note 157 and accompanying text). These have to do with the deliberative character of appellate decision making, including the time to assign a matter to a three-judge panel, the time for briefing, any time consumed by oral argument, and the time to prepare a formal opinion. In the course of this process, panels of three judges generally do not have the flexibility of a single judge. Accordingly, the Conference recommended that to the extent *TRAC* remains the law, the courts of appeals should undertake to review their rules to permit, in appropriate cases, "prompt and efficient disposition" of preliminary claims over which they exercise power based on *TRAC*. *See* Recommendation 3 of No. 88–6, *supra*. Notably, in apparent response to the expressed concerns of the Administrative Conference, the D.C. Circuit recently has ordered changes in its rules in order to accommodate this concern at least in part. The effect of these changes remains to be seen. *See* General Order (Dealing with Petitions for Writs of Mandamus Based on Claims of Unreasonable Agency Delay), filed Nov. 25, 1988, which provides:

In the end, *TRAC* highlights the pitfalls of holding inflexibly to a preference for initial review of agency decision making by the courts of appeals. More generally, it shows the depth of continuing debates about this aspect of administrative law and the need to keep in mind the full range of relevant yet competing jurisdictional principles and policies.

It is ORDERED by the *en banc* Court that, notwithstanding D.C. Cir. R. 7(j)(2), a petition for a writ of mandamus based on a claim of unreasonable delay by an administrative agency shall be treated as a motion for purposes of the Circuit's local rules, except that no responsive pleading shall be permitted unless requested by the Court; no such petition shall be granted in the absence of such a request. This order shall also apply to claims of unreasonable agency delay transferred from the district court.

Third, the Conference recognized that there is a good deal of confusion surrounding *TRAC* and its doctrine. With this in mind, it recommended that when Congress chooses to address questions of district court versus appellate court jurisdiction, it should consider expressly where preliminary challenges, such as to alleged agency delay, are to be reviewed initially. *See* Recommendation 1(b) of No. 88–6, *supra*.

Each of the foregoing three recommendations represents important critiques of *TRAC*, albeit ones limited tacitly to accepting its existence as the law of the D.C. Circuit. I support each of these efforts, although I would underscore that they represent only partial criticisms of a decision that, as I have argued, needs to be more fully reevaluated.

I do not, however, support the fourth major aspect of the Conference recommendation. The Conference stated that in the face of *TRAC*'s apparent confusion, a simplifying principle should be adopted holding that when a statute provides for review of a final agency action in a particular level of court, "jurisdiction over reviewable preliminary challenges should be assigned to the forum that would have jurisdiction if an appeal were taken from final agency action growing out of the proceeding." Recommendation 1(b) of No. 88–6, *supra*. I understand the desire for clarity that seems to have spawned this formulation. Yet in my view, it goes in the wrong direction because it strongly favors exclusive appellate review of preliminary challenges whenever final actions would be reviewed by the courts of appeals. This aspect of the Conference recommendation suffers from the failings attributable to *TRAC's* own result.

The larger point is that in three of its four main substantive aspects, Recommendation No. 88–6 presents important, albeit partial, critiques of *TRAC*. As a whole, the recommendation acknowledges a number of *TRAC*'s ambiguities and difficulties, even as it strains to avoid a broad critique of its premises. (Recommendation 2 of No. 88–6 simply reaffirms the principles of Recommendations 1(b) and (c), and Recommendation 1(a) reaffirms the earlier 1976 recommendation, No. 75–3.)