AGENCY DELAY AND THE COURTS

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Administrative delay plagues the modern regulatory state, yet scholars and courts lack a coherent framework for analyzing when delay becomes unlawful and how to remedy it. This Article provides the first comprehensive examination of judicial oversight of agency delay, tracing the evolution from common law mandamus through the delay provisions of the Administrative Procedure Act (APA). It reveals critical distinctions between these mechanisms that courts have increasingly elided, leading to doctrinal confusion and ineffective remedies. On account of the second Trump Administration's Department of Government Efficiency and associated initiatives, this topic takes on unprecedented urgency because administration policies to reduce workforce and restructure the executive branch agencies will rapidly lead to a dramatic increase in delays across the administrative state. This Article makes three contributions. First, it illuminates the forgotten role of mandamus as a check on bureaucratic delay by excavating its development from prerogative writ to modern remedy. Second, it demonstrates how courts have improperly conflated mandamus with APA delay claims, obscuring important differences in their scope, standards, and available relief. Finally, it proposes a new framework for evaluating agency delay that better serves congressional intent while respecting executive branch resource constraints. This framework would replace the malleable and increasingly ineffective factors in the prevailing judicial review standard for agency delay with more structured analysis of agency operations, congressional deadlines, and regulated party impacts. The Article's insights are intended to help the Judiciary more effectively police the boundary between permissible administrative discretion and unlawful foot-dragging—a critical task as political forces threaten to increase delays across the regulatory state as a consequence of shrinking government.

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I. INTRODUCTION

An inescapable feature of contemporary government is delay. Like a DMV experience that many Americans encounter, delay by the federal government manifests at a larger scale. Delay and torpor are practiced by actors in all branches of the federal government. Congress has been passing fewer bills[1] and often struggles to pass spending bills, necessitating stopgap continuing resolutions.[2] Continuing resolutions, to say nothing of lapses of appropriations, can themselves cause delays elsewhere by affecting how courts, public defenders, prosecutors, and other parties move cases forward.[3] Even

1. Joe LoCascio, Benjamin Siegel & Ivan Pereira, *118th Congress on Track to Become One of the Least Productive in U.S. History*, ABC NEWS (Jan. 10, 2024, 7:30 PM), https://abcnews.go.com/Politics/118th-congress-track-become-productive-us-history/story?id=106254012 [https://perma.cc/H4NC-DAMM].

2. *See* Drew Desilver, *Congress Has Long Struggled to Pass Spending Bills on Time*, PEW RSCH. CTR. (Sept. 13, 2023), https://www.pewresearch.org/short-reads/2023/09/13/congress-has-long-struggled-to-pass-spending-bills-on-time/ [https://perma.cc/2P6T-75QP].

3. Justin C. Van Orsdol, *Cancelling Continuing Resolutions*, 62 U. LOUISVILLE L. REV. 1, 11–14 (2023) ("[Continuing resolutions] threaten criminal defendants' Sixth Amendment rights, in part because of their budgetary effects. . . . Because [of those concerns,] civil cases may be

in times of full funding, courts are overworked with case filings rising but the number of authorized judgeships largely held stagnant since 1990.[4] The Civil Justice Reform Act[5] empowers the federal judiciary to monitor delay in the courts—and through public reporting requirements, tries to discourage judges from letting motions and cases linger, although the targets for resolving cases are soft deadlines.[6] Sometimes, the delay is not a negative byproduct of federal officials trying to do more with less, but rather a choice or an allocation of limited resources.[7] U.S. Senate rules permit Senators to place holds on nominations, which can be used to register displeasure with the nominating President. For example, for several months Senator Tommy Tuberville maintained a blanket hold on military promotions over a Department of Defense servicemember abortion policy.[8] In 2025, Senator Brian Schatz announced that he would implement a blanket hold on Department of State nominees in protest over President Donald Trump's dismantling of the U.S. Agency for International Development.[9]

But delays in the Executive Branch are especially prevalent and deleterious.[10] In our complex society with federal agencies engaging in an expansive

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placed on the backburner so that courts can prioritize criminal trials.").

4. *The Need for Additional Judgeships: Litigants Suffer when Cases Linger*, U.S. CTS. (Nov. 18, 2024), https://www.uscourts.gov/news/2024/11/18/need-additional-judgeships-litigants-suffer-when-cases-linger [https://perma.cc/KCS4-U2WC]. Although Congress recently passed bipartisan legislation to add dozens of new federal judge positions through 2035, President Joe Biden vetoed the bill. *Biden Vetoes 66 New Federal Judgeships, Blames 'Hurried Action' by the House*, CBS NEWS (Dec. 24, 2024, 7:15 AM), https://www.cbsnews.com/news/biden-66-new-federal-judgeships-vetoes/ [https://perma.cc/U5JG-QAE9].

5. 28 U.S.C. § 476.

6. Miguel F. P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363, 363, 367 (2020) (questioning the efficacy of the Six-Month List requirements).

7. *Mayorkas Assigns Hundreds of Asylum Officers to Address Humanitarian Needs at Border*, ABC NEWS (May 11, 2023, 7:58 AM), https://abcnews.go.com/US/video/mayorkas-assigns-hundreds-asylum-officers-address-humanitarian-border-99257419 [https://perma.cc/NC9K-WM99] (news coverage of tasking hundreds of asylum officers from their other duties to alternate duties).

8. Eric McDaniel, *Sen. Tuberville Drops Remaining Holds on Senior Military Promotions*, NPR (Dec. 19, 2023, 7:21 PM), https://www.npr.org/2023/12/19/1220492250/tuberville-drops-blockade-military-promotions [https://perma.cc/7CQS-QV4F].

9. Sahil Kapur, Frank Thorp V & Abigail Williams, *Democratic Sen. Brian Schatz Puts a Hold on Trump's State Department Nominees*, NBC NEWS (Feb. 3, 2025, 3:20 PM), https://www.nbcnews.com/politics/congress/democratic-sen-brian-schatz-puts-hold-trumps-state-department-nominees-rcna190470 [https://perma.cc/MY9N-U9TC].

10. KRISTEN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 14.1 (7th ed. 2024) ("Numerous studies of particular agencies have documented patterns of

and deep regulatory domain, delays in agencies' adjudication and rulemaking functions are a mainstay. The impacts reverberate across agencies: Immigration agencies have faced mounting backlogs totaling nearly 10 million adjudications.[11] Freedom of Information Act (FOIA) request backlogs have grown, driven partly by increasing request complexity.[12] The Internal Revenue Service (IRS) operates with diminished audit capacity after budget cuts.[13] The Social Security Administration wrestles with record-low staffing levels despite serving record-high beneficiaries.[14]

In the second Trump term, agency delays are on trajectory to spike.[15] The Department of Government Efficiency (DOGE) has a stated intention of reducing the size of the federal civil service.[16] In the second week of the term, DOGE caused the Office of Personnel Management to email deferred resignation agreements to two million federal employees.[17] There was a hiring

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decisionmaking delay as long as 10 years or more.").

11. *Completing an Unprecedented 10 Million Cases in Fiscal Year 2023, USCIS Reduced Its Backlog for the First Time in over a Decade*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 9, 2024) [hereinafter *USCIS Reduced Its Backlog*], https://www.uscis.gov/EOY2023 [https://perma.cc/V5VN-76WX].

12. U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106535, FREEDOM OF INFORMATION ACT: ADDITIONAL GUIDANCE AND RELIABLE DATA CAN HELP ADDRESS AGENCY BACKLOGS (2024).

13. U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104960, TAX COMPLIANCE: TRENDS OF IRS AUDIT RATES AND RESULTS FOR INDIVIDUAL TAXPAYERS BY INCOME (2022).

14. Ayelet Sheffey, Ana Altchek, Juliana Kaplan, Tim Paradis & Noah Sheidlower, *DOGE Is on a Cutting Spree—and Social Security Workers Warn It's Going to Affect Your Benefits*, BUS. INSIDER (Mar. 1, 2025, 3:36 AM), https://www.yahoo.com/news/doge-cutting-spree-mdash-social-083601532.html [https://perma.cc/XWF4-4BUS].

15. *See* Jack Kelly, *Federal Employees Brace for Potential Mass Layoffs in Trump's Second Term*, FORBES (Nov. 15, 2024, 2:07 PM), https://www.forbes.com/sites/jackkelly/2024/11/15/federal-employees-brace-for-potential-mass-layoffs-in-trumps-second-term/ [https://perma.cc/P6RF-U8Z3].

16. Elon Musk & Vivek Ramaswamy, Opinion, *The DOGE Plan to Reform Government*, WALL ST. J. (Nov. 20, 2024, 12:33 PM), https://www.wsj.com/opinion/musk-and-ramaswamy-the-doge-plan-to-reform-government-supreme-court-guidance-end-executive-power-grab-fa51c020 [https://perma.cc/Z4R7-G6CE]; *see also* Exec. Order No. 14,158, *Establishing and Implementing the President's "Department of Government Efficiency"*, 90 Fed. Reg. 8,441, 8,441 (Jan. 20, 2025).

17. Daniel Wu & Ben Brasch, *What Federal Workers Should Know About Trump Administration's 'Deferred Resignation' Offer*, WASH. POST (Jan. 28, 2025), https://www.washingtonpost.com/politics/2025/01/28/federal-worker-offer-resign-explained-trump [https://perma.cc/AWC3-Z6ZZ]; Memorandum from Charles Ezell, Acting Dir. of the U.S. Off. of Pers. Mgmt., to the Heads and Acting Heads of Dep'ts and Agencies (Jan. 28, 2025), https://www.opm.gov/media/3oaf3vs0/opm-guidance-memo-re-deferred-resignation-program-01-28-25-final.pdf

freeze that caused the revocation of hiring offers and start dates.[18] Special scrutiny has been placed on the Senior Executive Service[19] and even employees who have not served out their initial probation periods.[20] Layoffs (some stymied by court injunctions) have targeted multiple agencies.[21] An entire agency was placed on administrative leave.[22] The net effect will not just "drain the swamp," but drain the capability of government—albeit in a potentially more efficient, technologically agile state—to keep the current pace with non-discretionary adjudications and rulemakings. These policies, including Schedule F, which reduces job protections for policy-level career service personnel, will be significant.[23] The inevitable result would be longer processing times, larger backlogs, and more pervasive delays across

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[https://perma.cc/W4JU-HWUT].

18. Memorandum for the Heads of Executive Departments and Agencies, 90 Fed. Reg. 8,247, 8,247 (Jan. 20, 2025) ("Within 90 days . . . the Director of the Office of Management and Budget (OMB), in consultation with the Director of OPM and the Administrator of United States DOGE Service (USDS), shall submit a plan to reduce the size of the Federal Government's workforce through efficiency improvements and attrition.").

19. Exec. Order No. 14,170, *Reforming the Federal Hiring Process and Restoring Merit to Government Service*, 90 Fed. Reg. 8,621, 8,622 (Jan. 20, 2025).

20. Memorandum from Charles Ezell, Acting Dir. of the U.S. Off. of Pers. Mgmt., to the Heads and Acting Heads of Dep'ts and Agencies (Jan. 20, 2025), https://www.opm.gov/media/yh3bv2fs/guidance-on-probationary-periods-administrative-leave-and-details-1-20-2025-final.pdf [https://perma.cc/6LCF-A9KT].

21. *See, e.g.*, Nat'l Treasury Emps. Union v. Vought, No. 25-5091, 2025 WL 996856, at *1 (D.C. Cir. Apr. 3, 2025) (initially permitting the Consumer Financial Protection Bureau (CFPB) to issue reductions in force—which it later did to 90% of the agency—upon the government's "representations that, absent congressional action, the Consumer Financial Protection Bureau will remain open and will perform its legally required functions"); Nat'l Treasury Emps. Union v. Vought, No. 25-5091, 2025 WL 1721136, at *1 (D.C. Cir. Apr. 28, 2025) (sua sponte reversing course and staying the CFPB's reductions in force pending final review of the district court's preliminary injunction); Edward Helmore, *US Forest Service and National Park Service to Fire Thousands of Workers*, THE GUARDIAN (Feb. 15, 2025, 2:47 PM), https://www.theguardian.com/us-news/2025/feb/15/us-forest-service-national-park-service-layoffs [https://perma.cc/2LD2-XCKA] (describing layoffs planned for the U.S. Forest Service and National Park Service).

22. *See* U.S. AGENCY FOR INT'L DEV. (Feb. 6, 2025), https://www.usaid.gov/ [https://web.archive.org/web/20250206000404/https://www.usaid.gov/] (all website content removed; including sole message, "On Friday, February 7, 2025, at 11:59pm (EST) all USAID direct hire personnel will be placed on administrative leave globally" with narrow exceptions).

23. Shannon Bond, *Thousands of Federal Workers Would Be Easier to Fire Under Trump Rule Change*, NPR (Apr. 18, 2025, 5:33 PM), https://www.npr.org/2025/04/18/nx-s1-5369550/trump-federal-workers-schedule-f [https://perma.cc/KD6L-DSP8].

government functions—even as statutory obligations remain unchanged.[24] Such an unanticipated adverse consequence could result in the sharpest spike in executive branch-wide delayed action in over 100 years.[25]

This Article provides a general contemporary account of how courts review and address federal agency delay. It explores the historical development and modern application of key legal mechanisms: mandamus, agency delay claims under the Administrative Procedure Act (APA), statute-specific delay provisions, and the various remedies available to courts facing agency delay. In doing so, it illuminates why agencies engage in delay and how courts react to delay.

Part II delves into the nature and effects of administrative delay, examining definitional challenges and impacts on regulated parties. This section explores how delay manifests differently across contexts while highlighting common themes in its causes and consequences. Part III traces judicial and legislative reactions to delay, from the historical development of mandamus through modern statutory frameworks. This historical account provides context for how current approaches evolved and what lessons that evolution might offer. Part IV explores how courts assess delay claims today, analyzing divergent approaches across circuits and highlighting areas of doctrinal uncertainty. Part V offers recommendations for clarifying the relationship between mandamus and APA delay claims while pressing for a more coherent framework for judicial review than what is currently in force, including *Telecommunications Research & Action Center v. FCC*,[26] a 1984 D.C. Circuit opinion.

This analysis comes at a crucial moment. As political forces push to reshape the federal workforce in ways that could magnify delays, understanding how courts can effectively review and address agency delay becomes increasingly vital. The stakes extend beyond abstract questions of administrative law to fundamental issues of governmental function and individual rights. When agencies delay, the regulated public is affected.[27] As

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24. *See* Press Release, S. Comm. on Appropriations, Minority, Fact Sheet: Trump and Elon's Layoffs Jeopardize Essential Services Americans Rely on, Threaten Critical Agency Objectives Keeping Americans Safe & Healthy (Feb. 14, 2025), https://www.appropriations.senate.gov/news/minority/fact-sheet-trump-and-elons-layoffs-jeopardize-essential-services-americans-rely-on-threaten-critical-agency-objectives-keeping-americans-safe_healthy [https://perma.cc/GM5R-VFJ2].

25. *See id.*

26. 750 F.2d 70 (D.C. Cir. 1984).

27. *See* Raul Pinto & Jennifer Coberly, *Trump Administration Abruptly Stopped Processing Green Card Applications Filed by Asylees, Refugees. A FOIA Request Seeks Answers*, AM. IMMIGR. COUNCIL (Apr. 23, 2025), https://www.americanimmigrationcouncil.org/blog/trump-stopped-processing-green-cards-asylees-refugees-foia/ [https://perma.cc/5X8C-HYF5]; Sarah D. Wire, *Social Security Wait Times Were Already Long Under Biden. They're Even Longer Under Trump.*, USA

staffing constraints and policy choices threaten to exacerbate these delays, the need for clear judicial frameworks to address them grows more pressing.

This Article aims to advance that understanding while suggesting reforms to make judicial oversight more coherent and impactful. By examining how courts have approached delay historically and how they might do so more effectively going forward, it seeks to contribute to both scholarly discourse and practical governance. The recommendations offered here could help courts better fulfill their vital role in ensuring that agency delay does not unduly burden those who depend on government action.

II. BACKGROUND ON DELAYS

A. What Is Delay?

There is a rich history in the definition of delay and its treatment in American law. The term arises in multiple contexts: court opinions,[28] statutes,[29] and government reports.[30] There is not one clear, universally accepted administrative law definition of the term.[31] The Administrative Procedure Act acknowledges the concept by setting a basic expectation of timeliness: "[W]ithin a reasonable time, each agency shall proceed to conclude a matter presented to it."[32] As a remedy to "unreasonably delayed" agency action, the APA authorizes courts to compel such action.[33] But the APA does not define delay.[34] The influential *Attorney General's Manual on the Administrative*

TODAY (May 6, 2025, 12:50 PM), https://www.usatoday.com/story/news/politics/2025/05/06/social-security-wait-times-longer/83385829007/ [https://perma.cc/K2VD-APX3]; David Lawder, Andrea & Timothy Aeppel, *Trump's Tariff Deadline Delay Brings Hope, Confusion to Trade Partners, Businesses*, REUTERS (July 8, 2025, 4:14 PM), https://www.reuters.com/world/asia-pacific/trumps-tariff-deadline-delay-brings-hope-confusion-trade-partners-businesses-2025-07-08/ [https://perma.cc/BJ33-ZDXF].

28. *See, e.g.*, Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1097 (D.C. Cir. 2003).

29. *See, e.g.*, 5 U.S.C. § 706(1); 7 U.S.C. § 1736-1(c)(2); 10 U.S.C. § 806b(a)(7); 15 U.S.C. § 717r(d)(2).

30. *See, e.g.*, ACUS Recommendation 2023-7, Improving Timeliness in Agency Adjudication, 89 Fed. Reg. 1,513, 1,513 (Dec. 14, 2023).

31. *Cf.* Aram A. Gavoor & Steven A. Platt, *Administrative Investigations*, 97 IND. L.J. 421, 428–29 (2022) (concluding that there is no general definition of "investigation," despite investigations being a quintessential part of agency operation).

32. 5 U.S.C. § 555(b).

33. *Id.* § 706(1).

34. *See id.*

Procedure Act does not elaborate on the term either.[35] Dictionaries provide some direction, but are amorphous. The latest edition of *Black's Law Dictionary* defines delay as an instance or period "during which something is postponed or slowed."[36] Similarly, *Merriam-Webster* keys on slow speeds: "the act of postponing, hindering, or *causing something to occur more slowly than normal*."[37]

These definitions presume an undefined timeframe by which some agency action *should* be taken. That baseline is easier to ascertain when there is a court deadline to undertake agency action[38] or a statutory deadline for an agency to act.[39] It is much more difficult to identify the point at which an agency's pace constitutes "delay" when, Congress has merely suggested a timeframe;[40] Congress has said nothing at all on the matter; a court has not adjudicated a dispute between the agency and a disappointed stakeholder and issued an opinion finding delay; or there is no other baseline for an agency adjudication or rulemaking.

If delay is the cause of agency action that has not taken place at scale, a backlog is a common result. But that term, too, suffers from imprecision. As one scholar examining U.S. Citizenship and Immigration Services (USCIS)

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35. TOM C. CLARK, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947).

36. *Delay*, BLACK'S LAW DICTIONARY (12th ed. 2024). Older versions of *Black's* contain like terms. *See, e.g.*, *Delay*, BLACK'S LAW DICTIONARY (4th rev. ed. 1968) ("[t]o retard; obstruct; put off; postpone; defer; procrastinate; prolong the time of or before; hinder; interpose obstacles"). The terms in the Fourth Revised Edition definition might connote willfulness, though the entry for "delay" adds, "[t]he term does not imply dishonesty or involve moral wrong." *Id.*

37. *Delay*, MERRIAM-WEBSTER DICTIONARY (emphasis added), https://www.merriam-webster.com/dictionary/delay [https://perma.cc/K4X6-QUU3] (Sept. 6, 2025).

38. *In re* Ctr. for Biological Diversity, 53 F.4th 665, 670 (D.C. Cir. 2022) ("In a standard unreasonable delay case, we evaluate an agency's delays in its own rulemaking or in responding to private parties' requests. But here, we also face EPA's five-year-long failure to respond to our own order. When an agency ignores a court order, it creates a 'different [problem].' It 'nullifie[s] our determination that its [action is] invalid' and 'insulates its nullification of our decision from further review.'" (alterations in original) (internal citations omitted)).

39. N. States Power Co. v. U.S. Dep't of Energy, 128 F.3d 754, 755–56 (D.C. Cir. 1997) (referencing a January 31, 1998, statutory deadline for the agency to dispose of radioactive waste and spent nuclear fuel). *See generally* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923 (2008).

40. Li v. Jaddou, No. 22-50756, 2023 WL 3431237, at *1 (5th Cir. May 12, 2023) ("Although Congress enacted an aspirational goal of six months, 8 U.S.C. § 1571(b) ('180 days'), there is no clear mandate here such that we can say the USCIS was *required* to act within six months, or even within a year."); Da Costa v. Immigr. Inv. Program Off., 80 F.4th 330, 344 (D.C. Cir. 2023) (of § 1571(b), looking to "Congress's aspirational statement as 'a ruler against which the [agency's] progress must be measured'" (alteration in original)).

delays observed, "Part of the problem with USCIS's backlog is that the term itself is ill-defined."[41] If USCIS announces to the public that it is taking a certain amount of time to process a certain type of application, then that helps inform what constitutes delay, and may definitionally decrease the backlog by dint of executive fiat.[42]

Delay is related to, but distinct from, another frequently litigated type of conduct by agencies: inaction. There is confusion on what, precisely, "inaction" is for courts and scholars alike.[43] The term does not appear in the APA,[44] though the APA does define agency action to include a failure to act.[45] One way to view inaction, then, is being further along the finality spectrum than mere delay, at the point where the agency has indicated that it will not act. For example, *Heckler v. Chaney*[46] reviewed such inaction in the context of the Food and Drug Administration's (FDA's) decision not to institute enforcement proceedings.[47] Essentially, inaction is a final decision governed by an established regime: arbitrary and capricious review under 5 U.S.C. § 706(2).[48] In that way, it may equate with "unlawfully withheld" agency action, which *is* referenced in the APA, in § 706(1).[49]

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41. Ryan J. Fennell, *Stuck on the Backburner: An Analysis of USCIS's Backlog of Immigration Applications and Potential Reforms*, 37 GEO. IMMIGR. L.J. 87, 92 (2022).

42. *Id.* at 93 ("The dilemma here is striking; USCIS's self-imposed processing goal informs its net backlog. Lengthening processing times would decrease the number of applications stuck in limbo. Shorter benchmarks would increase backlogged applications. Either move produces artificial results.").

43. *See* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 10–12 (2008); *see also, e.g.*, Florida v. FDA, No. 8:22-cv-1981-TPB-JSS, 2023 U.S. Dist. LEXIS 45473, at *4–5 (M.D. Fla. Mar. 17, 2023) (referring to an "agency inaction/unreasonable delay" claim under § 706(1)).

44. *See, e.g.*, 5 U.S.C. §§ 551, 706.

45. 5 U.S.C. § 551(13) (including "failure to act" in the definition of "agency action").

46. 470 U.S. 821 (1985).

47. *Id.* at 837–38. *Heckler* recognized discretionary action as an exception to the presumption in favor of judicial review of agency action—and held that the FDA's decision there was such a discretionary action. What shielded the nonenforcement decision from Article III review was *not* that it was incomplete or nonfinal. *Id.*

48. The Supreme Court has suggested, without elaboration, that a complete "'failure to act' is not the same thing as a 'denial.'" Norton v. S. Utah Wilderness All., 542 U.S. 55, 63 (2004) ("The latter[, i.e., denial,] is the agency's act of saying no to a request; the former[, i.e., a failure to act,] is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline."). But we view the Supreme Court's use of the "failure to act" in that case to (incorrectly) mean delay. *Id.* at 63.

49. 5 U.S.C. § 706(1).

This Article concerns delay, and inaction is not delay—or at least not always, given the difficulty in finding a consistent definition. Delay is the less well-studied of the two. Consider higher-profile Supreme Court cases of the last forty years concerning inaction, like *Heckler v. Chaney*,[50] *Massachusetts v. EPA*,[51] and *United States v. Texas*.[52] Those are cases where, respectively, the FDA refused to initiate enforcement proceedings against states using drugs for executions; the U.S. Environmental Protection Agency denied Massachusetts's petition to make rules regulating greenhouse gas emissions from automobiles; and U.S. Immigration and Customs Enforcement set out a policy under which it, as alleged, refused to initiate removal proceedings against certain lower-priority noncitizens even if they were removable.[53] Given inaction's similarity to affirmative agency action, this area is already studied.

This paper also brackets inaction here because the line can be hazy. Finality is context-dependent.[54] The APA's requirement of finality implies that an agency not rendering a decision on a request for adjudication or rulemaking hardens into "inaction" when the agency has finally decided it will not affirmatively act.[55] Whether in a given instance such final inaction is an explicit decision by the agency, or a refusal to act that has calcified into a final decision—the agency's scienter—can be difficult to assess and is beyond the scope of this Article. Suffice it to say that there are some instances of a private party not getting what it wants from an agency that are already covered by § 706(2). At bottom, the APA provides judicial review for three situations relevant here: final agency action,[56] agency action unlawfully withheld,[57] and agency action unreasonably delayed.[58] Because inaction is not clearly one of those—or may perhaps be the first two of those—inaction is really a semantic concern that we omit from this Article. Those three APA categories will be discussed in much greater depth later. For now, we identify the confusion with inaction and move along.

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50. 470 U.S. 821.

51. 549 U.S. 497 (2007).

52. 599 U.S. 670 (2023).

53. *Heckler*, 470 U.S. at 837–38; *Massachusetts v. EPA*, 549 U.S. at 533–35; *United States v. Texas*, 599 U.S. at 674–75.

54. *See* Aram A. Gavoor & Daniel Miktus, *Public Participation in Nonlegislative Rulemaking*, 61 VILL. L. REV. 759, 775–76, 786–92 (2016) (offering the example of § 553(e) petition justiciability).

55. *Id.* at 775–76.

56. 5 U.S.C. § 706(2).

57. *Id.* § 706(1).

58. *Id.*

B. What Are the Effects of Delay?

Delay is worth studying. It has attracted attention from within the federal government, from an 1817 Supreme Court case recognizing a judicial power to compel a customs officer to institute refused forfeiture proceedings,[59] to a 2023 report by the Administrative Conference of the United States, a government body, offering recommendations to improve agency adjudication times.[60]

Delays have only worsened in the modern era. COVID caused agency delays.[61] Immigration agencies in particular have suffered delays: In March 2022, USCIS faced a "backlog of about 9.5 million cases, a surge from the 5.7 million applications that were outstanding at the end [of] 2019. According to research published by the Migration Policy Institute in February 2022, . . . the backlog has steadily increased over the past decade."[62] There have been record-high FOIA requests,[63] and the backlog surpassed 200,000 requests for the first time in Fiscal Year 2022 (in part because of the increasing complexity of requests).[64] Congressional budget cuts have hampered the IRS. The IRS employed over a third fewer auditors in 2018 than in 2010, and conducted 42% fewer audits in 2017 than in 2010.[65] Delayed upgrades

59. Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 2–3 (1817).

60. ACUS Recommendation 2023-7, Improving Timeliness in Agency Adjudication, 89 Fed. Reg. 1,513 (Dec. 14, 2023).

61. Fennell, *supra* note 41, at 96 ("COVID-19 undeniably worsened USCIS's backlog through two unforeseeable challenges: reduced operational capacity and severe fiscal insecurity.") (describing these challenges).

62. *Id.* at 94.

63. Justin Doubleday, *FOIA Backlogs on the Rise After Record Number of Requests*, FED. NEWS NETWORK (Mar. 3, 2023, 4:34 PM), https://federalnewsnetwork.com/agency-oversight/2023/03/foia-backlogs-on-the-rise-after-record-number-of-requests/ [https://perma.cc/2T2P-QBH7].

64. *FOIA Backlogs Hinder Government Transparency and Accountability*, U.S. GOV'T ACCOUNTABILITY OFF. (Mar. 14, 2024), https://www.gao.gov/blog/foia-backlogs-hinder-government-transparency-and-accountability [https://perma.cc/9XSM-27HZ]; *see also USCIS Reduced Its Backlog*, *supra* note 11.

65. Paul Kiel & Jesse Eisinger, *How the IRS Was Gutted*, PROPUBLICA (Dec. 11, 2018, 5:00 AM), https://www.propublica.org/article/how-the-irs-was-gutted [https://perma.cc/6VLA-P7NQ]. Some of these processing delays include where the IRS makes a finding for additional tax that is required but does not adjudicate the taxpayer's responses prior to the threatened payment deadline, which carries significant penalties. *See* 26 U.S.C. § 6662 (imposing accuracy-related penalties on underpayments). For example, a taxpayer might accurately pay their taxes, but the IRS adds a zero by mistake to a domestic worker return, then charges more taxes on the worker. The IRS may then take time to resolve the issue, while the worker suffers the lost time-value of money as they had to have prepaid the unwarranted

to an IT system caused yearslong delays in federal background checks.[66] The Social Security Administration, operating with "record-low staffing levels and a record-high number of beneficiaries," faces the prospect of needing to close offices or reduce service levels without an increase in appropriations in 2025.[67] Millions of students applying for financial aid through the Department of Education's Free Application for Federal Student Aid encountered glitches and roadblocks when applying in 2024.[68]

Delay is typically unfavorable for the regulated parties. Delay may heighten health and safety risks or severe economic harms.[69] It can create uncertainty and make future planning difficult.[70] Delay also implicates civil liberties. When a due process right attaches, an agency may need to adjudicate or make rules in a particular way.[71] Of course, to some extent, agencies need to be able to deliberate and carefully consider the arguments of the private parties without unduly rushing to complete the action.[72] A delay in a pending enforcement action could be favorable for the target in the sense that the target avoids any adverse outcome and relief. However, the target remains under the specter of such outcomes and obligated to incur costs responding to agency demands for information.[73]

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penalty. The bifurcation of the enforcement and accuracy side creates a disconnect. This is not delay of the type that is judicially reviewable and thus the focus of this Article, but it is notable as general delay outside of the Article III interaction.

66. U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-107616, PERSONNEL VETTING: DOD NEEDS TO IMPROVE MANAGEMENT OF THE NATIONAL BACKGROUND INVESTIGATION SERVICES PROGRAM 9 (2024), https://www.gao.gov/products/gao-24-107616 [https://perma.cc/67Q7-JFKF].

67. Aliss Higham, *Why Social Security Delays Could Hit in 2025*, NEWSWEEK (Dec. 13, 2024, 10:34 AM), https://www.newsweek.com/why-social-security-delays-could-hit-2025-2000255 [https://perma.cc/488D-JA49].

68. *Botched FAFSA Rollout Leaves Uncertainty for Students Seeking Financial Aid for College*, U.S. GOV'T ACCOUNTABILITY OFF. (Sept. 24, 2024), https://www.gao.gov/blog/botched-fafsa-rollout-leaves-uncertainty-students-seeking-financial-aid-college [https://perma.cc/RVF3-4A5S].

69. Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1400–01 (2011).

70. *Id.*

71. JEREMY S. GRABOYES & JENNIFER L. SELIN, ADMIN. CONF. OF THE U.S., IMPROVING TIMELINESS IN AGENCY ADJUDICATION 6–7 (2023), https://www.acus.gov/sites/default/files/documents/Improving-Timeliness-Agency-Adjudication-121223.pdf [https://perma.cc/J7PM-6KFX].

72. *Id.*; *see also, e.g.*, 5 U.S.C. § 553.

73. Gavoor & Platt, *supra* note 31, at 466.

Delay can be unfavorable for the taxpayer, especially if the delay stems from bureaucratic inefficiencies or waste. These delays are costly.[74] In the case of the IRS, one estimate is that a decrease in appropriations has exacted "a toll of at least $18 billion every year, but the true cost could easily run tens of billions of dollars higher."[75] Attempts to reduce backlogs may result in numerous harms. The costs of rushing to meet inflexible and increasing congressional deadlines can also be high: wasted resources, resource misallocation, and resource inefficiencies.[76]

Delay can be bad for the agency. If the matter proceeds to litigation and a burdensome remedy is ordered, that can scramble the agency's budget.[77] As explained more below, litigation can also hamper the agency's priorities through intrusive remedies. Delay can erode the public's confidence in the agency's work and increase stakeholder dissatisfaction.[78] Congressional oversight may increase, as committees of oversight jurisdiction scrutinize agencies with persistent delays or consider legislative changes aimed at expediting decisionmaking.[79] Congress can also shun the carrot and break out the stick with threats to eliminate funding for the agency if it does not move more quickly.[80]

Delay can have countervailing benefits, depending on the situation and the particular agency. For example, delay may serve a political goal, either intrinsically by decelerating or obstructing a program that the actor does not like, or by using the delay to generate attention in furtherance of a political

74. *See* LORI SCIALABBA, BRUCE CHEW, CHINA WIDENER & ISAAC JENKINS, DELOITTE CTR. FOR GOV'T INSIGHTS, GOVERNMENT BACKLOG REDUCTION 4 (2019), https://www2.deloitte.com/content/dam/insights/us/articles/5060_Government-backlog-reduction/DI_Government-backlog-reduction.pdf [https://perma.cc/P8WC-AAT5] ("For example, backlogs in three top patent offices led to more than US$10 billion in reduced global growth each year.").

75. Kiel & Eisinger, *supra* note 65.

76. Bobby Kim, Note, *Missed Statutory Deadlines and Missing Agency Resources: Reviving Historical Mandamus Doctrine*, 121 COLUM. L. REV. 1481, 1486–87 (2021).

77. *See* U.S. DEP'T OF JUST., JUST. MANUAL § 4–10.100 (2018), https://www.justice.gov/jm/jm-4-10000-judgments-against-government [https://perma.cc/9ZH9-83T7] ("While the Treasury's Judgment Fund is the usual source for payment of judgments, payment of an adverse judgment may be made in some cases directly by the client agency if it has an appropriation or other source of funds available.").

78. KEVIN J. HICKEY, CONG. RSCH. SERV., R45336, AGENCY DELAY: CONGRESSIONAL AND JUDICIAL MEANS TO EXPEDITE AGENCY RULEMAKING 1 (2018), https://crsreports.congress.gov/product/pdf/R/R45336 [https://perma.cc/T26C-GHT3].

79. *Id.* at 15–16.

80. *Id.*

goal.[81] Notwithstanding, we view delay as being a normatively bad thing that injures private parties and wastes public money.

Although minimizing or preventing delay is the goal, the means of achieving that goal is not, in every scenario, to demand that the agency accelerate and complete the adjudication. For instance, agencies have free rein to employ procedures not required by statute or the Constitution.[82] Undertaking notice-and-comment on agency guidance may seem odd when it is not strictly necessary and sure to consume valuable time. Doing so comes at "some cost," but is "usually a good investment."[83] If an agency with a massive backlog of audits is ordered to eliminate the backlog by a date certain or suffer some adverse action, the quality of the action could suffer.[84] It could also lead to an inability to timely handle other agency missions of higher priorities that get leapfrogged. Sometimes agencies make a difficult choice to adopt a last-in-first-out model that seriously disadvantages long-awaiting applications or petitions.[85]

III. JUDICIAL AND LEGISLATIVE REACTIONS TO DELAY

Congress addresses delays through appropriations, oversight, and restructuring agencies.[86] The President addresses delays through their perch atop the Executive Branch and ability to control agency operations.[87] Agencies can predict backlogs, or strive to understand why they are falling behind and

81. *See* Kim, *supra* note 76, at 1485 ("In some cases, newly elected presidential administrations seek to fulfill political promises by undoing or postponing the work of prior administrations. These new administrations may leverage various tools for delaying administrative action . . . .").

82. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990) (holding that the APA only requires an agency to take whatever steps are necessary to justify its rationale in a decision, and thus does not permit a court to prescribe specific procedures for the agency).

83. NICHOLAS R. PARRILLO, ADMIN. CONF. OF THE U.S., FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 162 (2017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf [https://perma.cc/PC62-WKF7].

84. *See* Gersen & O'Connell, *supra* note 39, at 938 ("[O]ur analysis suggests that there are critical tradeoffs between the timing of agency action, the procedures used to make agency decisions, and the quality of regulatory policy.").

85. *Affirmative Asylum Interview Scheduling*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling [https://perma.cc/7XSK-8VYE] (Mar. 29, 2024) (laying out tiers of adjudication priorities that favor "starting with newer filings and working back towards older filings").

86. HICKEY, *supra* note 78.

87. *See, e.g.*, Exec. Order No. 13,767, § 5(c), 82 Fed. Reg. 8,793, 8,794–95 (Jan. 25, 2017) (ordering the Attorney General to allocate immigration judges to southern border detention facilities to reduce adjudicatory delays).

develop strategic plans to improve services before a problem emerges.[88] This Article is not focused on *ex ante* measures.[89] Rather, it centrally focuses on what courts can do after delay actualizes and the role that they play assessing, superintending, and remediating agency delay.

A. The History of Mandamus in England

A significant mechanism for judicial oversight is the writ of mandamus. The writ of mandamus translates roughly to "we command."[90] As William Blackstone recognized, the writ "was rooted in a command from the king to control 'any person, corporation, or inferior court,' requiring them to do some particular action pertaining to their office and duty consonant with ensuring 'right and justice.'"[91] It was the means of ensuring that government officials carried out their duties: "on the application of a party grieved, a public body or official will be ordered to perform a public duty."[92]

Mandamus is a way to make sure that the work is done, not a guarantee of the work's result. For instance, mandamus is often, both then and now, used to command an inferior court to perform a particular function or duty.[93] Historically, however, mandamus was not to be issued "to compel a court to perform a judicial act in a particular way."[94]

The main principles of the English system of extraordinary writs have largely been adopted in the United States.[95] For instance, Blackstone's *Commentaries* were influential in early American legal thinking and cited frequently by Chief Justice John Marshall, including in *Marbury v. Madison*.[96] To

88. *See, e.g.*, Martin O'Malley, *The Tough, Necessary Work to Reduce Disability Wait Times*, U.S. SOC. SEC. ADMIN., https://blog.ssa.gov/the-tough-necessary-work-to-reduce-disability-wait-times [https://perma.cc/87YT-Q66C] (Apr. 18, 2025) (arguing that the Social Security Administration is behind on decisions for disability benefits applications due to budgetary constraints and noting that the agency has put together an executive team to analyze and address these shortcomings).

89. *See generally* GRABOYES & SELIN, *supra* note 71, at 31–44 (suggesting a general framework that agencies may use to improve adjudication timeliness); HICKEY, *supra* note 78, at 3–7 (listing tools that Congress might use to encourage agency timeliness).

90. *Mandamus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

91. Kim, *supra* note 76, at 1498.

92. *See* Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523, 530 (1923) (comparing the informal "mandamus" used often by "the autocratic head of a vast administrative system" in ordering around subordinates with the more formal "writ of mandamus").

93. *Mandamus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

94. *Recent Cases*, 18 HARV. L. REV. 390, 397 (1905).

95. FRANK J. GOODNOW, THE PRINCIPLES OF ADMINISTRATIVE LAW IN THE UNITED STATES 420 (1905).

96. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163–69 (1803).

understand how it works in the United States today, the English history is worth attention.[97] The power embodied in the writ of mandamus goes back centuries and in ways is subtly distorted from the present-day writ, such that "its early history is involved in obscurity and has been the cause of much curious research and of many conflicting opinions."[98]

The writ of mandamus traces its lineage to the Norman political system, which consolidated all governmental power in the Crown.[99] The sovereign therefore became "the fountain and source of justice" who could employ their prerogative powers when the law did not otherwise afford a remedy.[100] Among those powers were writs, which directed the performance of any desired act by the king's subjects.[101] These writs were issued in the sovereign's discretion.[102] No particular justification was required; the fact that a writ was issued was accepted as being the will of the sovereign and therefore in the public interest.[103] Any public official could be issued a writ.[104] Even after Parliament's creation, there was initially no legal difference between judicial officers and executive officers.[105] All were mere "servants of the Crown," whether they primarily engaged in or regulated private law or public law.[106] The Crown held equal authority to remove any one of them and—importantly for mandamus—to dictate to them how to do their jobs and what

97. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 37 (1881) ("The history of what the law has been is necessary to the knowledge of what the law is.").

98. JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, EMBRACING MANDAMUS, QUO WARRANTO AND PROHIBITION 5 (3d ed. 1896).

99. GOODNOW, *supra* note 95, at 420.

100. HIGH, *supra* note 98, at 7.

101. *Id.* at 5. The king's powers also included the ability to set certain civil standards like measures of weight and distance. Jenks, *supra* note 92, at 523.

102. *See* 1 RICHARD GUDE, THE PRACTICE OF THE CROWN SIDE OF THE COURT OF KING'S BENCH, AND THE PRACTICE OF THE SESSIONS 179–80 (1828) ("The writ of mandamus is a high prerogative writ of a most extensive remedial nature . . . . [B]ut where it is matter of a private nature, it is in the discretion of the Court either to grant the writ, or refuse the motion for the writ . . . ."); S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 42 (1951) ("[Prerogative writs] are not writs of course; they cannot be had for the asking, but proper cause must be shown to the satisfaction of the court why they should issue.").

103. Robert H. Howell, *An Historical Account of the Rise and Fall of Mandamus*, 15 VICT. U. WELLINGTON L. REV. 127, 128 (1985).

104. *See* de Smith, *supra* note 102, at 51 ("Through the writ of *mandamus* the King's Bench compelled the carrying out of ministerial duties incumbent upon both administrative and judicial bodies.").

105. GOODNOW, *supra* note 95, at 420.

106. *Id.*

decisions they should reach.[107] Writs of mandamus appear to have been first issued to executive officials, and later to lower courts.[108]

Mandatory writs gradually evolved from being purely executive commands to being judicial in nature.[109] The Court of King's Bench originated from the monarch's *Curia Regis* or king's council, who were the advisers who attended to the monarch as they traveled the country.[110] The *Curia Regis*'s original function was to advise the sovereign on the exercise of the royal prerogative.[111] In 1178, King Henry II reorganized the *Curia Regis* so that five advisers would adjudicate ordinary cases, but he reserved for himself the most difficult cases—thereby establishing a new court separate from the king's core coterie of advisers, with a sort of appellate jurisdiction over them by the king.[112] This new system of justice grew out to be the independent Court of King's Bench, for which the first records come from 1234.[113] In addition to that court, the judicial functions of the *Curia Regis* eventually dissolved into another court of Westminster Hall, the Court of Common Pleas. The advisory and executive functions of the *Curia Regis* fell to the Privy Council, and the sovereign's lawmaking abilities eventually accreted to Parliament, although for a long time the monarch could enact laws by proclamation.[114] The King's Bench became the "supreme court of common law."[115]

Views diverge on the precise origins of *judicially issued* mandamus.[116] The first school of thought views mandamus as simply flowing from the Crown's general authority to issue writs and the 1215 Magna Carta's admonition "*nulli negabimus aut differemus justiciam vel rectum*"[117] or "to no one deny or delay

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107. *Id.* at 420–21.

108. *See* de Smith, *supra* note 102, at 51 ("It would go, on the application of a party aggrieved, to compel the performance of a wide range of public or quasi-public duties . . . . More important still, it would issue to inferior tribunals that wrongfully declined jurisdiction.").

109. HIGH, *supra* note 98, at 5.

110. 1 WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT 525 (4th ed. 1883).

111. *See id.*

112. *See id.* at 524–25.

113. *See id.* at 525, 649; Ralph V. Turner, *The Origins of Common Pleas and King's Bench*, 21 AM. J. LEGAL HIST. 238, 248 (1977).

114. *See* STUBBS, *supra* note 110, at 525, 617-18, 646-47.

115. 3 WILLIAM BLACKSTONE, COMMENTARIES *41–42.

116. *See, e.g.*, Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More "Mile Marker down the Road of No Return"*, 39 ST. MARY'S L.J. 3, 10 n.22 (2007).

117. THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS AS IT OBTAINS BOTH IN ENGLAND AND IN IRELAND 56 (1853).

right or justice."[118] To these scholars, mandamus is simply "a residual constitutional remedy always available where no specific or adequate enforcement exists to remedy a violation of citizens' rights in public law."[119] A citizen (after the sixteenth century) could appeal to the Crown to force, via a writ, a public officer to do something that the law required of them.[120] Because the Court of King's Bench was viewed as an extension of the Crown, that upper court held the same authorities as if exercised by the sovereign themselves.[121] The Court of King's Bench was empowered to issue writs, first under the king's great seal as obtained from the Chancellor's Office, but later in the court's own name.[122] These sovereign prerogative powers were "invoked in aid of the ordinary judicial powers of the courts, and the mandamus was issued in the king's name, and by the court of king's bench only, as having a general supervisory power over all inferior jurisdictions and officers."[123]

By the 1400s, the Court of King's Bench was sitting as a court on which the King was not physically present, rather having delegated his judicial power.[124] By the 1600s, the court could issue a writ in the sovereign's name as a legal fiction without first obtaining the sovereign's consent.[125] Throughout this time, and to varying degrees, the judicial and executive functions intertwined, such that the king's command was issued through a court.[126] A small pool of English cases from the fourteenth century appear to consider mandamus-like relief, for example, considering whether a college or town should reinstate a fellow or a citizen, respectively, to their roles.[127] These cases did not explicitly recognize the issuance or withholding of a writ of

118. *Id.* ("So that it is not true that the writ was first used so lately as the reign of James 1, in a case called Bagg's case; probably, however, Bagg's case was merely the first writ, in its judicial form, which had reference to *municipal corporations* . . . ." (internal footnote omitted)).

119. Howell, *supra* note 103, at 129.

120. *See* GOODNOW, *supra* note 95, at 422.

121. *See id.* at 420–21.

122. *See id.* at 422; *see also* EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY 66–69 (1963) (citing, but disagreeing with, the argument that "lord Coke invented the whole thing," whose proponents advanced the argument "that the power to issue mandamus derived from the residual power of the King himself to do justice").

123. HIGH, *supra* note 98, at 7.

124. *See* Howell, *supra* note 103, at 132; Flint, *supra* note 116, at 10 n.3 (citing BLACKSTONE, *supra* note 115, at *41).

125. *See* Howell, *supra* note 103, at 128; HIGH, *supra* note 98, at 7.

126. *See* Howell, *supra* note 103, at 132.

127. *See id.* at 131–33 (citing, *e.g.*, R. v. Askew (1768) 98 Eng. Rep. 139, 141, 4 Burr. 2186, 2189 (KB); Middleton's Case (1573) 73 Eng. Rep. 752, 753, 3 Dyer 332, 333 (KB)).

mandamus, but do refer to that power or reference writs of restitution—the "synonymy of a 'writ of restitution' and a 'writ of mandamus'" being "well accepted."[128] But "the fact that a mandamus was formerly allowed only in cases affecting the sovereign, or the interests of the public at large, lent additional weight to the prerogative theory of the writ," meaning the writ issued "not of strict right, but at the will of the sovereign and as an attribute of sovereignty."[129]

A second school of thought views the Court of King's Bench as debuting the writ of mandamus, in a form closely aligning with its present form, in the early 1600s. As one scholar put it, "[I]n early times the King issued countless innominate writs that included the word *mandamus*[,] . . . but the connection between most of these royal mandates and the modern judicial writ was verbal only."[130] Indeed, in the seventeenth century the writ was often called a writ of restitution.[131] Those early uses of mandamus were of a slightly different sort than the mandamus that came later, primarily concerning public, not private, grievances.[132] Around this time, an "'unprecedented increase in legislation' assigned new problems of governance to localized tribunals."[133] By this time, England had an administrative state which was administering "novel and elaborate programs of poor relief, marshland drainage, public works, public lands acquisition, alehouse licensing, and economic regulation; by laying and collecting taxes to fund such programs; and by issuing orders, bylaws, and ordinances to implement them."[134] Although lower-level government functionaries held diverse and broad powers, they were not checked

128. Howell, *supra* note 103, at 132–33.

129. HIGH, *supra* note 98, at 7; *see also* TAPPING, *supra* note 117, at 58 n.f. ("The Court must be satisfied that they have jurisdiction to grant the writ, because, being a prerogative writ, it will not be issued as of course, nor be granted merely for asking." (internal citation omitted)).

130. de Smith, *supra* note 102, at 50.

131. *Id.* at 50 n.85.

132. *Id.* at 50 ("[T]he writs called *mandamus* that appear in the early law books are concerned . . . with steps to be taken by the escheator or the sheriff in connection with possible accretions to the royal revenues. Not until 1573 do we find a reported case that centres around a judicial writ of *mandamus* serving purposes substantially similar to those of the modern writ; it was issued to restore a citizen of London to his franchise of which he had been illegally deprived. For practical purposes, however, the history of mandamus begins with *Bagg's Case*." (internal citations omitted)).

133. James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269, 1293 (2020) (quoting HENDERSON, *supra* note 122, at 9); *see also* HENDERSON, *supra* note 122, at 1–3.

134. Pfander & Wentzel, *supra* note 133, at 1293.

from abusing that power, including by courts.[135] In this telling, the writ of mandamus is a seventeenth-century creation. Largely, "a subject could challenge the legality of administrative action only in the Privy Council—less a court of justice than a central executive department that was known tellingly as 'the King in Council.'"[136] Again, the Court of King's Bench, by the seventeenth century, was issuing so-called extraordinary or prerogative writs.[137] It had the flexibility to creatively devise remedial solutions to the issues of public-official intransigence.[138] Mandamus was one such prerogative writ, alongside certiorari, prohibition, and habeas corpus.[139] In response to a petition for a writ of mandamus, the court generally considered only questions of law, not questions of fact or expediency, to ensure that lower authorities were acting within their limits.[140]

This theory identifies the 1615 *Bagg's Case*[141] as the seminal exercise of mandamus, or the "well-head of *Mandamus*."[142] James Bagg was a resident of Plymouth in the early seventeenth century who clashed with the mayor.[143] The mayor removed Bagg from his position as a burgess (an official), allegedly because Bagg disrespected various mayors.[144] Bagg sought a writ of

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135. *See id.* at 1294.

136. *Id.* at 1295.

137. Bernard Schwartz, *Forms of Review Action in English Administrative Law*, 56 COLUM. L. REV. 203, 204 (1956).

138. *Id.*

139. *See id.*; de Smith, *supra* note 102, at 40; *see also id.* at 40 n.4 ("Of course, all writs are in form commands issuing in the name of the King; but only writs that were conceived as standing in a special relationship with the Crown came to be regarded as 'prerogative' writs."); Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 351 n.37 (2012) (citing MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS JURISDICTION AND PRACTICE 185 (3d ed. 1999) ("The extraordinary writ that restrains a person from taking some action is technically the writ of prohibition. But modern parlance has combined prohibition and mandamus under the label 'mandamus.'")).

140. *See* GOODNOW, *supra* note 95, at 423.

141. Bagg's Case (1615) 77 Eng. Rep. 1271 (KB).

142. Jenks, *supra* note 92, at 530; *accord* HENDERSON, *supra* note 122, at 49 & n.6 ("By lawyer's tradition, the writ in this case was the beginning of the modern remedy of mandamus . . . . Neither seventeenth-century lawyers nor modern scholars have been able to find any cases of mandamus or restitution in the reports or judicial records before 1606 (with arguably one exception . . .)"; a writ of privilege case, Middleton's Case (1573) 73 Eng. Rep. 752; 3 Dyer 332 (KB); Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 414 (1958) ("Coke created the rationale on which mandamus was later based practically out of whole cloth in the famous and mysterious *James Bagg's Case*.").

143. Bagg's Case (1615) 77 Eng. Rep. 1271, 1273–74 (KB).

144. Among the disagreements was the allegation that Bagg turned toward the mayor, "turning the hinder part of his body in an inhuman and uncivil manner . . . , scoffingly,

restitution in King's Bench, arguing that the disenfranchisement had no legal basis.[145] The Chief Justice of the King's Bench, Edward Coke, ordered the mayor and commonalty to "signify the cause thereof to us" through a "return," that is, to respond and "give their side of the case."[146] Essentially, the King's Bench ordered briefing—and cemented its authority to supervise and command actions from executive officials.[147] Previously, writ proceedings did not give an option of return against the complained-of official.[148] The *Bagg's Case* opinion notably emphasizes that the Court of King's Bench enjoyed the authority "not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or . . . any manner of misgovernment."[149] The mayor and commonalty's return failed to satisfy the court, which held that the borough owed Bagg notice and an opportunity to be heard but failed to provide that.[150] The court issued a peremptory mandamus to restore Bagg.[151] Others put *Middleton's Case*, from 1573, as the first exercise of mandamus,[152] but both cases are relatively of the same vintage.

This theory holds that although mandamus is often thought of as a prerogative writ—in the words of Lord Mansfield, "flowing from the King himself, sitting in this court, superintending the police, and preserving the peace of this country"[153]—it was Lord Coke's King's Bench, not the Crown, that brought mandamus into being.[154] That said, the Court of King's Bench,

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contemptuously, and uncivilly, with a loud voice, said . . . these words following, that is to say, ('Come and kiss.')." *Id. at* 1275. To another man, Bagg allegedly "threateningly and maliciously spoke these words following, that is to say, 'I will make thy neck crack.'" *Id.*

145. *Id.* at 1272 ("[Y]ou the mayor and commonalty of the borough aforesaid, little regarding the aforesaid James, unduly, and without reasonable cause, from the office of one of the twelve chief burgesses and magistrates of the borough aforesaid, unjustly have amoved . . . .").

146. Jenks, *supra* note 92, at 530.

147. HENDERSON, *supra* note 122, at 72 ("Out of *James Bagge* and Coke's sweeping theory came a development in the next one hundred and fifty years whose end product was the writ of mandamus as we know it.").

148. TAPPING, *supra* note 117, at 57.

149. Bagg's Case (1615) 77 Eng. Rep. 1271, 1277–78 (KB).

150. *Id.* at 1280–81.

151. *Id.* at 1277.

152. S.A. de Smith notes that the first reported case involving a judicial writ of mandamus that served a similar purpose to the modern writ was *Middleton's Case* (1573) 73 Eng. Rep. 752 (KB). *See* S.A. de Smith, *supra* note 102, at 50 & n.84.

153. R. v. Barker (1762) 96 Eng. Rep. 196, 196 (KB) (Mansfield, C.J.).

154. It is worth noting that although most mandamus writs came from the Court of King's Bench, the Court of Chancery occasionally issued the writ as well. 3 MATTHEW

under Lord Mansfield, recognized the relationship and the court's connection to the Crown in noting that "mandamus is certainly a prerogative writ, flowing from the King himself."[155]

The two views—those of Lord Mansfield and Lord Coke; the King versus the King's Bench as progenitor of mandamus—are perhaps not very far apart. As Robert Howell has argued, "from the perspectives of *form* and *function* at least, the pre-17th century factors were sufficiently proximate to be considered relevant in a causative sense to the development of the writ or order in its modern form."[156]

In any event, the writ as a judicial tool rapidly developed from *Bagg's Case* through the late eighteenth century. Two common applications were mandamus to restore someone to a public office and mandamus to ensure that lower courts fulfilled their duties.[157] But since the tenure of Lord Chief Justice of England John Holt, "the scope of the writ has been considerably extended; and it is no longer confined to the correction of municipal irregularities."[158] By that point in the Kingdom of Great Britain, the law of mandamus had not exactly cohered; "To some extent each particular circumstance was still often regarded as a separate line of precedent in itself and any application for its issue in a new circumstance was reasoned by analogy."[159] One 1948 treatise contains 252 pages of circumstances in which mandamus was sought in the seventeenth, eighteenth, and nineteenth centuries, concerning "most spheres of community life, even to the rather jocular cause of enforcing the swearing-in of a village ale-taster."[160] It would not, for example, be used to "restore a Fellow of a College, a proctor, or the steward of a manor."[161]

BACON, A NEW ABRIDGMENT OF THE LAW 540 (1740).

155. R. v. Barker (1762) 96 Eng. Rep. 196, 196.

156. Howell, *supra* note 103, at 135.

157. Audrey Davis, *A Return to the Traditional Use of the Writ of Mandamus*, 24 LEWIS & CLARK L. REV. 1527, 1540–43 (2020) (collecting cases).

158. Jenks, *supra* note 92, at 531 ("But the essentials laid down by Coke and Holt have been preserved.").

159. Howell, *supra* note 103, at 136.

160. *Id.* at 137; *see also* de Smith, *supra* note 102, at 51 (citing examples of writs issued to compel a corporation to admit and restore an alderman and to compel the holding of an election).

161. Jenks, *supra* note 92, at 531 (citing King v. Oxenden (1619) 90 Eng. Rep. 1139 (KB); Parkison's Case (1689) 90 Eng. Rep. 977 (KB)).

Some key principles emerged from this disparate case law. First, a party could seek a writ of mandamus "to compel the performance of a wide range of public or quasi-public duties, performance of which had been wrongfully refused."[162] Second, the lower official's duty had to be ministerial, not discretionary.[163] Third, mandamus would issue only where "there is no other adequate legal remedy for it," as the Court of King's Bench declared in an exemplar 1762 case.[164] Fourth, issuance of mandamus was in the court's discretion. For instance, a court was entitled to refuse mandamus "to applicants if they have been guilty of laches or misconduct"—"notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty."[165] More than that, the writ was an extraordinary remedy; Blackstone called it a "high prerogative writ" of a "most extensively remedial nature."[166] Fifth, mandamus could issue against either a court or a public official[167]—without apparent limitation on who that official could be.[168]

Around this transition point from the United Kingdom to the United States, by the late eighteenth century the legislature began to acquiesce in the mandamus scheme. By then, Parliament had "become prepared to directly promote the remedy of mandamus as a means of remedying abuses in

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162. de Smith, *supra* note 102, at 51; *see also* TAPPING, *supra* note 117, at 58–59 ("[Mandamus] is not applicable as a redress for mere private wrongs."). Relatedly, "the writs were typically prosecuted in the name of the Crown (typically 'R' for 'Rex' (King) or 'Regina' (Queen)), such that when they issued, they did so as a 'command[]' issuing from the monarch herself, as if still sitting in person on the Bench." Pfander & Wentzel, *supra* note 133, at 1302 (collecting cases). This, of course, was a fiction, as the courts were issuing or refusing mandamus relief without the sovereign's imprimatur.

163. Jaffe, *supra* note 142, at 415; GOODNOW, *supra* note 95, at 295.

164. R. v. Barker (1762) 96 Eng. Rep. 196 (KB); *see also* de Smith, *supra* note 102, at 44; *see also, e.g.*, Case of Andover (1701) 90 Eng. Rep. 1143, 1143 (KB) ("[I]t is rare to grant [mandamus] when one has any other remedy.").

165. de Smith, *supra* note 102, at 44.

166. 3 WILLIAM BLACKSTONE, COMMENTARIES *110.

167. de Smith, *supra* note 102, at 51 ("Through the writ of *mandamus* the King's Bench compelled the carrying out of ministerial duties incumbent upon both administrative and judicial bodies."); 3 WILLIAM BLACKSTONE, COMMENTARIES *110 ("[Mandamus] issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them: and this not only by restraining their excesses, but also by quickening their negligence . . . .").

168. Pfander & Wentzel, *supra* note 133, at 1297 (citing Bagg's Case (1615) 77 Eng. Rep. 1271, 1279 (KB)).

particular cases."[169] A number of enactments, for example from 1711 and 1843, aimed to increase access to the remedy.[170]

B. Mandamus in the Colonies

We turn to colonial America. Before the American Revolution, the British colonies in North America adopted much of English common law, including the use of writs like mandamus. The practice and principles behind the writ were familiar to American legislators, lawyers, and judges, though that view is not universal.[171] Some colonial courts had the authority to issue this writ.[172] After the Revolution but before the adoption of the U.S. Constitution and the Judiciary Act of 1789, state courts in the newly independent states had the power to issue writs of mandamus based on their own state constitutions and statutes.[173] Yet the concept did not transplant seamlessly. In Massachusetts, for instance, there was "considerable opposition on the part of the provincial legislature to mandamus," as the legislature asserted that executive oversight in this manner was within its purview.[174] In 1795—that is, before *Marbury v. Madison*—the U.S. Supreme Court denied a writ of mandamus directed toward a New York District Court judge to issue an arrest warrant for the captain of a French ship. The Supreme Court rejected the writ because it would override the lower court's discretion, thus comporting with the King's Bench's limits on the use of mandamus.[175]

Soon after independence, Congress passed the Judiciary Act of 1789. Section 13 of that Act gave the Supreme Court the power "to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any

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169. Howell, *supra* note 103, at 140.

170. *Id.* (citing 9 Ann. c. 20 (Gr. Brit.); 6 & 7 Vict. c. 89 (UK)).

171. *Compare* James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1568 (2001) (deeming the King's Bench to be one judicial system "with which the members of the Congress of 1789 were most familiar"), *and Ex parte* Newman, 81 U.S. 152, 165 (1871) ("Power to issue writs of mandamus to any courts appointed under the authority of the United States was given to this court by the thirteenth section of the Judiciary Act, in cases warranted by the principles and usages of law."), *with* SAMUEL SLAUGHTER MERRILL, LAW OF MANDAMUS 3 (1892) ("The states of the American Union have adopted the English common law, but generally of a period when the writ of mandamus had been but little used, and the principles . . . had not been formulated.").

172. Jaffe, *supra* note 142, at 417–18; Leonard S. Goodman, *Mandamus in the Colonies—The Rise of the Superintending Power of American Courts*, 1 AM. J. LEGAL HIST. 308, 311–12 n.13 (1957) (collecting cases).

173. Jaffe, *supra* note 142, at 418.

174. *Id.* at 418.

175. United States v. Lawrence, 3 U.S. (3 Dall.) 42, 42, 53 (1795).

courts appointed, or persons holding office, under the authority of the United States."[176] Yet, Article III of the new U.S. Constitution gave the Supreme Court original jurisdiction only over those "[c]ases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party," leaving the Court with only appellate jurisdiction in all other cases.[177]

In the most famous mandamus case ever decided by the Supreme Court, William Marbury asked the Court to issue a writ of mandamus to Secretary of State James Madison to deliver Marbury his commission as a justice of the peace in Washington, DC.[178] This raised an important question: Was the traditional English take on mandamus consistent with the new U.S. Constitution's limitation on Supreme Court original jurisdiction in Article III? Writing for the Court in *Marbury*, Chief Justice Marshall answered in the negative.[179] The Court held that Section 13 of the Judiciary Act of 1789 conflicted with Article III because it enlarged the Court's jurisdiction, by authorizing the Court to issue the writ "to any courts appointed, or persons holding office, under the authority of the United States"[180]—even in matters not invoking the Court's original jurisdiction.[181] The holding may have come under criticism in the years since,[182] but the decision stands. As a procedural matter, if *Marbury* were heard from 1946 to the present, it would likely be an APA unreasonable delay case under 5 U.S.C. § 706(1) or a Mandamus Act case under 28 U.S.C. § 1361.[183] Under such authorities in a lower court, Marbury may very well have succeeded. Chief Justice Marshall recognized that Madison had a legal duty to deliver Marbury's commission, and his refusal to do so was an "illegal act" presenting "a plain case for a mandamus."[184]

Note that Section 13 itself aligned with the English common law's limitations. Its text restricted mandamus to courts and officers acting under the authority of the United States.[185] The *Marbury* opinion tracked these

176. Judiciary Act of 1789, ch. 20, 1 Stat. 73 § 13.

177. U.S. CONST. art. III, § 2, cl. 2.

178. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155 (1803).

179. *Id.*

180. *Id.* at 148, 153–54.

181. *Id.* at 173.

182. *See, e.g.*, Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 456 (1989).

183. Pfander & Wentzel, *supra* note 133, at 1299–1300 (discussing how modern mandamus jurisdiction under § 1361 and judicial review under the APA reflect continuity with common law writ practice and would likely provide a procedural vehicle for relief in a case like *Marbury* today), *inspired by* JONATHAN R. SIEGEL, FEDERAL COURTS: CASES AND MATERIALS 4–19 (2d ed. 2019).

184. *Marbury*, 5 U.S. (1 Cranch) at 170, 173.

185. Pfander, *supra* note 171, at 1572 ("Such language made clear that mandamus would

limitations. It distinguished ministerial duties from discretionary duties: mandamus could compel the Secretary of State to fulfill his ministerial duties, but not his policymaking duties in his capacity as "agent[] of the executive."[186] It was Article III that stood as an obstacle to the Supreme Court considering issuing mandamus under these conditions.[187]

There are limits to the writ for the lower courts, and the Supreme Court has enforced them. For example, in 1813's *M'Intire v. Wood*, the plaintiff had received a writ of mandamus from the lower court, directing the register of the land offer to grant final certificates of purchase to the plaintiff for certain lands to which he was entitled.[188] The Supreme Court held that although the court, by statute, had jurisdiction over "suits of a civil nature at common law or in equity . . . the Circuit Court did not possess the power to issue the mandamus moved for."[189] Specifically, the Judiciary Act did not confer that power on any court other than the Supreme Court.[190] The Constitution might tolerate that, but there "the legislature have not thought proper to delegate the exercise of that power to its Circuit Courts, except in certain specified cases."[191]

Such power *was* found in the District of Columbia Circuit Court in an 1838 case, *Kendall v. United States ex rel. Stokes*.[192] Mandamus was sought there against the postmaster general to issue disputed payments for transporting the mail pursuant to contract.[193] The statute in *Kendall*, unlike the Judiciary Act, empowered the District to issue mandamus to compel a "ministerial act."[194] The Supreme Court affirmed the lower court's issuance of mandamus, emphasizing that mandamus would be properly used "to enforce the performance of a mere ministerial act, which neither [the executive officer at issue, the Postmaster General,] nor the President had any authority to deny or control."[195] The upshot is that when Congress has granted a right, it would "involve a monstrous absurdity in a well-organized government, that

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perform its traditional office as a remedy for government inaction and would not play a role in regulating the relationship between parties to private civil litigation.").

186. *Marbury*, 5 U.S. (1 Cranch) at 166 ("[Where] the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.").

187. *Id.* at 173.

188. M'Intire v. Wood, 11 U.S. (7 Cranch) 504, 504–05 (1813).

189. *Id.* at 505–06.

190. *Id.* at 506.

191. *Id.*

192. 37 U.S. (12 Pet.) 524 (1838).

193. *Id.* at 608–09.

194. *Id.* at 610.

195. *Id.*

there should be no remedy."[196] But the courts should very carefully police their mandamus authority and ensure it springs from a statute. Unlike in the common law courts of England, there was no sovereign whose authority could justify prerogative writs. A legislative act was needed, and then the writ had to conform to common law understandings.

But despite recognition that mandamus but be appropriate in some lower courts, the Court moved in the opposite direction after Chief Justice Marshall was succeeded by Roger Taney. In 1840's *Decatur v. Paulding*,[197] the widow of a naval officer killed in action sued to compel pension payments under the terms of a statute creating two different pension schemes. There was a dispute of which of the two provisions should pay the widow.[198] The Court noted that executive officials were using their judgment to "expound[] the laws and resolutions of Congress," and the relevant officer had to "exercise[] his judgment upon the construction of the law" in managing the pensions.[199] It then held that the choice of which pension scheme to use was discretionary.[200] Accordingly, mandamus was unavailable.[201] Although that might resemble a question of statutory interpretation—a question fit for the courts to resolve—the Court expressed reluctance to countenance the "judgment and discretion" that agency heads were "continually required to exercise [when] expounding the laws and resolutions of Congress."[202] As one scholar noted, "Although Marshall may have hoped to restore the mandamus power

196. *See id.* at 624.

197. 39 U.S. (14 Pet.) 497 (1840).

198. *Id.* at 513–14.

199. *Id.* at 515.

200. *Id.*

201. *Id.* at 516–17 (distinguishing the case from *Kendall*, where the act at issue was entirely ministerial).

202. *Id.* at 515. Justice Antonin Scalia and some commentators have drawn parallels between this reasoning and the reasoning behind judicial deference in *Chevron*. Kim, *supra* note 76, at 1503 & n.147 (citing opinions by Justice Scalia including his concurring opinion in *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 111–12 (2015)). Both regimes gave the Executive Branch broad discretion to interpret ambiguous statutes: mandamus deference supposing that executive officers had the discretion and expertise to decide how to interpret such statutes, thus precluding a writ forcing one interpretation over another, and *Chevron* deference resting on the premise that statutory interpretation of ambiguous statutes was a policy decision that agencies are especially equipped to make, thus raising the standard to challenge those interpretations. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984). *But see* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 947–48, 958 (2017) (arguing that any deference extended to executive officers' legal interpretations was due to the writ's high standard, not the particular substance of the executive action sought to be compelled).

in a later case [from *Marbury*], Congress took no action and the Court refused to adopt the sort of dynamic interpretation that might have done the trick."[203]

C. *Post-*Marbury *Statutory Developments*

For the rest of the nineteenth century and through the early twentieth century, courts issued few writs of mandamus except in the clearest cases.[204] Without robust access to mandamus, plaintiffs had few options.[205] An aggrieved plaintiff could pursue a tort claim against the officer, but those hinged on state tort law and had to contend with sovereign immunity if the officer was acting within the scope of their official duties.[206]

Given the Supreme Court's focus on what the statutes permit, it is worth tracking what Congress did since *Marbury*. Again, absent a statute enabling mandamus (among other conditions), a court could not issue mandamus.[207] This was not a problem in *Kendall*, as the Court construed the relevant federal statute as conferring Maryland's common-law jurisdiction on the District of Columbia federal court in 1838.[208] In other words: "as the inheritor of the common-law jurisdiction of Maryland, the circuit court of the District of Columbia was empowered to issue original writs of mandamus,"[209] and the "timing of the statute and its special connection to Maryland made the District of Columbia court's mandamus authority unique among the lower federal courts."[210] This meant that the District of Columbia was, absent new legislation, the only appropriate venue for federal mandamus relief—although the case law grew to be "so complex and so uncertain that even [that]

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203. Pfander, *supra* note 171, at 1597.

204. Pfander & Wentzel, *supra* note 133, at 1308.

205. *See* Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 6–7 (2015).

206. *Id.*

207. Clark Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1500 (1962).

208. Kendall v. U.S. *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 625–26 (1838); *id.* at 631–33 (Taney, C.J., dissenting) (noting the majority's argument that "before the cession of the District of Columbia to the United States, county courts were established in Maryland corresponding in character with what are called circuit courts in most of the states. These courts possessed general jurisdiction, civil and criminal, in the respective counties," and concluding for himself that contrary to the majority, "the authority to issue this writ of mandamus [derives] from the first section of the act of congress, adopting the laws of Maryland as they then existed.").

209. Byse, *supra* note 207, at 1499–1500.

210. Pfander, *supra* note 171, at 1593 n.328 (2001); Kenneth Culp Davis, *Mandatory Relief from Administrative Action in the Federal Courts*, 22 U. CHI. L. REV. 585, 587 (1955) [hereinafter *Mandatory Relief*].

simple question [became] the subject of conflicting lines of cases."[211] This was perhaps not a significant concern for regulated parties seeking to challenge the failure to complete a ministerial act by officials based in Washington. Courts also always retained the option to duly issue injunctive relief, and it can be difficult to draw the line between mandatory injunctions and prohibitory injunctions.[212] And special statutes might establish mandamus relief for specific subject matters.[213] But "[l]imits on the jurisdictional reach of lower federal courts sitting in the District of Columbia, . . . made the mandamus remedy of doubtful efficacy in at least some distant controversies."[214] It also raised the issue of agencies headquartered outside of the District of Columbia evading mandamus accountability—including, for example, agencies headquartered in nearby Virginia.[215] Kenneth Davis called it "[t]he greatest single deficiency of mandamus."[216]

The Judiciary Act of 1789 did not resolve this issue. Section 14 of the Judiciary Act, which concerns in part writs in aid of lower-court jurisdiction,[217] is now codified in 28 U.S.C. § 1651 as the All Writs Act.[218] This aspect of the All Writs Act was last amended in 1948.[219] The current statute essentially retains the original ancillary-jurisdiction limitation: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable

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211. *Mandatory Relief*, *supra* note 210, at 585. Part of the reason why some courts may have permitted mandamus relief outside of the District of Columbia, by the time of Kenneth Davis's article in 1955, is the variable of the Administrative Procedure Act of 1946, which is discussed later. *Id.* (citing the APA).

212. *Id.* at 589–91.

213. *See* Note, *Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts*, 38 COLUM. L. REV. 903, 905 n.13 (1938) (collecting statutes).

214. Pfander, *supra* note 171, at 1598.

215. *See* Byse, *supra* note 207, at 1502.

216. *Mandatory Relief*, *supra* note 210, at 608. Davis also viewed this as contrary to the APA's unreasonable delay provision in 5 U.S.C. § 706(1). *Id.* at 609.

217. Judiciary Act of 1789, ch. 20, 1 Stat. 73 § 14 ("*And be it further enacted*, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.").

218. 28 U.S.C. § 1651; *see* Davis, *supra* note 157, at 1546–47 (arguing that the All Writs Act also incorporates Section 13, even though Section 13 was eliminated from the 1948 amendment, because the legislative history shows that "this section was only eliminated to avoid redundancy"); H.R. Rep. No. 80-308, at A145 (1947) ("The special provisions . . . with reference to writs of prohibition and mandamus . . . were omitted as unnecessary in view of the revised section.").

219. *See* Davis, *supra* note 157, at 1547.

to the usages and principles of law."[220] *Marbury* does not restrict reading mandamus into this statute for the lower courts, and the legislative history may suggest that Congress saw any reference to mandamus as superfluous,[221] but neither does this statute reference mandamus or explicitly confer on courts the power to issue mandamus relief. Whatever else they did, the 1948 amendments also did not enlarge the mandamus power recognized by the Judiciary Act, which took from the common law tradition: mandamus cannot be a basis to appeal an underlying decision that the plaintiff thinks was wrongly decided.[222] In the notes accompanying the 1948 amendments, Congress expressly endorsed the approach taken by the Supreme Court in two 1945 cases, each of which emphasized the "traditional" purpose of mandamus and denounced the use of "extraordinary writs as a means of review."[223]

The Federal Rules of Civil Procedure, first promulgated in the 1930s, today emphasize that the "writs of . . . mandamus are abolished," and "[r]elief previously available through them may be obtained by appropriate action or motion under these rules."[224] This language might sound severe, but it is "clear in preserving the substance of mandamus,"[225] and emphasizes the general principle laid down by the early Supreme Court cases: courts do not have free rein to issue mandamus outside of traditional and statutory limits.[226] This is consistent with the trend seen in other former British territories, which have created "statutorily provided streamlined 'Application for Review' procedures to obtain judicial orders formerly given under the nomenclature of one or more of the prerogative writs or orders."[227]

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220. 28 U.S.C. § 1651(a).

221. *See* Carol R. Miaskoff, *Judicial Review of Agency Delay and Inaction under Section 706(1) of the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 635, 637 (1987).

222. *See* Davis, *supra* note 157, at 1548–49.

223. H.R. Rep. No. 80-308, at A145 (1947) ("The revised section is expressive of the construction recently placed upon such section by the Supreme Court in *U.S. Alkali Export Assn. v. U.S.* . . . and *De Beers Consol. Mines v. U.S.* . . . ."); U.S. Alkali Exp. Ass'n v. United States, 325 U.S. 196, 202 (1945); De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 219 (1945).

224. FED. R. CIV. P. 81(b).

225. *Mandatory Relief*, *supra* note 210, at 588.

226. Davis, *supra* note 157, at 1551 (arguing that Congress and the Supreme Court intended to keep mandamus limited to its original use).

227. Howell, *supra* note 103, at 145.

D. Mandamus Resurgence in the Mid-Twentieth Century

1. Mandamus

It took until the mid-twentieth century for Congress to fix the geographic quirk of mandamus being limited to the District of Columbia. In 1962, Congress passed legislation that explicitly gave all federal courts mandamus authority over matters arising within their jurisdictions.[228] The Mandamus Act, present-day 28 U.S.C. § 1361, states in full, "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[229] That language, plus Section 1361's legislative history, suggests that the Act's purpose "is to confer on federal district courts outside the District of Columbia jurisdiction to review and compel official action similar to that long exercised by the federal courts within the District of Columbia."[230] Congress's grant of such jurisdiction in the Mandamus Act "does not expand the generally recognized scope of mandamus."[231]

Given the Mandamus Act, 28 U.S.C. § 1361, and the common law, there are a number of elements that a mandamus petitioner today must satisfy. The petitioner must show that they have a clear and demonstrable right to relief, that the government official has a clear duty to perform the act in question, and no other adequate remedy exists.[232] The petitioner must then demonstrate that the circumstances warrant issuance of the writ,[233] such as "timing, resources, and efficacy."[234] Nevertheless, some have criticized the federal judiciary's modern mandamus approach as straying from the English origins of the doctrine, as it is used not just to compel officers to perform ministerial duties, but also to reexamine the exercise of discretion.[235] "Twentieth-century mandamus case law on the 'usefulness' of a mandamus action

228. *See* Mandamus and Venue Act of 1962, Pub. L. No. 87-748, § 1(a), 76 Stat. 744, 744 (codified at 28 U.S.C. § 1361); *see, e.g.*, M'Intire v. Wood, 11 U.S. (7 Cranch) 504, 505–06 (1813) (holding that the circuit court lacked jurisdiction to issue mandamus to a federal officer).

229. 28 U.S.C. § 1361.

230. Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 318–19 (1967).

231. Plaskett v. Wormuth, 18 F.4th 1072, 1081 (9th Cir. 2021) (quoting Nova Stylings, Inc. v. Ladd, 695 F.2d 1179, 1180 (9th Cir. 1983)).

232. Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380–81 (2004); *id.* at 392 (Stevens, J., concurring).

233. *Id.* at 381 (majority opinion).

234. *In re* Aiken County, No. 11-1271, 2012 WL 3140360, at *1 (D.C. Cir. Aug. 3, 2012) (Kavanaugh, J., concurring in an abeyance).

235. Davis, *supra* note 157, at 1558.

demonstrated that courts also considered broader effects on governance and the public purpose in their mandamus inquiry."[236] These considerations include harmful public effects, such as interference with agency processes, or the rights of third parties.[237]

The courts of appeals have used mandamus to address pure unreasonable delay claims. The wellspring of federal unreasonable delay analysis is *Telecommunications Research & Action Center v. FCC*, [238] or *TRAC*, a 1984 opinion from the D.C. Circuit. The alleged delinquent in *TRAC* was the Federal Communications Commission (FCC).[239] The FCC had ratemaking authority under a federal statute, which it expounded through formal adjudications.[240] Several non-profit corporations and public interest groups claimed that these authorities meant the FCC should require AT&T to reimburse ratepayers for certain services and development costs.[241] Yet, the FCC did not take final action on these requests.[242] Although the groups could petition the D.C. Circuit for review of a final FCC decision,[243] there was no final decision, so the groups needed a different jurisdictional hook to access the court of appeals.[244] Resting on the All Writs Act—with its tool of writs necessary to aid a court in exercising its jurisdiction—the court held that it could consider a writ of mandamus to compel action by the FCC to aid its later petition-for-review jurisdiction, "to protect its prospective jurisdiction."[245] Otherwise, and from an instrumental perspective, the court might never have the opportunity to exercise jurisdiction later on, when the agency finally completes agency action and then review may be sought of that final agency action.[246] The court also relied in part on the APA, which is discussed below, although it acknowledged that the APA, which creates a cause of action in the *district courts*, "unquestionably does not confer an independent grant of jurisdiction" to issue mandamus relief like the D.C. Circuit was considering.[247] Courts, both in the D.C. Circuit and elsewhere, have relied on *TRAC*

236. Kim, *supra* note 76, at 1504–05.

237. *Id.* at 1505.

238. 750 F.2d 70, 72 (D.C. Cir. 1984).

239. *See id.*

240. *See id.* at 73–74.

241. *See id.*

242. *See id.*

243. *Id.* at 75 (citing 28 U.S.C. § 2342(1) (1982); 47 U.S.C. § 402(a) (1982)).

244. *See id.*

245. *Id.* at 76 ("Because 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.").

246. *See id.*

247. *See id.* at 76–77.

in the forty years since, often by name, even as the circumstance-specific approach of that case has been applied to countless other fact patterns and cases have refined the hexagonal test, as explained later.[248] It has been several decades since the Supreme Court last addressed when an agency's delay demands a writ of mandamus by the courts.[249]

2. The APA: Section 706(1)

Besides 28 U.S.C. § 1361, the central legislative enactment in this field is the APA. The APA, enacted in 1946, does not set clear deadlines for any agency to perform any particular agency action.[250] It says merely that "within a reasonable time, each agency shall proceed to conclude a matter presented to it."[251] Section 10(e) of the APA says, "So far as necessary to decision and where presented the reviewing court . . . shall (A) compel agency action unlawfully withheld or unreasonably delayed."[252] Section 10(e)(A) was later codified as 5 U.S.C. § 706(1).[253] This provision creates a cause of action for individuals aggrieved by agency delay, within the parameters of the remainder of the APA and Article III's case-or-controversy requirement.

a. Unreasonably Delayed and Unlawfully Withheld

Again, the APA does not explain precisely what "unreasonably delayed" action means. The APA House committee report stated that no agency "shall in effect deny relief or fail to conclude a case by mere inaction, or proceed in a dilatory fashion to the injury of the person concerned. No agency

248. *See generally infra* Part III.E.1 (discussing more recent cases that have relied on *TRAC*).

249. Sant'Ambrogio, *supra* note 69, at 1383 n.1 (citing Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 10 (1817)); ICC v. United States *ex rel.* Humboldt S.S. Co., 224 U.S. 474, 485 (1912); Smith v. Ill. Bell Tel. Co., 270 U.S. 587, 590 (1926)). The U.S. Supreme Court recently denied a petition for a writ of certiorari to examine "[w]hether exceptions exist to the three demanding conditions for mandamus articulated in *Cheney v. U.S. District Court for District of Columbia*." Petition for a Writ of Certiorari at 1, Juliana v. United States, No. 24-645 (Sept. 24, 2024), *cert. denied*, 145 S. Ct. 1428 (2025).

250. Pub. L. 79-404, § 10(e), 60 Stat. 237 (1946).

251. 5 U.S.C. § 555(b).

252. APA § 10(e), 60 Stat. at 243–44.

253. Congress did once make slight grammatical and style revisions to 5 U.S.C. § 706 in 1966, but the changes were not material. For example, the 1966 revisions included changing, "To the extent necessary to decision and when presented, the reviewing court . . . shall (1) compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706 (1966), to, "The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706 (2025).

should permit any person to suffer injurious consequences upon unwarranted official delay."[254]

For its part, the *Attorney General's Manual* stated of this section, "This restates the present law as to the scope of judicial review."[255] It reiterated that § 706(1) "appears to be a particularized restatement of existing judicial practice under section 262 of the Judicial Code (28 U.S.C. [§] 377)," which closely resembles modern-day 28 U.S.C. § 1651, the All Writs Act.[256] This reinforces that § 706(1) bears resemblance to the scope of the writ of mandamus, but does nothing to suggest that its grant of authority is coextensive with the All Writs Act or Mandamus Act.[257]

For the proposition that § 706(1) was simply restating the law as it stood in 1946 (i.e., federal mandamus being available only in the District of Columbia), the *Attorney General's Manual* approvingly cited *Safeway Stores, Inc. v. Brown*, a decision of the U.S. Emergency Court of Appeals, a court constituted to hear wartime price-control matters.[258] That case involved a provision of the then-Emergency Price Control Act which required the Price Administrator to either grant a protest, deny it, notice it for a hearing, or provide an opportunity for the submission of further evidence, and to do so "[w]ithin a reasonable time" after the protest was filed, "but in no event more than thirty days after such filing or ninety days after the issuance of the regulation of order . . . in respect of which the protest is filed, whichever occurs later."[259] A complainant could then petition the Emergency Court of Appeals for review of a protest denial.[260] The complainant in *Safeway*, a grocery store chain, claimed that the Administrator failed to take action on a protest within those periods, hence the Administrator had effectively denied the protest.[261] The court disagreed.[262] It noted that the judicial review provision only applied to protests which "have been actually denied by an overt act of the Administrator," and the timing requirements violated there were triggered by something less (e.g., simply noticing the protest for a hearing).[263] The court also made

254. S. Doc. No. 79-248, at 263–64 (1946).

255. CLARK, *supra* note 35, at 108.

256. "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." 28 U.S.C. § 377 (1940).

257. *Id.*

258. Safeway Stores, Inc. v. Brown, 138 F.2d 278 (Emer. Ct. App. 1943).

259. *Id.* at 279 (quoting 50 U.S.C. app. § 923(a) (1942) (repealed 1946)).

260. *Id.* (citing 50 U.S.C. app. § 924(a) (1942) (repealed 1946)).

261. *Id.*

262. *Id.*

263. *Id.* at 279–80.

an instrumental consideration: "[I]t is obvious that in many cases it would be wholly impracticable for the Administrator to take considered final action on a protest within the periods specified in the statute."[264] Thus, while the Administrator had a statutory obligation to take certain actions within a timeframe, and apparently did not take any of those actions, that delay was unreviewable under the statute because the statute made only *action* reviewable. "It is of course within the power of Congress to confer such additional jurisdiction upon this court but we may not assume to exercise it without statutory authority."[265] Once again, some independent statutory grant of jurisdiction is necessary to review delay.

The *Safeway* Court then identified just such a grant of jurisdiction for the Administrator's delay: the All Writs Act.[266] The court held, "Under such circumstances mandamus will lie where an inferior tribunal or agency refuses to act even though the act required involves the exercise of judgment and discretion."[267] The court reinforced that, at most, a court could "require the Administrator to exercise his discretionary power with respect to the protest without any direction as to the manner in which his discretion should be exercised."[268] This is consistent with *TRAC*, which would come over forty years later and was a mandamus case that cited the APA § 706(1) as support.[269] *TRAC* would adopt the theory that it needed to assert mandamus jurisdiction in aid of its jurisdiction to later review a final agency action reached when the delay ceased. [270] The *Attorney General's Manual* endorsed *Safeway*, citing it three times in its brief treatment of § 706(1).[271] The APA appeared to create the delay-review jurisdiction for federal district courts that *Safeway* found wanting, in addition to leaving intact the All Writs Act and

264. *Id.* at 280.

265. *Id.*

266. *See id.* ("If the Administrator should unreasonably delay final action it would seem clear that this court, upon a proper showing, may under the authority of Section 262 of the Judicial Code, 28 U.S.C.A. § 377, in aid of its jurisdiction issue an order in the nature of a writ of mandamus directing the Price Administrator to take action upon a pending protest." (citing Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943); McClellan v. Carland, 217 U.S. 268, 280 (1910); Knickerbocker Ins. Co. v. Comstock, 83 U.S. (16 Wall.) 258, 270 (1872)).

267. *Id.*

268. *Id.*

269. 750 F.2d 70, 76 (D.C. Cir. 1984).

270. *Id.*

271. CLARK, *supra* note 35, at 108.

writ of mandamus that *Safeway* noted could be used in the specialized court of appeals available under that particular statutory scheme.[272]

Beyond citing *Safeway*, the *Attorney General's Manual* emphasized a connection between § 706(1) and mandamus: "Orders in the nature of a writ of mandamus have been employed to compel an administrative agency to act, or to assume jurisdiction, or to compel an agency or officer to perform a ministerial or non-discretionary act. [What is now § 706(1)] was apparently intended to codify these judicial functions."[273] These are generally the uses of the writ of mandamus, only updated to explicitly reflect an "administrative agency" in lieu of a specific official or judicial officer.

An appendix to the *Attorney General's Manual* that commented on an earlier version of the APA (but which may have included the same language in § 706(1) that ultimately passed) added, "The power of the court to direct or compel agency action unlawfully withheld or unreasonably delayed is not intended to confer any nonjudicial functions or to narrow the principle of continuous administrative control enunciated by the Supreme Court in *Federal Communications Commission v. Pottsville Broadcasting Co.*"[274] That case emphasized the need to defer to agencies: "Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."[275] Later courts recognized that a federal district court hearing an APA claim enjoys "both general equitable powers and powers granted under the APA" to "insure that statutory rights are not denied" by delay.[276]

The *Attorney General's Manual* also highlighted a key limitation of § 706(1): "Obviously," the Manual wrote, "the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. In fact, with respect to constitutional courts, it could not do so."[277] This limitation was shared with mandamus.[278] "[A] court may require an agency to take action upon a matter, without directing how it shall act,"[279] which is again consistent with the historical writ of mandamus.[280] This is also consistent with the separation of powers, a

272. *Safeway Stores*, 138 F.2d at 278.

273. CLARK, *supra* note 35, at 108 (internal citation omitted).

274. *Id.* at 138 (internal citations omitted).

275. FCC v. Pottsville Broad. Co., 309 U.S. 134, 146 (1940).

276. Caswell v. Califano, 583 F.2d 9, 15 (1st Cir. 1978).

277. CLARK, *supra* note 35, at 108 (internal citations omitted).

278. Miaskoff, *supra* note 221, at 637.

279. CLARK, *supra* note 35, at 108 (internal citations omitted).

280. *See supra* Part III.A; *see also, e.g.*, Recent Case, Horton v. Gill, *supra* note 94, at 397.

constitutional limitation that of course did not apply to and restrict the writ's use in pre-eighteenth century England.[281] One common consideration of § 706(1) cases is the competing priorities that an agency faces, which is given deference in many other contexts, such as the decision not to institute enforcement proceedings[282] or how to allocate lump-sum appropriations within the agency.[283] The Senate Committee on the Judiciary likewise reinforced that § 706(1) was not intended to greenlight judicial interference in the agencies' operations by directing them to achieve specific results.[284]

The *Attorney General's Manual* highlights one feature of § 706(1) that appears to deviate from how the historical writ of mandamus was used: "The power thus stated is vested in 'the reviewing court', which, in this context, would seem to be the court which has or would have jurisdiction to review the final agency action."[285] This emphasizes that the act upon review being delayed should, once consummated, become a final agency action.

This is an important clarification. Take statutes requiring congressional reporting, which are common.[286] For example, 8 U.S.C. § 1377a requires U.S. Citizenship and Immigration Services to create a downloadable, searchable, and sortable report and post it on a public website.[287] The report must include data on the number of noncitizens that the agency has found to have a credible or reasonable fear of persecution or torture.[288] USCIS must update the report "semimonthly."[289] If an individual wanted to challenge USCIS's failure to update this report, they might be able to make out a mandamus claim provided that they could demonstrate standing: USCIS appears to have a nondiscretionary, ministerial duty to collect data and update the website. But for § 706(1) relief, the individual should also have to show that

281. Miaskoff, *supra* note 221, at 658 ("To the extent that such use of section 706(1) offends the separation of powers doctrine by directing the agency's exercise of discretion, it is improper.").

282. Heckler v. Chaney, 470 U.S. 821 (1985).

283. Lincoln v. Vigil, 508 U.S. 182 (1993).

284. Miaskoff, *supra* note 221, at 637 (citing STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, 1944–46, at 39 (1946) [hereinafter APA JUDICIARY COMMITTEE PRINT]).

285. CLARK, *supra* note 35, at 108.

286. *Congressionally Mandated Reports*, GOVINFO, https://www.govinfo.gov/app/collection/CMR [https://perma.cc/8BM3-MR3F] (last visited Dec. 20, 2024); *see, e.g.*, 15 U.S.C. § 2709(a) (report by the Secretary of Energy).

287. 8 U.S.C. § 1377a.

288. *Id.* § 1377a(a).

289. *Id.* § 1377a.

the reports, once issued, are "final agency action"[290]—something they arguably are not, as they do not appear to be a rule establishing any sort of policy or adjudicating the rights of the agency or any parties.[291] The same dynamic attends statutes requiring personnel appointments, like 7 U.S.C. § 7464, which obliges the Secretary of Agriculture to appoint members to the National Kiwifruit Board, some of them "based on a proportional representation of the level of domestic production and imports of kiwifruit (as determined by the Secretary)."[292] Mandamus is arguably available if the Secretary fails to appoint a qualifying member—or fails to appoint anyone at all.[293] But § 706(1) would not be available, as the appointment of an executive branch officer probably would not qualify as final agency action.[294] The same is true of the statutory requirement in 42 U.S.C. § 18934 that the Director of the National Institute of Standards and Technology "establish a program to support measurement research to inform the development of best practices, benchmarks, methodologies, procedures, and voluntary, consensus-based technical standards for biometric identification systems."[295] This could be an example of where mandamus and § 706(1) relief diverge—assuming the *Attorney General's Manual*'s statement can be accepted, which it should be given the concern in the APA as a whole on final agency action.

Besides the questions of whether (1) a court may withhold a remedy upon concluding that delay is unreasonable for the purpose of respecting the separation of powers, and (2) the agency's unfulfilled duty would, upon completion, qualify as an agency action, the APA left alone the writ of mandamus, even though § 706(1) created a cause of action that the *Attorney General's Manual* recognizes as mandamus-like. We do not view the relationship between mandamus and § 706(1) as being the agency delay equivalent of *Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*,[296] a case in which then-D.C. Circuit Judge Antonin Scalia concluded that § 706(2)(B)–(E) are cumulative to § 706(2)(A).[297] Section 706(1) is indeed not cumulative to and a subpart of mandamus, nor is the opposite true.

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290. 5 U.S.C. § 704.

291. *See id.* §§ 551(4), 706(1).

292. 7 U.S.C. § 7464(a)(1).

293. Safeway Stores, Inc. v. Brown, 138 F.2d 278, 280 (Emer. Ct. App. 1943).

294. 5 U.S.C. § 706(1).

295. 42 U.S.C. §§ 18934(a), 18921(1). The same statutes require the Comptroller General to "submit a detailed report to Congress on the impact of biometric identification technologies on historically marginalized communities." *Id.* § 18934(c). That subsection stands for the same point.

296. 745 F.2d 677 (D.C. Cir. 1984).

297. *See id.* at 683–84.

b. Unlawfully Withheld

Although our principal focus is on unreasonable delay and its relationship to mandamus, we must also address the sibling of unreasonable delay in § 706(1): "agency action unlawfully withheld."[298] An open question is the meaning of "unlawfully withheld" and "unreasonably delayed," and whether different standards apply to each. The APA does not define "unlawfully withheld" or "unreasonably delayed."[299] But the terms do seem non-duplicative. In *Safeway*, the case cited approvingly by the *Attorney General's Manual*, the court held that even a failure to meet a statutory deadline does not automatically render the delay judicially reviewable as final agency action.[300]

Courts seem to treat "unreasonably delayed" as an agency having a duty to do something, and falling temporally short to some degree.[301] If that sounds oversimplified, it is; recall our exploration at the top of the Article regarding the difficulty in defining "delay," "backlog," and so forth.

Courts diverge on the definition of "unlawfully withheld." The Tenth Circuit agrees that the text is silent, and "the floor debates and committee reports attendant to the APA provide little guidance regarding any possible distinction between 'unlawfully withheld' and 'unreasonably delayed.'"[302] The Tenth Circuit could not find a distinction from elsewhere in the U.S. Code.[303] That court, in what appears to be an outlier decision, drew a particular distinction between "unreasonably delayed" and "unlawfully withheld" that turns on whether Congress imposed a date-certain deadline on agency action.[304] In that circuit, "unlawfully withheld" action is a form of delay that is a less acceptable and more egregious form of delay subject to a bright-line test, as opposed to a balancing test to determine whether the delay is unreasonable.[305]

The competing approach, exemplified by the Eighth and Ninth Circuits,[306] is to equate "unlawfully withheld" not with delay, but with a "failure

298. 5 U.S.C. § 706(1).

299. *See id.* § 551.

300. Safeway Stores, Inc. v. Brown, 138 F.2d 278, 279 (Emer. Ct. App. 1943).

301. *Id.* at 279–80 & n.1.

302. Forest Guardians v. Babbitt, 174 F.3d 1178, 1189–90 (10th Cir. 1999) (citing. S. REP. NO. 79–7, at 213–14 (1945) and CLARK, *supra* note 35, at 108).

303. *Id.* at 1189 n.15.

304. *Id.*

305. *Id.* at 1189–90 (citing S. REP. NO. 79-7, at 213–14 (1945); CLARK, *supra* note 35, at 108).

306. Irshad v. Johnson, 754 F.3d 604, 607 (8th Cir. 2014) (citing the definition of "failure to act" in 5 U.S.C. § 551(13)); Al Otro Lado v. Exec. Off. for Immigr. Rev., 120 F.4th 606, 624 (9th Cir. 2024) ("When an action is delayed, one expects that, with the passage of time

to act."[307] That makes some sense; "withheld" implies more concreteness than "delay" and connotes a decision has been made not to proceed with the agency action.[308] That is, itself, an agency action.[309] This view carries an interesting implication, not discussed in those cases. Although unlawfully withheld action could otherwise be reviewed under § 706(2) (because a failure to act is agency action under the § 551(13) definition), §§ 706(1) and (2) are not mutually exclusive here.[310] When the agency action is a decision not to act, § 706(1) could be *an additional* remedial vehicle for plaintiffs. They could elect to have the refusal to proceed "h[e]ld unlawful and set aside" under § 706(2).[311] Alternatively, they could get the more direct relief of having the withheld action "compel[led]," so long as all § 706(1) requirements are met and equity favors it.[312] It also makes little sense to set aside action that has not occurred yet. This flexibility is consistent with the flexibility of mandamus, which is important given the close relationship between mandamus and § 706 as illuminated by the *Attorney General's Manual*.[313]

Of course, although delay and unlawful withholding are distinct, they could operate on a continuum based on the passage of time wherein a sufficiently long delay can result in a withholding that is otherwise subject to a higher standard of review.[314] Those are ordinary principles of finality.[315]

This approach is consistent with FOIA, which is closely associated with the APA.[316] FOIA creates a cause of action to "order the production of any agency records improperly withheld from the complainant."[317] In FOIA, "'withheld' [is used] only 'in its usual sense'"; when an agency refuses to grant requests for records in its possession, the agency has "undoubtedly 'withheld'

(maybe even an unreasonable amount of time), the action eventually will be completed. By contrast, when an action has been withheld, no amount of waiting can be expected to change the situation. With patience, one can wait out delay, but even with superhuman patience, one cannot wait out withholding.").

307. *See* 5 U.S.C. § 551(13).

308. *Al Otro Lado*, 120 F.4th at 624.

309. 5 U.S.C. § 551(13).

310. *See id.* § 706.

311. *Id.* § 706(2).

312. *Id.* § 706(1).

313. CLARK, *supra* note 35, at 107.

314. Al Otro Lado v. Exec. Off. for Immigr. Rev., 120 F.4th 606, 624 (9th Cir. 2024).

315. *See* 5 U.S.C. § 704.

316. *See* Aram A. Gavoor & Steven A. Platt, *U.S. Department of Justice Executive Branch Engagement on Litigating the Administrative Procedure Act*, 75 ADMIN. L. REV. 429, 436–37 & n.44 (2023). FOIA amended the APA but "is generally given distinct analytical consideration from the APA." *Id.*

317. 5 U.S.C. § 552(a)(4)(B).

[such records] in any reasonable sense of that term."[318] That connotes finality on the textualism-focused mode of interpretation that has pervaded recent Supreme Court opinions.[319] The D.C. Circuit has read "improperly" as a separate element to mean not in conformity with the FOIA rules.[320] Interpreting "unlawfully withheld" in § 706(1) consistently with FOIA would mean that agency action is unlawfully withheld when the agency refuses to finalize or pursue an action—that is, when it acts with a degree of intent and finality that goes beyond mere delay.

E. Modern Developments

1. How Courts Assess the Unreasonableness of Delay

Courts assess the existence and unreasonableness of delay in various ways. The most common approach is practiced by the D.C., First, Second, Third, Fifth, Sixth, Eighth, and Ninth Circuits, which use a multifactor test, with ultimate discretion on whether to order a remedy.[321] The circuits' tests originate from, or closely model, the D.C. Circuit's *TRAC* decision,[322] which provides a sextet of factors for a court to consider: (1) a "rule of reason;" (2) whether Congress "provided a timetable or other indication" of the pace at which it wanted the agency to act; (3) whether human health and welfare are implicated; (4) the effect of the agency's competing priorities; (5) "the nature and extent of the interests prejudiced by delay"; and (6) bad faith or

318. U.S. Dep't of Just. v. Tax Analysts, 492 U.S. 136, 150 (1989).

319. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261–62 (2024) ("The text of the APA means what it says."); Garland v. Cargill, 144 S. Ct. 1613, 1630 (2024); West Virginia v. EPA, 142 S. Ct. 2587, 2624–25 (2022).

320. Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y, 827 F.3d 145, 147 (D.C. Cir. 2016) (quoting Kissinger v. Reps. Comm. for Freedom of the Press, 445 U.S. 136, 150 (1980)).

321. TRAC v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984); *accord, e.g.*, Town of Wellesley v. FERC, 829 F.2d 275, 277 (1st Cir. 1987); Barrios Garcia v. U.S. Dep't of Homeland Sec., 25 F.4th 430, 451–52 (6th Cir. 2022); Irshad v. Johnson, 754 F.3d 604, 607 (8th Cir. 2014); Indep. Mining Co. v. Babbitt, 105 F.3d 502, 507 (9th Cir. 1997); Da Costa v. Immigr. Inv. Program Off., 80 F.4th 330, 340 (D.C. Cir. 2023); *see also* Equal Emp. Opportunity Comm'n v. Liberty Loan Corp., 584 F.2d 853, 857 (8th Cir. 1978) ("We are unwilling to rule that any set length of delay is per se unreasonable, but rather look to the facts of each case to determine reasonableness."). The Fifth Circuit uses similar criteria, but has warned in an unpublished decision that "this circuit has never adopted that multi-factor test." Li v. Jaddou, No. 22-50756, 2023 WL 3431237, at *1 n.2 (5th Cir. May 12, 2023).

322. 750 F.2d 70 (D.C. Cir. 1984).

impropriety, which is not required for the court to find unreasonable delay.[323] The factors are not exhaustive.[324] Their individual weights are also somewhat unclear. For instance, a missed statutory deadline is, perhaps surprisingly, not dispositive, but rather one of many considerations a court makes.[325] Thus, *TRAC* analyses are "highly fact-specific and often difficult to predict."[326] Others have found *TRAC* to be a "useful blueprint" to follow when assessing delay.[327]

The Third Circuit uses a similar test:

> First, the court should ascertain the length of time that has elapsed since the agency came under a duty to act. Second, the reasonableness of the delay should be judged in the context of the statute authorizing the agency's action. Third, the court should assess the consequences of the agency's delay. Fourth, the court should consider any plea of administrative error, administrative inconvenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources.[328]

The Fifth Circuit appears to also use a multifactor test itself, and has used the *TRAC* factors in a mandamus case,[329] but has warned in an unpublished decision that "this circuit has never adopted that multi-factor test [from *TRAC*]."[330] While most circuits follow *TRAC* by name, it is unclear the extent to which the issue is settled in circuits like the Second Circuit, which has cited the case at least once.[331] If the delay is unreasonable, a court then may decline to issue a remedy.[332]

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323. *TRAC*, 750 F.2d at 80; *accord, e.g.*, *Town of Wellesley*, 829 F.2d at 277; *Barrios Garcia*, 25 F.4th at 451–52; *Irshad*, 754 F.3d at 607; *Indep. Mining Co.*, 105 F.3d at 507; *Da Costa*, 80 F.4th at 340; *see also Equal Emp. Opportunity Comm'n*, 584 F.2d at 857.

324. Afghan & Iraqi Allies v. Blinken, 103 F.4th 807, 815 (D.C. Cir. 2024) (characterizing the factors as "neither 'ironclad' nor exhaustive [yet] still provid[ing] 'useful guidance'") (quoting *TRAC*, 750 F.2d at 80).

325. TODD GARVEY, CONG. RSCH. SERV., R43710, A PRIMER ON THE REVIEWABILITY OF AGENCY DELAY AND ENFORCEMENT DISCRETION 3 (2014) (citing, *e.g.*, *In re* Bluewater Network & Ocean Advocs., 234 F.3d 1305, 1316 (D.C. Cir. 2000)), https://crsreports.congress.gov/product/pdf/R/R43710/6 [https://perma.cc/8P97-YJBC].

326. HICKEY, *supra* note 78.

327. Gavoor & Miktus, *supra* note 54, at 791.

328. Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin., 145 F.3d 120, 123 (3d Cir. 1998).

329. Nat'l Grain & Feed Ass'n v. Occupational Safety & Health Admin., 903 F.2d 308, 310 (5th Cir. 1990).

330. Li v. Jaddou, No. 22-50756, 2023 WL 3431237, at *1 n.2 (5th Cir. May 12, 2023).

331. *See* Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin., 710 F.3d 71, 84 (2d Cir. 2013).

332. Org. for Competitive Markets v. USDA, 912 F.3d 455, 462 (8th Cir. 2018).

Some of these courts have expressed separation of powers concerns, for example the Eighth Circuit's fear of "becoming the ultimate monitor of congressionally set deadlines, as 'courts are not charged with general guardianship against all potential mischief in the complicated tasks of government'"—a quote from the *Pottsville* Supreme Court case identified by the *Attorney General's Manual* as support for § 706(1) carrying forward existing practice.[333] Rather, Congress can, and is better situated to, "determine that its directive has been unreasonably delayed, and take appropriate action."[334] That said, some circuits, including the D.C. Circuit, have viewed the separation of powers as cutting the other way. As then-Judge Brett Kavanaugh wrote for the court in *In re Aiken County* in granting a writ of mandamus to the Nuclear Regulatory Commission to finish processing a license application, "It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by the Nuclear Regulatory Commission."[335] To Judge Kavanaugh, it was entirely appropriate for the judiciary to enforce Congress's pronouncements, instead of waiting for Congress to act on its own.[336]

A different approach than *TRAC* is taken by the Fourth and Tenth Circuits: Duties with a deadline must be compelled; duties without a deadline are subject to a more open-ended test.[337] These courts' APA case law makes a distinction between "unlawfully withheld" actions and "unreasonably delayed" actions, bringing them both within the ambit of delay (as opposed to viewing "unlawfully withheld" action as the completed action of refusing to proceed further).[338] To them, unlawfully withheld action is that delayed beyond a statutory deadline, and unreasonably delayed action lacks a statutory mandate and is governed only by APA § 555(b)'s "reasonable time" provision.

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333. *Id.* at 463 (quoting FCC v. Pottsville Broad. Co., 309 U.S. 134, 146 (1940)).

334. *Id.*

335. *In re* Aiken County, 725 F.3d 255, 267 (D.C. Cir. 2013).

336. *See id.* at 267 ("To be sure, if Congress determines in the wake of our decision that it will never fund the Commission's licensing process to completion, we would certainly hope that Congress would step in before the current $11.1 million is expended, so as to avoid wasting that taxpayer money. And Congress, of course, is under no obligation to appropriate additional money for the Yucca Mountain project.").

337. *See* Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1999).

338. *See id.*

The Fourth and Tenth Circuit's approach says that courts must order an agency to act per its obligations under the controlling statute if the obligations are mandatory, and thus "unlawfully withheld."[339] These courts view themselves as lacking any discretion to act.[340] For action lacking a statutory deadline, when the agency is only guided by a "general timing provision," such as a requirement to act "within a reasonable time," the court has discretion to decide whether the delay has been unreasonable. [341] This aligns with the *TRAC* approach, except it is much more open-ended.[342]

The Seventh Circuit uses a more open-ended approach. For example, in a U-visa petition delay case, the court simply considered "the circumstances [the agency] faces and the agency's recent changes to alleviate the backlog."[343]

Again, there is some synergy between mandamus and the APA. *TRAC* was predicated on a mandamus action, not § 706(1), but did rely on § 706(1).[344] The *TRAC* approach has since been used in purely § 706(1) cases.[345] The D.C. Circuit, however, recently emphasized in a § 706(1) case *TRAC*'s mandamus origins, noting that "we have routinely applied the same framework to assess claims that agency action has been 'unreasonably delayed' for purposes of the Administrative Procedure Act, 5 U.S.C. § 706(1)."[346] It is unclear whether remarking upon that distinction means that the D.C. Circuit might be open to a new framework for evaluating § 706(1) claims besides *TRAC* and cabining *TRAC* to mandamus claims.

The use of *TRAC* has generated criticism. For example, some *TRAC* critics argue that the *TRAC* test is malleable and can support any conclusion a court wants to reach, while failing to account for the root causes of delay[347]

339. *Id.*; South Carolina v. United States, 907 F.3d 742, 755 (4th Cir. 2018).

340. *Forest Guardians*, 174 F.3d at 1187–93.

341. *Id.* at 1190.

342. *Id.*

343. Calderon-Ramirez v. McCament, 877 F.3d 272, 276 (7th Cir. 2017).

344. 750 F.2d 70, 77 (D.C. Cir. 1984) ("[S]ection 706(1) coupled with section 555(b) does indicate a congressional view that agencies should act within reasonable time frames and that court[s] designated by statute to review agency actions may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed.").

345. *See, e.g.*, Barrios Garcia v. U.S. Dep't of Homeland Sec., 25 F.4th 430, 436 (6th Cir. 2022).

346. Afghan & Iraqi Allies v. Blinken, 103 F.4th 807, 815 (D.C. Cir. 2024).

347. *See, e.g.*, Sant'Ambrogio, *supra* note 69, at 1388 (calling the approach exemplified by *TRAC* "ad hoc, incoherent, and difficult to apply consistently"); Kyle M. Asher, *Judicial Review of Agency Delays Caused by a Lack of Appropriations: The Yucca Two-Step*, 2015 MICH. ST. L. REV. 371, 401 (calling the *TRAC* factors "a good starting point" but noting that they, for instance, "fail[] to take into account whether the reason for the agency's delay was legitimate, whether the statutory mandate was specific or broad, and whether the decision imposes

(of which there are many, as discussed above). The six factors are open to much interpretation; it is unclear what, precisely, the "rule of reason" means, and factors one and two, and factors three and five, are often lumped together.[348] A report to the Administrative Conference of the United States has criticized *TRAC* rulings as being "all over the map" and "unpredictable," cataloguing lengths of delay that various courts have held to be unlawful (as little as five months) or lawful (as long as ten years).[349] Others have defended *TRAC*'s approach, because the countless ways that Congress asks, suggests, recommends, implores, or requires an agency to act do not lend themselves to bright lines.[350] *TRAC* emphasized that although it was giving six factors of "useful guidance," they were neither "ironclad" nor exhaustive.[351] No matter the approach, courts rightly seem to place some importance on the *why* of the delay.

Administrative law observers might assume that delay challenges are handled primarily by the D.C. Circuit, thus the D.C. Circuit's APA-delay case law is the only corpus worth studying. The current state of affairs belies that assumption. The venue for published delay cases varies quite a bit. We conclude as much by reviewing U.S. courts of appeals decisions over a 31-year period from 1992 to 2022 in which § 706(1) was a claim. The plaintiff usually loses.

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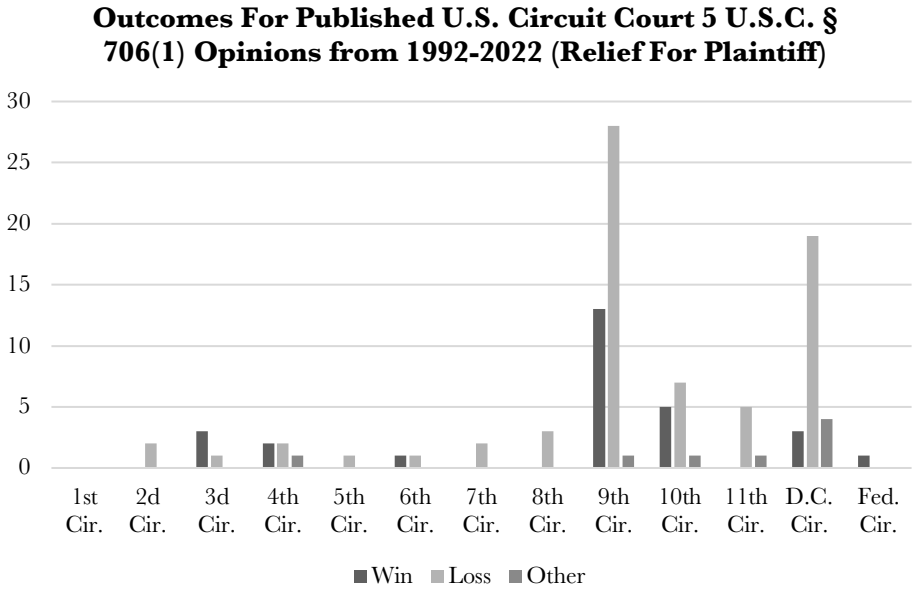
obligations on the agency in the face of limited resources or substantive action").

348. *See* Sant'Ambrogio, *supra* note 69, at 1388 (referring to *TRAC*'s "mishmash of factors" but concluding that "in the end," courts "typically weigh the interests of the individuals harmed by delay against the agency's interest in controlling the manner and pace of its decisionmaking, thus using an individual-rights framework without any of the constitutional bite"). *See generally infra* Part IV.B.

349. JASON A. SCHWARTZ & RICHARD L. REVESZ, ADMIN. CONF. OF THE U.S., PETITIONS FOR RULEMAKING 14–16 (2014), https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Report%2520%255B11-5-14%255D.pdf [https://perma.cc/87ST-AJDZ] (summarizing the lengths of delay found reasonable by the D.C. Circuit to demonstrate "how unpredictable the results can be").

350. *See, e.g.*, Miaskoff, *supra* note 221, at 652 ("The *TRAC* test is necessarily flexible because the issue of reasonableness is a question of fact.").

351. 750 F.2d 70, 80 (D.C. Cir. 1984) ("Although the standard is hardly ironclad, and sometimes suffers from vagueness, it nevertheless provides useful guidance in assessing claims of agency delay."); *see also* Afghan & Iraqi Allies v. Blinken, 103 F.4th 807, 815 (D.C. Cir. 2024).



We emphasize that we reviewed only appellate opinions, which does not capture settlements, instances in which the agency mooted the claims by completing the adjudication or rule, and district court litigation that simply was not appealed.

We found that over this span, the courts of appeals issued 103 published opinions. Of those, the D.C. Circuit decided only 26%. The Ninth Circuit is seeing many delay cases itself—despite recently referencing what it called the "more developed law of the District of Columbia Circuit" in an unreasonable delay decision.[352] There has also been a significant uptick in the quantity of cases in the past fifteen years compared to the previous fifteen-year span of the set. More and more delay cases are reaching the circuits, although not by large absolute numbers.

2. How Courts Remedy Delay

If a plaintiff establishes APA liability or mandamus eligibility, and convinces the court to order relief, what exactly will the court order? Judicial relief in delay litigation is highly unsettled. As of the late 1980s, one commentator wrote, "Although section 706(1) and All Writs mandamus are virtually coextensive for purposes of defining unreasonable delay, the APA

352. *In re* Nat. Res. Def. Council, Inc., 956 F.3d 1134, 1139 (9th Cir. 2020).

provides the more flexible remedy. Mandamus provides appropriate relief under the All Writs Act, but courts have generally been unwilling to use the writ in this context."[353] That generally remains the case today.[354]

Although the approaches are distinct—the D.C. Circuit's *TRAC* or the Tenth Circuit's *Forest Guardians* under the APA, and the Supreme Court clear-duty-with-no-adequate-alternative for mandamus—courts often treat their remedies as the same.[355] Because "mandamus relief and relief under the APA are 'in essence' the same," according to one court of appeals, "when a complaint seeks relief under the Mandamus Act and the APA and there is an adequate remedy under the APA, we may elect to analyze the APA claim only."[356] That makes sense; mandamus "is an extraordinary remedy that is not available when review by other means is possible."[357] Similarly, the APA permits judicial review only when "there is no other adequate remedy in a court."[358] If APA relief overlaps with mandamus relief, then a plaintiff cannot satisfy a necessary prerequisite for mandamus relief.[359]

Of course, the APA is intentionally a body of default procedures for many segments of the administrative state.[360] Congress can always establish specific deadlines or consequences for failing to meet them in an agency's enabling statute. The most recent Supreme Court treatment of § 706(1) is *Norton v. Southern Utah Wilderness Alliance* from over 20 years ago.[361] Quite similar to mandamus, the APA delay provision is violated only when the agency has a duty to perform a discrete action that it has failed to do.[362] The legal duty must be "ministerial or nondiscretionary" and must amount to "a specific, unequivocal command."[363] The court then proceeds to consider whether the delay is unreasonable—an additional step not explicitly present during a mandamus analysis.[364] That said, mandamus perhaps covered this

353. Miaskoff, *supra* note 221, at 656 (discussing compliance via scheduling orders by which the agency will complete the delayed action).

354. *Id.*

355. *See, e.g.*, Vaz v. Neal, 33 F.4th 1131, 1135 (9th Cir. 2022).

356. *Id.*

357. TRAC v. FCC., 750 F.2d 70, 78 (D.C. Cir. 1984) (citing Kerr v. U.S. Dist. Court, 426 U.S. 394, 403 (1976)).

358. 5 U.S.C. § 704.

359. *See, e.g.*, Sawan v. Chertoff, 589 F. Supp. 2d 817, 825–26 (S.D. Tex. 2008).

360. *See, e.g.*, Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 20–21 (2018).

361. Norton v. S. Utah Wilderness All., 542 U.S. 55, 63 (2004).

362. *Id.* at 62–63.

363. *Id.* at 63–64.

364. *Id.* at 63 & n.1.

through a judge's discretion of whether to issue a remedy.[365] Implicitly, a judge is unlikely to issue a writ of mandamus if the executive official has acted reasonably.[366]

Mandamus is equitable and so the judge holds the discretion to issue the writ.[367] The APA is slightly different. Section 706(1) states that "[t]he reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed."[368] The only remedy permitted by the APA is to "compel."[369] "Compel" means simply "[t]o force."[370] So apart from the debate on whether a remedy *must* issue if a court finds § 706(1) unreasonable delay, if a court elects to order a remedy, arguably the court is textually limited to simply forcing the agency to complete action. However, the equitable underpinnings of mandamus transferred to § 706(1) actions. Note also that the APA in § 702 admonishes, "Nothing herein . . . affects . . . the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground."[371] So perhaps the best way to harmonize these concepts—and in the absence of a clearer indication from the APA itself—is to read "compel" to mean that the court may do more than simply order the executive official to complete the action by a date certain, but rather, the court may do more to superintend the process. This should be consistent with the textualist bent of the current Supreme Court.

Courts are not authorized to tell the agency *how* to rule upon remand, though they could include comments or limiting principles in instructions to imply an intended outcome.[372] Nor may there be "plenary review of the [agency action being unreasonably delayed] by a district court."[373]

While the issuance of mandamus is in the court's discretion,[374] courts diverge on whether any relief must follow a finding of APA delay. On the one hand, as the Fourth Circuit has held:

> [I]f a party has successfully demonstrated an unlawfully withheld agency action under § 706(1), the court must enter an appropriate order and secure the agency's compliance

365. *Id.* at 65.

366. *See* Bamzai, *supra* note 202, at 913 (so arguing with regard to executive officials' interpretations of statutory ambiguities).

367. de Smith, *supra* note 102, at 44.

368. 5 U.S.C. § 706, 706(1).

369. *Id.* § 706(1).

370. *Compel*, BLACK'S LAW DICTIONARY (3d ed. 1933).

371. 5 U.S.C. § 702.

372. *See* SEC v. Chenery Corp., 332 U.S. 194, 196–97 (1947).

373. McHugh v. Rubin, 220 F.3d 53, 61 (2d Cir. 2000).

374. Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 381 (2004).

> with the law. If the agency's legal obligation falls within the scope of § 706(1), such an order must issue regardless of equitable or policy considerations.[375]

The Tenth Circuit has held similarly.[376] On the other hand, the D.C. Circuit has held that even though reasonableness is a question of law for § 706(1) cases, "a finding that delay is unreasonable does not, alone, justify judicial intervention."[377] So, too, the Ninth Circuit has provided that a "statutory violation does not always lead to the automatic issuance of an injunction."[378] Apart from whatever a remedy might ultimately be, the text of § 706(1) does seem to require a court to issue a remedy upon a finding that unreasonable delay has occurred.

When a court orders compliance with the law, there are a few ways to accomplish it. Sometimes, a court will order the agency to complete the delayed action by a date certain, such as an adjudication within one year[379] or a notice of proposed rulemaking within thirty days.[380] Courts are generally not ordering the agency to complete the delayed act immediately, perhaps in recognition of the impossibility of the agency immediately ceasing its delay (due to resource constraints, perhaps).[381] But a court might issue the writ of mandamus to an agency suffering from a lack of adequate appropriations—even when the challengers admit that the appropriations are inadequate.[382]

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375. South Carolina v. United States, 907 F.3d 742, 756 (4th Cir. 2018).

376. Forest Guardians v. Babbitt, 174 F.3d 1178, 1190–91 (10th Cir. 1999).

377. Cobell v. Norton, 240 F.3d 1081, 1096 & n.4 (D.C. Cir. 2001) (quoting *In re* Barr Lab'ys, Inc., 930 F.2d 72, 75 (D.C. Cir. 1991)) (citing *Forest Guardians*, 174 F.3d at 1191, for the contrary position); *see also In re Barr Lab'ys, Inc.*, 930 F.2d at 74 ("Equitable relief, particularly mandamus, does not necessarily follow a finding of a violation: respect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of priorities.").

378. Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1176–78 (9th Cir. 2002).

379. *In re* MDL-1824 Tri-State Water Rts. Litig., 644 F.3d 1160, 1205 (11th Cir. 2011) (ordering a set deadline because of the twenty-plus years that the litigation had ensued and the "extremely high" stakes of the underlying dispute).

380. Pub. Citizen Health Rsch. Grp. v. Auchter, 702 F.2d 1150, 1158–59 (D.C. Cir. 1983) (ordering a set deadline because of the "significant risk of grave danger to human life, and the time [the agency] has already devoted to [the rulemaking topic]"); *see also In re* Nat. Res. Def. Council, Inc., 956 F.3d 1134, 1143 (9th Cir. 2020) (requiring the agency to issue a full response to a petition within ninety days).

381. *See, e.g.*, *Forest Guardians*, 174 F.3d at 1192.

382. *In re* Aiken County, 725 F.3d 255, 266–67 (D.C. Cir. 2013). An additional complication of this case was that the agency had, in the court's telling, ignored multiple warnings from the court to act. *Id.* at 267 n.12.

If the writ issues, one common remedy is to order the agency to eventually complete the action without immediately setting a deadline. "[E]ven when a court finds that an agency has failed to act or has delayed unreasonably, it is very unlikely to force the agency to grant the petition; rather, it 'typically will ask the agency for a timetable concerning when it can respond, thereby adding additional delay.'"[383] The same has occurred for APA relief, where agencies have been ordered to propose a schedule for adjudication.[384] A court might also ask for status reports or a processing plan.[385] For example, in *TRAC* itself, the court stated, "Whether or not the[ ] [agency's] delays would justify mandamus," they were significant enough that the court retained jurisdiction to promote a quick resolution.[386]

Many courts warn that they will view a request for relief more favorably if the delay persists and the plaintiff must return to court.[387] This incremental approach seems sound, especially considering the worst-case scenario of an agency being forced to perform an action immediately. Such immediate deadlines could panic the agency, incentivizing it to do a sloppy job and give short shrift to other pressing priorities—perhaps other cases that do not have the benefit of having a § 706(1) case pending before the court.[388]

Some have proposed using a cost-benefit analysis to ensure that given the particular causes of delay, that the agencies are rationally forging ahead.[389]

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383. Gavoor & Miktus, *supra* note 54, at 791 (citing Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 27 (2009)); *accord, e.g.*, Caswell v. Califano, 583 F.2d 9, 17 (1st Cir. 1978) ("Several courts faced with similar claims of unreasonable delay have required agency action within specified time limits."); *Badgley*, 309 F.3d at 1178.

384. Afghan & Iraqi Allies v. Blinken, 103 F.4th 807, 815 (D.C. Cir. 2024); Nader v. FCC, 520 F.2d 182, 207 (D.C. Cir. 1975).

385. Miaskoff, *supra* note 221, at 652 (discussing compliance via scheduling orders by which the agency will complete the delayed action).

386. TRAC v. FCC, 750 F.2d 70, 81 (D.C. Cir. 1984); *see also* Washington v. Barr, 925 F.3d 109, 121 (2d Cir. 2019) (in a mandamus case, retaining jurisdiction "to take whatever action may become appropriate if Plaintiffs seek administrative review and the [agency] fails to act promptly"); *In re* Pesticide Action Network N. Am., 532 F. App'x 649, 652 (9th Cir. 2013) ("[I]t is well established that we may retain jurisdiction over [a case] to ensure that [the agency] acts expediently" in a mandamus case, although declining to do so there.).

387. *See, e.g.*, *In re Pesticide Action Network N. Am.*, 532 F. App'x at 652 ("[I]t is well established that we may retain jurisdiction over [a case] to ensure that [the agency] acts expediently," although declining to do so in that case.).

388. DANIEL T. SHEDD, CONG. RSCH. SERV., R43013, ADMINISTRATIVE AGENCIES AND CLAIMS OF UNREASONABLE DELAY: ANALYSIS OF COURT TREATMENT 1 (2013).

389. Sant'Ambrogio, *supra* note 69, at 1435–47; GRABOYES & SELIN, *supra* note 71, at 35–40.

Others have argued that mandamus should issue only if truly useful, meaning the public and governmental equities favor it—even if the agency misses a statutory deadline.[390] In other words, mandamus relief should not reflexively issue simply because of a missed deadline. For example, in a case challenging the delay in holding Social Security cases in Maine, the First Circuit noted, "The possibility that an order requiring expeditious hearings in Maine will adversely affect disability applicants in other states, of course, is a matter of concern."[391] The court ordered relief anyway, as "the vindication of almost every legal right has an impact on the allocation of scarce resources."[392] However, these approaches may miss the conflict between the agency and its beneficiaries, which is in play under either a pure historical mandamus approach or the § 706(1) case law.

Of course, even the most sensible judicial remedy is of limited value if the agency fails to comply. Noncompliance is not merely hypothetical; it has historical pedigree and should give pause to any plaintiff who secures a mandamus or § 706(1) order.[393] An agency may fail to comply due to logistical hurdles because Congress has given it a truly impossible mission that the court's order cannot facilitate. An agency may also fail to comply due to a belief, however constitutionally dubious, that the judicial mandate infringes upon executive prerogatives.[394] Courts, in turn, are placed in a difficult position: they must uphold the authority of the judiciary without forcing agencies into legally or operationally untenable positions.[395] Even when judges escalate enforcement through contempt proceedings, the available sanctions—fines, public rebuke, or in rare cases, imprisonment—are used sparingly.[396] Instead, the administrative state often operates in a zone of negotiated compliance, where reputational costs and interbranch signaling matter

390. Kim, *supra* note 76, at 1512–15 (2021) ("Such an analytical inquiry would allow courts to acknowledge violations of statutory provisions but also recognize that the social costs of mandamus outweigh the benefits of its issuance.").

391. Caswell v. Califano, 583 F.2d 9, 17 (1st Cir. 1978).

392. *Id.*

393. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 688 (2018).

394. *See* Alan Feuer, *Judges Openly Doubt Government as Justice Dept. Misleads and Dodges Orders*, N.Y. TIMES (Aug. 4, 2025), https://www.nytimes.com/2025/08/04/us/politics/trump-justice-department-judges-courts.html [https://perma.cc/PHP9-FHNM] (describing the erosion of deference to Department of Justice lawyers during the second Trump Administration as they "have repeatedly misled the courts, violated their orders and demonized judges who have ruled against them").

395. Parrillo, *supra* note 393, at 689–91.

396. *Id.* at 704–05, 739, 765.

more than coercive enforcement.[397] Thus, while contempt may function as a shaming device, its deterrent effect is imperfect and uneven.[398]

Given these serious limitations on the contempt power, do plaintiffs win anything real when they secure a writ of mandamus or § 706(1) order against an agency compelling it to complete a delayed agency action? A writ of mandamus or § 706(1) order is not a Pyrrhic victory. First, agencies do generally comply, perhaps especially when the court's order is clear and the threat of reputational damage looms.[399] Second, even if compliance is partial or delayed, litigation can catalyze internal prioritization and external scrutiny.[400] Administrative inertia is not immutable and can be disrupted by legal pressure, media attention, and congressional interest. Ultimately, courts cannot compel a particular substantive outcome, but they can compel movement. And in the administrative context, movement itself may be meaningful.

3. How Congress Has Improved the Judicial Review Process

a. General Possibilities

Both mandamus and APA § 706(1) review are case-specific and give judges wide berth to decide whether an agency's delay is unlawful: either by electing to issue a discretionary writ, in the case of mandamus, or by assessing unreasonableness and crafting a remedy, in the case of APA review. What has Congress already done?

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397. *Id.* at 773–75.

398. *Id.* at 775–77, 789–94.

399. *See id.* Some courts have shown a willingness to escalate judicial intervention in the delay context. *See, e.g.*, *In re* Aiken County, 725 F.3d 255, 266 (D.C. Cir. 2013) ("[W]e have repeatedly gone out of our way over the last several years to defer a mandamus order against the Commission. . . . At this point, the Commission is simply defying a law enacted by Congress, and the Commission is doing so without any legal basis. We therefore have no good choice but to grant the petition for a writ of mandamus against the Commission."). Some such cases have acutely appreciated the gravity of ordering progressively more severe sanctions against an agency, even one that is not timely acting. *See id.* at 266–67 ("This case has serious implications for our constitutional structure."); *see also id.* at 268–69 (Garland, C.J., dissenting) (quoting United States *ex rel.* Sierra Land & Water Co. v. Ickes, 84 F.2d 228, 232 (D.C. Cir. 1936)) (chastising the court for issuing "the writ to do a useless thing" even though the agency had concluded that it could not act).

400. *See* HICKMAN & PIERCE, *supra* note 10, at § 14.4 (discussing the political remedies for delay, including congressional casework, oversight, and systemic solutions). A court order directing an agency to make a rule or adjudicate an application might publicize the issue, thereby spurring congressional intervention. *See id.*

First, Congress can exercise its oversight authorities, even *ex post*.[401] It has control over appropriations.[402] It could hope that § 555(b) and the judicial review provisions including § 706(1) serve as a deterrent. Congress often sets a deadline in the statute by which the agency must act.[403] It often sets a deadline in the statute by which the agency *should* act.[404]

Congress can put teeth on its organic statutes with hammer provisions: not only is the agency told it must meet a certain deadline, but also a specific penalty (the "hammer") befalls the agency if it misses the deadline.[405] These can be effective, although they can cause blowback by upending priorities: "although hammer provisions are often successful in forcing an agency to meet the deadline, they run the risk of short-circuiting the agency's usual deliberative process, curtailing opportunities for public input, and interfering with the agency's other regulatory priorities."[406] This resolves the question of remedy: the hammer provision is self-enforcing as it simply sets out what Congress wants to have happen to the agency if it fails to comply. However, as of 2018, one author found "there are no reported judicial decisions directly addressing challenges to compel agency action subject to hammer provisions. The few judicial decisions that reference hammer provisions at all do so only in passing."[407]

We have surveyed a cross-section of delay review statutory provisions, as represented in the chart below. Many of these statutes follow the model of letting a private party petition the government to investigate or enforce a statute, giving the government the opportunity to do so itself, and letting the

401. Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187, 1194 (2018).

402. *Id.*; *see* U.S. CONST. art. I, § 9, cl. 7 (Appropriations Clause).

403. *See, e.g.*, Pregnant Workers Fairness Act, 42 U.S.C. § 2000gg-3(a) ("Not later than 1 year after December 29, 2022, the [Equal Employment Opportunity] Commission shall issue regulations . . . to carry out this chapter. Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.").

404. *See, e.g.*, 8 U.S.C. § 1571(b) ("It is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application, except that a petition for a nonimmigrant visa under section 1184(c) of this title should be processed not later than 30 days after the filing of the petition.").

405. *See* M. Elizabeth Magill, *Congressional Control over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 154 n.17 (1995) ("The United States Code is littered with statutory deadlines requiring a particular agency to act within a time certain."); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 839.

406. HICKEY, *supra* note 78, at 7.

407. *Id.* at 15.

private party proceed (before an administrative tribunal) if the government declines or fails to act.

Federal Statutory Agency Delay Judicial Oversight Provisions

U.S. Code Provision	Description of Authority	Forum or Venue Constraint?	Temporality Constraints?	Scope of Remedial Authority Conferred to Court
42 U.S.C. § 7604(a)	Air pollution and emission standards.	U.S. district court	No action may be commenced prior to sixty days after the plaintiff has given notice of the violation to the EPA Administrator. Otherwise, none immediately apparent.	Enforce emission standards, order administrator to perform act/duty, apply appropriate civil penalties, compel agency action unreasonably delayed.
30 U.S.C. § 1276(a)(1)	Pertaining to preparing or promulgating a Federal program for surface coal mining and reclamation operations.	Concerning approval/ disapproval of State/Federal program only in U.S. district court for the district which includes the capital of the State whose program is at issue; concerning national rules only in the District Court for D.C.; concerning any other action constituting rulemaking only in U.S. District Court for the district in which the surface coal mining operation is located.	Within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day.	No reference.

10 U.S.C. § 1558(f)(4)(A), (B)	Regarding correction of military records.	U.S. district courts	Secretary has six months to act before they are deemed not to have acted; otherwise, none immediately apparent.	Set aside Secretary's determination or set aside Secretary's action based on board determination.
41 U.S.C. § 4712(c)(2)	Federal contractor protection from reprisal for disclosure of certain information.	U.S. district court	210 days after the submission of a complaint if agency head fails to act/denied relief.	De novo action at law or equity against party in violation of statute.
29 U.S.C. § 662(d)	Failure of Secretary of Labor to act to restrain dangerous employment conditions.	U.S. district court for the district in which the imminent danger is alleged to exist or the employer has its principal office, or for the District of Columbia.	None immediately apparent.	Writ of mandamus to compel the Secretary to seek an order to restrain any conditions or practices in any place of employment where a danger exists and for such further relief as may be appropriate.
12 U.S.C. § 4541(c)(4)(B)	Product approval by Director of the Federal Housing Finance Agency.	N/A	N/A (after thirty days of no action the enterprise may offer the product).	No reference.
42 U.S.C. § 10139	Failure to act in regarding disposal of radioactive waste and spent nuclear fuel.	U.S. court of appeals	180-day delay required.	No reference.

15 U.S.C. § 6503	Failure of the FCC to act on a request for approval of children online privacy guidelines.	U.S. district court	180-day delay required.	No reference.
8 U.S.C. § 1447(b)	Judicial review of a pending naturalization application.	U.S. district court	120-day delay required following an agency interview.	De novo review.

Although judges have disagreed on whether separation of powers favors a stringent § 706(1) test—as in one that offers no discretion to the judge on whether to enter an order in favor of the moving party when the standard is satisfied—or a more lenient one, virtually all agree that Congress could choose to step in and be clearer about what it wants. In *M'Intire v. Wood*, the Supreme Court reversed a mandamus grant because Congress did not endow that authority on the court.[408] At any time, Congress can legislate particular requirements to an agency or to a class of agency action.[409]

For example, regarding the FOIA backlogs discussed above, the FOIA statute provides its own independent mechanism to expedite judicial review.[410] FOIA imposes a much lower bar for plaintiffs than the APA does in § 706(1) or (2): review is de novo, the burden is on the agency, and the court may review the records in camera to assure itself that the records were not improperly withheld.[411] FOIA also authorizes a trial, albeit they occur in less than 1% of FOIA cases as of 2008.[412] By permitting the court to step into the shoes of the agency via close judicial supervision and even in camera review of claimed exemptions, Congress created a powerful oversight mechanism for document releases.[413]

408. M'Intire v. Wood, 11 U.S. (7 Cranch) 504, 505 (1813).

409. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255–56 (2001).

410. 5 U.S.C. § 552(a)(4)(B) (creating a cause of action for a federal district court to "order the production of any agency records improperly withheld from the complainant").

411. *Id.*

412. Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 256–57 (2011).

413. *See generally* Aram A. Gavoor & Daniel Miktus, *Oversight of Oversight: A Proposal for More Effective FOIA Reform*, 66 CATH. U. L. REV. 525, 537–41 (2017) (arguing that FOIA judicial review is more deferential to agencies than the de novo standard would intend, but acknowledging imperfect means of tracking the effectiveness of FOIA litigation).

b. Case Study: 8 U.S.C. § 1447(b)

As a case study, let's examine an immigration statute: 8 U.S.C. § 1447(b). It is an apparently unique statute in the U.S. Code that applies to naturalization applications:

> If there is a failure to make a determination under section 1446 of this title before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the [U.S. Department of Homeland Security] to determine the matter.[414]

Before this provision was created in 1990, a noncitizen hoping to become a U.S. citizen—usually a lawful permanent resident—would submit an application to a naturalization court.[415] An Immigration and Naturalization Service employee received the application, examined the applicant, then recommended to the court whether to grant or deny citizenship.[416] The court would then make its own decision.[417] This process caused backlogs, leading to the Immigration Act of 1990.[418] Then, for the first time, the agency had the full authority to adjudicate naturalization applications.[419] Courts retained a narrow role in the process through § 1447(b): if 120 days passed from the interview, then they could intervene and adjudicate the application themselves.[420] All circuit courts to consider the issue have held that § 1447(b) grants courts exclusive jurisdiction once the lawsuit is filed, and USCIS cannot continue to adjudicate the lawsuit unless and until the court remands.[421] This did not solve the backlogs. Whether that led to delay lawsuits is not immediately clear, but the backlog ballooned in the mid-to-

414. 8 U.S.C. § 1447(b). The reference to the Immigration and Naturalization Service in the text now refers to the Department of Homeland Security. 6 U.S.C. §§ 271(b)(2), 557.

415. Jessica Schneider, *Waiting to Be an American: The Courts' Proper Role and Function in Alleviating Naturalization Applicants' Woes in 8 U.S.C. § 1447(b) Actions*, 29 ST. LOUIS U. PUB. L. REV. 581, 583, 585 (2010) (citing 8 U.S.C. §§ 1445–1446 (1988)).

416. *Id.* at 585.

417. *Id.*

418. *Id.* at 585–86, 605.

419. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

420. 8 U.S.C. § 1447(b).

421. *See, e.g.*, Haroun v. U.S. Dep't of Homeland Sec., 929 F.3d 1007, 1009 (8th Cir. 2019).

late 2000s because of USCIS's expansion of the FBI name check.[422] The backlog persists.[423]

This provision is more powerful than mandamus or the APA because the court is required by the text of the statute to act once a suit is filed, and either conduct a deference-free de novo review or remand to the agency to determine the matter.[424] Further, there is a bright line when those options become available: 120 days after the interview.[425] The applicant always retains the option of forgoing court and waiting for the agency to decide.[426]

As between deciding the naturalization application de novo and remanding, a majority of courts remand.[427] Conversely, one of the few courts to undertake de novo review did so "due to USCIS's failure to provide the plaintiff with a timely response when USCIS had all of the background check results."[428] In other words, equitable-type considerations came into play, even when a court was deciding whether to use this tool which is more powerful than mandamus or § 706(1). This shows how these concerns have transcended the original writ of mandamus and continue to play a role in delay litigation.

IV. RECOMMENDATIONS

The writ of mandamus has developed over the last several hundred years; the APA, over the last eighty.[429] The APA's unreasonable delay provision certainly traces its heritage to the writ. There are clear, though often subtle, differences between the two. Yet confusion reigns over what, precisely, an APA unreasonable delay claim *is* and how it differs from mandamus, if at all.[430] Courts should recognize that mandamus and APA § 706(1) claims are distinct. Not all cases may yield a published opinion in the court of appeals

422. Natalia May, *"What's in a Name?" While F.B.I. Slowly Administers Name Checks for USCIS, Some Courts Entertain Mandamus and APA Suits by Frustrated Lawful Immigrants*, 33 VT. L. REV. 749, 756–57 (2009); Memorandum from Records Management, FBI, to Finance (June 14, 2005), https://www.aclu.org/files/pdfs/immigrants/natzdelays_fbi_requestfor_employeedev.pdf [https://perma.cc/7RYK-2RMF] (requesting more funding and training for the FBI program).

423. Miriam Jordan, *Wait Times for Citizenship Have Doubled in the Last Two Years*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/us/immigrant-citizenship-naturalization.html [https://perma.cc/5T68-LBBF].

424. 8 U.S.C. § 1447(b).

425. *Id.*

426. *See id.*

427. Schneider, *supra* note 415, at 599.

428. *Id.* at 602.

429. *See supra* Parts II.A, III.D.2.

430. *See supra* Part III.E.

if a losing agency simply elects to comply with a court order compelling the delayed action rather than take up a lengthy appeal that risks generating adverse precedent. Thus, this work may fall more on the district courts.

After appreciating the different facets of these two claims, courts should then require proof and issue relief accordingly. For APA claims, that will require a hard reexamination of the current patchwork of delay doctrine—to the extent the six *TRAC* factors could be called a coherent test that actually guides judges, instead of a Potemkin village of six facades. The plaintiffs suffering delay, as with all APA plaintiffs, carry the burden of proof.[431] A critically reconsidered APA delay test could then give plaintiffs better ideas of what they need to prove about the agency's operations (and guide pre-suit FOIA requests accordingly), and what the agencies must demonstrate about their operations, staffing, evaluative processes, and officewide priorities to rebut such proof. Such a grounding would help to advance the law and resolve long-time questions on mandamus and more recent ones about agency delay. For courts and litigants, doing so would make practical sense; vindicate the text of the Mandamus Act, All Writs Act, and APA; and better incentivize agencies to protect individual liberty by performing their respective congressional charges.

A. Differences Between Mandamus and APA § 706(1)

The precise relationship between the statutory mandamus authority and the APA matters because one or the other might not be suitable for a given delay scenario. Section 706(1) is not mandamus per se because of its lack of clear lineage to a historical remedy and lack of mandamus-like elements, but it serves a distinct role. Mandamus relief is available only if the plaintiff has "no other adequate means to attain the relief" sought.[432] Whatever the differences in scope between *available* relief, if the plaintiff's complaint or petition prays for identical relief in both mandamus and § 706(1) counts, then they have an adequate means to attain the relief and disqualify themselves from a writ of mandamus. As the Ninth Circuit has held, "because mandamus relief and relief under the APA are in essence the same, when a complaint seeks relief under the Mandamus Act and the APA and there is an adequate remedy under the APA, we may elect to analyze the APA claim

431. *See, e.g.*, Sierra Club v. Marita, 46 F.3d 606, 619 (7th Cir. 1995) ("The party challenging the agency action also bears the burden of proof in these cases."); Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004) ("[A] claim under § 706(1) can proceed only where *a plaintiff* asserts that an agency failed to take a discrete agency action that it is required to take." (emphasis added and omitted)).

432. Kerr v. U.S. Dist. Court for N. Dist. of Cal., 426 U.S. 394, 403 (1976).

only."[433] Thus, we are not concerned with instances of self-defeating pleaders. Rather, we urge courts and practitioners to be more attuned to scenarios in which distinct forms of relief are sought.

In considering which causes of action to pursue, a plaintiff might recognize some similarities. For both mandamus and § 706(1), the action at issue must be a discrete action legally required of the agency.[434] The Supreme Court remarked on this in its 2004 opinion *Norton v. Southern Utah Wilderness Alliance*: "In this regard the APA carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus under the All Writs Act . . . ."[435]

Otherwise, courts should recognize the many important differences between mandamus and the APA's unreasonable delay provision. First, the mandamus remedy does not distinguish between an agency official's *final refusal* to undertake a ministerial duty, and an agency official's *delay* in undertaking a ministerial duty. The former roughly tracks agency inaction in APA § 706(2), with the latter tracking unreasonable delay in § 706(1). Some have stated that "[t]rying to categorize these cases under either §§ 706(1) or 706(2) would be problematic," although that statement appears to rest on definitions, and compares inaction with action, as opposed to inaction versus delay.[436] In either case, the official has a duty to do something, but is failing to do it.[437] For mandamus, that satisfies the ministerial-duty prong. For the APA, that exposes the fault between § 706(1) and (2).

Thus, mandamus is stronger for private parties than § 706(1) because the latter concerns *agency action* that is unreasonably delayed. If the nondiscretionary ministerial duty would not result in a final agency action upon completion, then it is not § 706(1)-violative conduct. In such circumstances, mandamus is the only way.

Second, the legal standard for § 706(1) appears to capture a broader range of behaviors in its domain. A court may issue mandamus relief when an executive officer has failed to complete a ministerial duty to which the

433. Vaz v. Neal, 33 F.4th 1131, 1135 (9th Cir. 2022) (quoting R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061, 1065 (9th Cir. 1997)) (citation modified); *accord* South Carolina v. United States, 907 F.3d 742, 754 (4th Cir. 2018) (collecting cases from several other circuits).

434. Norton v. S. Utah Wilderness All., 542 U.S. 55, 63–64 & n.1 (2004) ("This limitation appears in § 706(1)'s authorization for courts to 'compel agency action *unlawfully* withheld.' . . . Of course § 706(1) also authorizes courts to "compel agency action . . . unreasonably delayed"—but a delay cannot be unreasonable with respect to action that is not required." (second alteration in original)).

435. *Id.* at 63.

436. Biber, *supra* note 43, at 11.

437. *Id.*

petitioner has a clear and indisputable entitlement.[438] But § 706(1) applies to agency action that is *unreasonably* delayed.[439] That term could be read to embrace the kinds of equitable considerations that a court considers in determining whether to issue mandamus. That standard is thus more permissive to the government because in § 706(1), the court still has a step after determining whether there is a nondiscretionary ministerial duty that must be completed but was not: the court proceeds to consider whether the delay is unreasonable. This additional step is not explicitly present during a mandamus analysis.[440] Given the several justifications that may be available to an agency for its delay,[441] and general due deference implied by the APA's legislative history,[442] a plaintiff may well falter for failing to show that the delay is unreasonable.

Third, apart from the elements that need to be satisfied to prove liability, it is questionable whether the APA mirrors mandamus on remedies. Mandamus is distinctly different because it is discretionarily provided by courts.[443] A party is never legally entitled to mandamus relief.[444] Ordinarily, a court should *deny* mandamus relief.[445] Still, the court's satisfaction that mandamus is appropriate, in its exercise of discretion, can go either way. Presumably, the court can go beyond factors tied to the agency delay under review, like the unreasonableness of the delay. Such general equitable factors might include, for example, the size of financial resources of the agency, the history of previous violations, or the severity of the injury to the aggrieved party—the latter of which is, again, a concern of the APA per the *Attorney General's Manual*.[446] In the APA, § 702 appears to dovetail with that discretionary limitation: "Nothing herein affects . . . the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground."[447] However, § 706(1) says a court "*shall* compel" unreasonably

438. Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004).

439. 5 U.S.C. § 706(1).

440. *See supra* Part II.A.

441. *See generally supra* Part II.A.

442. *See* CLARK, *supra* note 35, at 108; FCC v. Pottsville Broad. Co., 309 U.S. 134, 146 (1940); APA JUDICIARY COMMITTEE PRINT, *supra* note 284, at 39.

443. *See supra* note 129 and accompanying text.

444. *See supra* note 129 and accompanying text.

445. *E.g.*, Audubon of Kan., Inc. v. U.S. Dep't of Interior, 67 F.4th 1093, 1111 n.10 (10th Cir. 2023) ("Mandamus is a drastic remedy, available only in extraordinary circumstances."); *see also* Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004) (mandamus against a lower court is a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes'").

446. CLARK, *supra* note 35, at 108–10.

447. 5 U.S.C. § 702.

delayed action.[448] If unreasonableness is taken as an objective albeit vague term, then once a court finds delay to be unreasonable, there it has no room to decide whether to issue relief.[449]

Fourth, although § 706(1) relief appears to be mandatory whereas mandamus relief is not, § 706(1) relief may be more limited than mandamus relief. Relief can vary given the potentially broad interpretation of "compel" in the APA.[450] For example, as the D.C. Circuit recently summarized its case law permitting the issuance of lesser § 706(1) remedies, "Upon finding such an unreasonable delay [under *TRAC*], the district court need not order immediate action, but may instead establish deadlines to ensure that the agency is proceeding as diligently as possible with the resources available to it."[451] This paradigm resembles the panoply of options available to judges issuing mandamus writs for delay.[452]

But it is an open question what types of remedies, exactly, are appropriately under the "compel" rubric. Is there a new remedy—beyond requiring the delay to cease by a date certain, or ordering a processing plan, or requiring status reports that would be feasible and faithful to the history of the delay? What is another way a court can help coerce the agency to act, that does not lead a court to micromanage the agency and arrogate the other branches' powers to itself? Courts should pause and give these questions critical reflection in APA delay cases.

Relatedly, there is a split over whether such "compel" relief is mandatory.[453] Giving a court discretion to decline to order a remedy to compel might appear sensible, as an agency may be unable to mobilize to complete the delayed rule or adjudication, at least while still preserving the integrity of the action and adhering to other statutory standards.[454] Such an agency might have something akin to an impossibility defense of sorts.[455] A strict "shall compel" remedy in line with the APA's text might be bad policy in that application. Yet the regulated entities' delay has, by definition, been found to be unreasonable by the time a court is considering relief.[456]

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448. *Id.* § 706(1) (emphasis added).

449. *Id.*

450. *See supra* Part III.E.2.

451. Afghan & Iraqi Allies v. Blinken, 103 F.4th 807, 815 (D.C. Cir. 2024) (citation modified).

452. *See supra* Part III.E.2.

453. *See supra* Part III.E.2.

454. *See* HICKMAN & PIERCE, *supra* note 10, at 1552.

455. *See id.* § 14.3.2 (citing *In re* United Mine Workers, 190 F.3d 545, 554 (D.C. Cir. 1999)) ("If Congress continues to tell agencies to do more and more with less and less, they will not comply because they cannot comply. No court order can change that reality.").

456. *Id.*

That "unreasonableness" element serves to help filter out instances in which an agency is simply unable to comply with remediating the delay, because otherwise it is reasonable for the agency to continue delaying and it does not need to remediate anything.[457] Thus, we view the unreasonableness element—which should be reexamined, as explained below—as resolving much of the uncertainty about the meaning of "shall compel." Courts should approach the phrase and the concept of § 706(1) relief with more rigor. If a court had to resolve the issue, we think it should follow the Fourth Circuit's textualist approach that "shall" means "must."[458] Thus, a court that finds liability under § 706(1) must issue some sort of order to force the agency into compliance.[459]

The prior two points on liability and remedy do not simply cancel each other out. Although the standards for securing a writ of mandamus match the narrow rigidity of the APA remedy, a court's equitable discretion on mandamus remedy does not mirror the wide-ranging inquiry of unreasonableness on § 706(1) liability. Although a court has discretion under both standards, the unreasonableness determination should be tied to the agency action being delayed, whereas the mandamus remedial determination may involve any appropriate equitable factors. A judge should not issue a writ of mandamus if the executive official has acted reasonably. But the converse is not true—a judge is not likely to issue a writ of mandamus if the executive official has acted unreasonably, because mandamus is supposed to be an extraordinary remedy.[460] The net effect is that unreasonableness—whatever it means, and to be sure, "there is a vigorous jurisprudential debate" about that[461]—is a factor that can go either way for the APA, but should usually help the government for mandamus claims.

Fifth, the two vary on the identity of a defendant. An APA plaintiff must name an agency,[462] but a mandamus petitioner needs an officer who can be compelled.[463] It is unclear what practical difference that makes. But in theory, limiting the compelled parties to certain, named defendants might limit how capacious a remedy a court might order.

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457. *Id.*

458. *Id.* at 1557.

459. *See, e.g.*, South Carolina v. United States, 907 F.3d 742, 756 (4th Cir. 2018).

460. Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004).

461. David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 527 & n.10 (2011) ("Understanding what reasonableness requires has been a preoccupation of legal thinkers for decades." (citing humanistic and feminist approaches to reasonableness)); *see, e.g.*, *Reasonable*, BLACK'S LAW DICTIONARY (4th rev. ed. 1968) ("Just; proper. Ordinary or usual. Fit and appropriate to the end in view.").

462. 5 U.S.C. §§ 704, 706(1) (permitting challenges to certain behavior by an "agency").

463. *Cheney*, 542 U.S. at 380–81; *id.* at 392 (Stevens, J., concurring).

The palatability of either cause of action, then, fundamentally hinges on the type of duty (and especially how far along in the administrative chain the duty falls), whether the government is being reasonable (as opposed to unreasonable), and whether the plaintiff simply has compelling circumstances worthy of the supposedly rare relief of mandamus or, if APA relief is sought, how a court interprets the term "compel." But the precise differences between mandamus and § 706(1) are under-researched. As we continue along in our highly polarized state of governmental affairs, we can expect that the second Trump Administration will face lawsuits alleging delays. It is unclear what sorts of rulings an adverse district court might order on liability and relief. Refinement should occur sooner rather than later.

B. Developing and Refining a True § 706(1) Framework

Having disentangled mandamus and APA delay claims, courts should then proceed to reexamine the judicial standards for reviewing § 706(1) claims. The circuits are not uniform in their approaches, particularly on the extent to which *TRAC* applies.[464] Even within the *TRAC* framework itself, questions abound.

There are possible gaps and flaws with the existing paradigm that courts should improve. Section 706(1) is mandamus by heritage, and mandamus has developed as common law.[465] That provides good ground to say courts should reevaluate their approach. Ideally, the Supreme Court, which has never examined how to evaluate APA unreasonable delay, would take up these issues. Alternatively, a circuit-by-circuit approach would have utility, especially in the D.C. and Ninth Circuits, which hear large numbers of delay cases. Notwithstanding, from 2022 preceding thirty years, the D.C. Circuit issued 25% of the delay circuit court published opinions.

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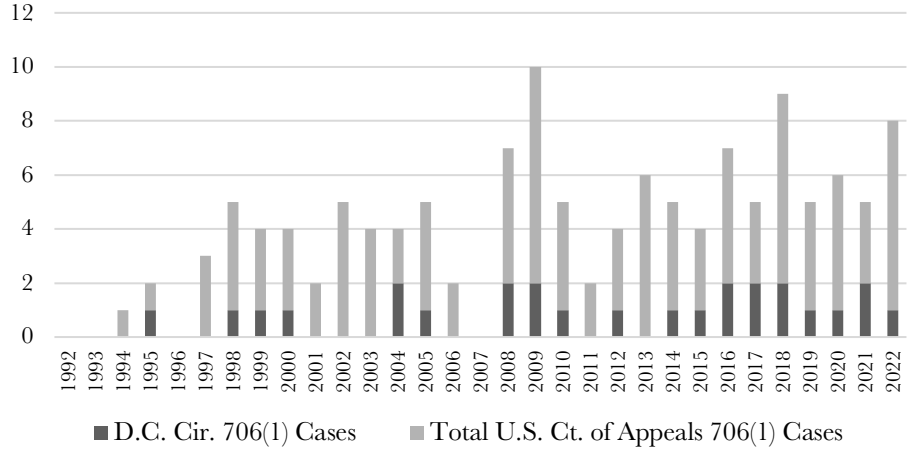
464. *See supra* Part III.E; CONG. RSCH. SERV., R45336, AGENCY DELAY: CONGRESSIONAL AND JUDICIAL MEANS TO EXPEDIATE AGENCY RULEMAKING 1, 10–13 (2018), https://www.congress.gov/crs-product/R45336 [https://perma.cc/8WAK-F8H3].

465. *See supra* Part III.A–B, D.

Published 5 U.S.C. § 706(1) Cases in U.S. Courts of Appeals from 1992-2022



We think a new § 706(1) framework is desirable for several reasons. The case law is not standardized, even within the same circuit. As discussed above, the cases are "all over the map."[466] Cases like *TRAC*, *Forest Guardians*, and suchlike should receive higher scrutiny.[467] Section 706(1) may deserve its own framework, instead of simply parroting the mandamus standards. The D.C. Circuit in June 2024 may have hinted an openness to separating out the two strains.[468]

TRAC—at least how the doctrine has evolved—should not be the foundation for the new, distinct § 706(1) analysis. A new framework for all circuits (or even just within each circuits), and not just the D.C. Circuit, would be helpful, given the somewhat unexpected distribution of APA delay cases across the federal appellate judiciary that we found above.[469] However, we single out *TRAC* here, given the extent to which it has influenced the other circuits.

466. SCHWARTZ & REVESZ, *supra* note 349, at 14–15 (summarizing the lengths of delay found reasonable by the D.C. Circuit to demonstrate "how unpredictable the results can be").

467. *See* TRAC v. FCC, 750 F.2d 70 (D.C. Cir. 1984); Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999).

468. Afghan & Iraqi Allies v. Blinken, 103 F.4th 807, 815 (D.C. Cir. 2024).

469. *See supra* Part III.E.1.

At base, the *TRAC* factors are too generalized and subjective. Although courts have remarked that the six factors are not exclusive or set in stone,[470] it would aid agencies and the public to have the necessary considerations better articulated. The whole exercise seems to undervalue what is actually going on at the agency and why delay is occurring. A new § 706(1) analysis might ask: How much time does the agency think will elapse before the adjudication or rulemaking occurs? The *TRAC* approach is very backwards-looking, which is unhelpful with devising the APA remedy that "shall [be] compel[led]" upon a finding of unreasonable delay.[471]

Any clarity on what a "rule of reason" means, exactly, would be helpful for factor 1. That phrase may simply refer to the context behind the agency's adjudication or rulemaking delays and whether they are reasonable. If so, that is tautological and unhelpful. Breaking this out into other considerations would aid the bench and bar.

Should there be a super-preference for health and human interests (*TRAC* factor 3)? Is that reasonable when so much of the regulatory state touches on health and human interests (and the argument could probably be made that just about any type of government benefit implicates health and human welfare)?[472] Or where some agencies' dockets are filled exclusively with such matters (like the Departments of Health and Human Services, Homeland Security, State, Defense, Justice, Housing and Urban Development, or Veterans Affairs)? Do these agencies effectively start at a disadvantage in the delay analysis, and should that be the case? To be clear, these interests could have *a* role, but it seems inconsistent with the APA's trans-substantive character and the flexible inquiry inherent in its mandamus progenitor to establish these as factors that will often weigh against the government. Congress can provide the preference in statutes and indeed does.[473] That is what should prevail, not what courts think about it.[474]

How should a court balance these six factors against each other? There is a lot of overlap between the factors, with some courts lumping together dyads of factors.[475] While the "rule of reason" might sound as if it should be the

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470. *See, e.g.*, Afghan & Iraqi Allies v. Blinken, 103 F.4th 807, 815 (D.C. Cir. 2024).

471. 5 U.S.C. § 706(1).

472. *See* Envt'l Def. Fund, Inc., v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) ("[C]ourts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty.").

473. Kagan, *supra* note 409, at 2255–56.

474. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 & n.21 (1978).

475. *See, e.g.*, *In re* Ctr. for Biological Diversity, 53 F.4th 665, 670–71 (D.C. Cir. 2022) (considering factors one and two together, and factors three and five together); *In re* Barr Lab'ys, Inc., 930 F.2d 72, 75 (D.C. Cir. 1991) (same).

sole and exclusive consideration when held up against the statutory language of "unreasonabl[e] delay[],"[476] there are still five other factors from *TRAC*. And there are no markers for how to weigh the rule of reason factor against the others. One D.C. Circuit case called the rule of reason the "most important factor."[477] Other times, the D.C. Circuit has indicated that factor one and factor four, the competing-priorities factor, "carry the greatest weight in our analysis."[478] But other D.C. Circuit opinions lack any commendations of this sort.[479] This all presumes that a court is able to apply the factors at all. One case, examining the plaintiffs' interests at issue to see how they fit with factors three and five, concluded that "categorization of the values at stake is elusive," then held that those factors were "largely irrelevant in light of *TRAC*'s fourth consideration" in that case.[480] Another case held that where the agency had failed to comply with a prior remand—which is not a *TRAC* factor—*that* was the "decisive factor."[481]

Other factors beyond *TRAC*'s six certainly seem salient. Perhaps the degree to which a party is prejudiced should have a much greater role. The APA House committee report on the APA warned, "No agency should permit any person to suffer injurious consequences upon unwarranted official delay."[482] Perhaps, too, deference to the agencies' allocation of resources and staff to align with presidential priorities should have a much greater role to respect the separation of powers. That concept currently does not figure into any *TRAC* factor.[483] Urging lower courts to consider such deference would respect the Senate Committee on the Judiciary's statement that § 706(1) was not intended to facilitate judicial interference in the agencies' operations.[484]

Current interpretations of § 706(1) sit uneasily with other fundaments of administrative law. For example, *TRAC* offers nothing about how an administrative record is compiled with delay.[485] Nor does it address how a record

476. 5 U.S.C. § 706(1).

477. *In re* Core Commc'ns, Inc., 531 F.3d 849, 855 (D.C. Cir. 2008).

478. Da Costa v. Immigr. Inv. Program Off., 80 F.4th 330, 339 (D.C. Cir. 2023).

479. *See, e.g.*, Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (though highlighting the "importance" of the competing-priorities factor).

480. *In re Barr Lab'ys, Inc.*, 930 F.2d at 75.

481. *In re* Ctr. for Biological Diversity, 53 F.4th 665, 671 (D.C. Cir. 2022) (citation modified).

482. H.R. REP. NO. 1980 (1946), *as reprinted in* ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, 1944–46, at 263–64 (1946).

483. 750 F.2d 70, 80 (D.C. Cir. 1984).

484. Miaskoff, *supra* note 221, at 637 (citing APA JUDICIARY COMMITTEE PRINT, *supra* note 284, at 39 (1946)).

485. 750 F.2d at 80.

would work for constitutional issues if, say, delay is alleged to violate procedural due process.[486]

We decline here to dictate the exact contours of a § 706(1) unreasonable delay test in this writing. These cases are diverse. The agencies involved are many. And the reasons for the delay vary greatly. What new crisis, for example, might follow COVID to delay agencies' work? How should courts react to allegations that the second Trump Administration is impounding funds destined for agencies or otherwise intentionally thwarting their efforts?[487]

A critical reconsideration of *TRAC* could benefit mandamus claims as well. The D.C. Circuit has acknowledged the tension between the classic three elements of mandamus and the *TRAC* test with at least six factors, admitting that it has "never squarely addressed the interplay."[488] Excusing *TRAC* as eschewing "a hard and fast set of requirement elements," the court remarked that the test might be "useful guidance" to a court to determine either liability (e.g., whether the delay violates a clear duty) or remedy (i.e., whether mandamus should issue).[489] Further mandamus-specific development of the case law could help courts as well.

A refined legal paradigm for delay claims could help deter administrative agencies' occasional indulgence in noncompliance with remedial orders. Clarifying procedural expectations, elevating transparency, and facilitating targeted judicial oversight might more effectively harness the shaming pressures that the judiciary currently enjoys against noncompliant agencies. Such a framework would not only reinforce judicial legitimacy and save judicial contempt or pre-contempt resources, but also enhance the practical enforceability of delay remedies in a resistant executive environment.

Finally, the third branch is not alone in shouldering responsibility for addressing agency delay. Congress could do more to disincentivize or reduce agency delay. Congress may wish to consider amending the APA to include factors for courts to consider when determining unreasonableness. The APA might also be updated to offer a specific menu of remedies for unreasonable delay violations and address the administrative record. Congress could also draft delay provisions similar to 8 U.S.C. § 1447(b), which offers

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486. *See id.*

487. *See, e.g.*, Global Health Council v. Trump, No. 25-5097, 2025 WL 2480618, at *1 (D.C. Cir. Aug. 28, 2025) (vacating a district court preliminary injunction on impoundment that granted relief to federal grantees and associations for frozen U.S. Department of State and U.S. Agency for International Development funds, holding that plaintiffs-appellees lacked a freestanding constitutional claim, and lacked a cause of action under the Impoundment Control Act through the APA).

488. Am. Hosp. Ass'n v. Burwell, 812 F.3d 183, 189–90 (D.C. Cir. 2016).

489. *Id.*

clear consequences to an agency that misses a clear deadline.[490] Mandamus, in contrast, has never been rigidly codified—even through the centuries as it has gone through the Judiciary Act, the All Writs Act, and the Mandamus Act—yet plaintiffs are clear on its terms.[491] The same concept should transfer to § 706(1).

V. CONCLUSION

The writ of mandamus and APA § 706(1) remain essential mechanisms for courts wrestling with agency delay, even as their precise relationship generates doctrinal uncertainty. The historical development of mandamus, from its English common law origins through American adaptations, demonstrates its durability as a tool for compelling ministerial duties.[492] While § 706(1) built upon this foundation, it represents a distinct cause of action that shares mandamus's concern with unremediated agency inaction but diverges in important ways.[493] Courts and practitioners would be well-served to recognize these as separate devices with different elements, constraints, and remedial possibilities.

The accuracy of delay doctrine takes on heightened importance as DOGE and related federal workforce initiatives threaten to dramatically expand processing times across the administrative state. When statutory obligations remain unchanged but staffing levels plummet, delays will proliferate.[494] The judiciary needs sharper analytical tools than the malleable *TRAC* factors to assess when delay becomes unreasonable while respecting separation of powers principles and agency resource limitations.

Congress could revise the APA to provide clearer standards for evaluating delay claims or expand targeted provisions like 8 U.S.C. § 1447(b). But legislative solutions demand careful calibration—agencies require flexibility to manage priorities and ensure quality decisionmaking, while regulated parties deserve timely resolution of their matters. Neither mandamus nor § 706(1) should enable courts to commandeer agency resource allocation. At the same time, these mechanisms must carry sufficient force to meaningfully address delay that undermines the administrative state's ability to execute its statutory duties.

The mounting delays across the administrative states illustrate the pressing need for doctrinal refinement. Because Trump Administration delays will be systemwide, the courts will be less concerned with administration-specific

490. 8 U.S.C. § 1447(b).

491. *See supra* Part III.A–D.

492. *See id.*

493. *See supra* Part III.E.

494. *See supra* Part II.B.

targeting.[495] Instead, they should embrace the distinct characters of mandamus and § 706(1) while developing more rigorous frameworks to evaluate delay. The alternative of allowing delay to calcify into effective denial of statutory rights would mark an abdication of judicial responsibility that the common law heritage of mandamus and the text of the APA neither contemplate nor permit.

495. Dep't of Com. v. New York, 139 S. Ct. 2551, 2583–84 (2019) (Thomas, J., concurring in part and dissenting in part) (criticizing the majority for targeting agency action during President Trump's first term: "In short, today's decision is a departure from traditional principles of administrative law. Hopefully it comes to be understood as an aberration—a ticket good for this day and this train only").