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Agency Delay: Congressional and Judicial Means to Expedite Agency Rulemaking

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SUMMARY

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Agency Delay: Congressional and Judicial Means to Expedite Agency Rulemaking

Agencies are sometimes criticized for taking too long to promulgate regulations and issue decisions. Some amount of time, of course, is necessary for reasoned decision making. However, unjustified delays have significant costs for regulated entities and the public at large. At the extreme, agency delays can undermine public trust in agencies and frustrate the implementation of the regulatory regime created by Congress.

Congress has a number of means at its disposal to reduce the likelihood of agency delays in rulemaking. Even if Congress does not impose any specific timing requirements for an agency to act, the Administrative Procedure Act's (APA's) default rule requires that the agency act "within a reasonable time." If Congress wishes to impose more stringent requirements, it can enact nonbinding time frames or hard statutory deadlines for particular agency rulemakings. Finally, if timing is of primary importance, Congress may impose statutory penalties on the agency should it fail to meet deadlines.

The particular statutory tools that Congress uses to encourage timely agency action will greatly influence the scope of subsequent judicial review. The APA grants persons affected by agency delay the right to sue to compel certain discrete agency actions. Lawsuits are available only with respect to required agency actions; if Congress has committed the decision to regulate to an agency's discretion, courts will dismiss a suit to compel the agency to act on that matter. For agency actions that are required, courts will compel the agency to engage in rulemaking only if the delay is unreasonable or the action is unlawfully withheld.

If Congress has not imposed a time frame or deadline, courts are usually deferential to the agencies and hesitant to compel agency action. Most courts employ a multifactor balancing test in this situation, looking to the length of the delay, the interests harmed by the delay, the agency's other priorities, and any bad faith by the agency. If Congress imposes a nonbinding time frame (i.e., a suggested sense of how long an action should take), that will be considered as an additional factor in the balancing analysis. If Congress imposes a statutory deadline, however, some courts will routinely order the agency to act if it misses the deadline, without the need to balance the various factors. Other courts still use the balancing test, but consider the missed deadline as a factor weighing against the agency. If Congress has imposed a statutory penalty for missing a deadline, lawsuits to compel agency action are usually unnecessary because the penalty spurs the agency to act.

Although lawsuits by affected individuals are the primary means to remedy agency delay, Congress may also use its oversight powers to address agency delay after it arises. Members may write letters to agencies on behalf of their constituents. Congressional committees may hold hearings and ask agency directors to account for the delay. Finally, Congress may use its power of the purse as a carrot or a stick to compel agency action, either by granting agencies additional resources to remedy the delay, or by threatening an agency's funding should it not take timely action.

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Introduction

Administrative agencies have long been criticized by some for taking too long to issue and implement regulations.[1] Of course, there are often justifiable reasons cited for agencies to take time before they act. Agencies are charged with administering complex statutory schemes.[2] Rulemakings generally follow the Administrative Procedure Act's (APA's) notice-and-comment procedure,[3] which entails soliciting input and marshaling information from the public, subject-matter experts, and other stakeholders.[4] It takes time to analyze that information, balance competing interests, and draft appropriate regulatory language.[5] Agencies may have limited resources, and there may be other, more pressing matters requiring their time and attention.[6] Some delay is necessary for reasoned decision making.

However, excessive delay by agencies can raise serious policy concerns. Delays in rulemaking may violate statutory directives when Congress has ordered an agency to regulate in a particular area.[7] If the regulatory area concerns the environment or public health, for instance, delays can endanger the public by leaving known harms unaddressed.[8] For regulated industries, excessive delay can create uncertainty, inhibit long-term planning, and cause economic harm.[9] Habitual delays can undermine public trust in agency process.[10] In addition, not all delays are justified by deliberative process. Agency delays may be the result of capture by special interests,

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[1] *See generally* 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, 1383–87 (2011) ("[F]ew would dispute that agency delays have long been a significant problem for the administrative state . . . .").

[2] *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (describing the statutory and regulatory scheme of the Clean Air Act and its amendments as "technical and complex").

[3] *See* 5 U.S.C. § 553(b)–(c) (2012) (providing procedures for notice-and-comment rulemaking by agencies). For general background of the process of agency rulemaking and notice-and-comment procedure, see CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*, by Todd Garvey, CRS In Focus IF10003, *Federal Regulations and the Rulemaking Process*, by Maeve P. Carey and Daniel T. Shedd, and CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[4] *See generally* Sant'Ambrogio, *supra* note 1, at 1392.

[5] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 511 (2007) (noting that EPA received "more than 50,000 comments" regarding proposal to regulate greenhouse gas emissions).

[6] *See* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 16–27, 33–34 (2008) (stressing the importance of resource allocation and priority setting as a justification for judicial deference to agency's decisions not to act).

[7] *See, e.g.*, Forest Guardians v. Babbitt, 174 F.3d 1178, 1186–87 (10th Cir. 1999).

[8] *See, e.g.*, *In re* A Cmty. Voice, 878 F.3d 779, 784–88 (9th Cir. 2017) (holding that EPA had unreasonably delayed in effectuating Congress's directive to "eliminate lead-based paint hazards in all housing as expeditiously as possible," leaving in place "insufficient" standards that threatened the welfare of children) (citing 42 U.S.C. § 4581a(1)).

[9] *See* Potomac Elec. Power Co. v. ICC, 702 F.2d 1026, 1034 (D.C. Cir. 1983) ("Quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans."); MCI Telecomms. Corp. v. FCC, 627 F.2d 322, 341 (D.C. Cir. 1980) ("[D]elay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities . . . .").

[10] *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 93-4, IMPROVING THE ENVIRONMENT FOR AGENCY RULEMAKING 3 (1993), https://www.acus.gov/sites/default/files/documents/93-4.pdf (noting that "missed deadlines" can "undermine respect for the rulemaking process"); Martin v. O'Rourke, 891 F.3d 1338, 1349 (Fed. Cir. 2018) (Moore, J., concurring) (describing system for adjudicating veterans' disability benefits as "plagued by delays and inaction" and "fundamentally flawed").

administrative error, misplaced priorities, or simple mismanagement.[11] Excessive agency delay can therefore undermine the effectiveness of the statutory regime created by Congress.

Congress has a number of tools that it can use to combat agency delay. To encourage agencies to act in a timely fashion, Congress may set nonbinding time frames[12] or statutory deadlines for particular agency actions,[13] or impose penalties on agencies should they fail to meet those deadlines.[14] Even if Congress does not impose any specific timing requirements for a required agency action, the agency still must act within a "reasonable time" under the APA.[15]

Persons alleging unreasonable delay by agencies may sue in court to compel agency action.[16] However, the recourse such individuals will have, if any, depends on the statutory scheme and the severity of the delay. In the absence of specific deadlines, most courts employ a multifactor balancing test to determine whether the agency's delay is "unreasonable"; this test examines, among other things, the length of the delay, the importance of the regulation at issue, and the interests harmed by the delay.[17] Courts are generally deferential to agencies in this analysis.[18] In other situations, such as when Congress has imposed a specific statutory deadline, courts are more willing to compel agency action, with some courts holding that an order compelling agency action is mandatory whenever a statutory deadline is violated.[19]

This report provides an overview of the various tools that Congress can use to encourage agencies to act within a particular time frame.[20] It then analyzes how those tools inform judicial analysis of challenges to agency actions as "unreasonably delayed" or "unlawfully withheld" under the APA. The report concludes by noting that lawsuits are not the only way to force agencies to issue delayed regulations; Congress can also use political pressure, its oversight powers, or its power of the purse to encourage the agency to act.

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[11] *See generally* Sant'Ambrogio, *supra* note 1, at 1393–1398 (overviewing causes of agency delays).

[12] *See infra* "Nonbinding Time Frames."

[13] *See infra* "Statutory Deadlines."

[14] *See infra* "Hammer Provisions."

[15] 5 U.S.C. § 555(b).

[16] 5 U.S.C. § 706(1) (authorizing reviewing court to "compel agency action unlawfully withheld or unreasonably delayed"); *In re* Core Commc'ns, Inc., 531 F.3d 849, 855 n.5 (D.C. Cir. 2008). Of course, litigants must satisfy the usual requirements of ripeness and standing to sue in order to raise a section 706(1) claim. *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (setting out three-part test for Article III standing); Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) (setting out factors for ripeness inquiry); *see also* CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole, at 6–8 (discussing standing and ripeness doctrines as applied to judicial review of agency actions).

[17] *See* Telecomms. Research & Action Ctr. v. FCC (*TRAC*), 750 F.2d 70, 80 (D.C. Cir. 1984) (creating six-factor standard for claims of unreasonable delay).

[18] *See, e.g.*, Sierra Club v. Gorsuch, 715 F.2d 653, 658 (D.C. Cir. 1983) ("Absent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of a rulemaking proceeding is entitled to considerable deference.") (citations omitted); Sant'Ambrogio, *supra* note 1, at 1428 ("[C]ourts are extremely receptive to arguments that compelling agency action in one matter will interfere with other agency priorities.").

[19] *See, e.g.*, Forest Guardians v. Babbitt, 174 F.3d 1178, 1191 (10th Cir. 1999) ("When an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act."); Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1178 (9th Cir. 2002) ("The Service's failure to complete the listing determinations within the mandated time frame compelled the [district] court to grant injunctive relief. . . . The exercise of discretion is foreclosed when statutorily imposed deadlines are not met.").

[20] Although analogous issues arise with respect to delays in agency adjudications, this report focuses primarily on delays in agency rulemaking.

Congressional Tools to Encourage Timely Agency Action *Ex Ante*

When drafting legislation granting agencies the power to engage in rulemaking, Congress can employ a variety of means that create incentives for the agency to issue regulations in a timely manner. At one end of the spectrum, Congress may decline to impose any timing requirements on the agency. In that case—presuming that the statute imposes some nondiscretionary duty to act[21]—the agency will be subject only to the APA's general requirement that it complete its rulemaking within a "reasonable time."[22] Courts have interpreted this requirement deferentially, requiring an "egregious" delay before they will compel an agency to issue a proposed or final rule.[23]

If the APA's default rule of reasonableness is not enough, Congress may choose to impose more stringent timing requirements on the agency, such as a nonbinding time frame or an explicit statutory deadline. Courts are generally more willing to order the agency to act by a date certain when the agency is subject to a statutory time frame or deadline.[24] If Congress considers a matter so important and time-sensitive that a deadline alone is insufficient, it may enact penalties that will ensue should the agency miss the deadline.[25]

By imposing deadlines or other timing restraints on an agency, legislators face a potential tradeoff between timely action and deliberative process. If Congress dictates a deadline that is too constrained, it may decrease the thoroughness of agency decision making and the quality of the final rule.[26] Indeed, a principal reason that Congress may wish to delegate a matter to an agency is the complexity of the issue and the agency's expertise in a specialized area. Given its expertise, the agency is often in a better position to know how long it will take to investigate a matter, seek public comment and technical input, and develop a well-crafted rule on a particular issue.[27] Perhaps for this reason, Congress declines to impose any specific statutory deadline for the vast

[21] *See infra* "Reviewability: Is the Agency Required to Act?."

[22] 5 U.S.C. § 555(b).

[23] *In re* Core Commc'ns, Inc., 531 F.3d 849, 855 (D.C. Cir. 2008) ("The central question in evaluating 'a claim of unreasonable delay' is 'whether the agency's delay is so egregious as to warrant mandamus.'") (quoting *TRAC*, 750 F.2d at 79).

[24] *See supra* notes 18–19; Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 832 ("[S]tatutory deadlines increase the likelihood that a court will find an agency's delay unreasonable and will force the agency to remedy that delay.").

[25] *See infra* "Hammer Provisions."

[26] *See* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 938 (2008) ("[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."); Alden F. Abbott, *Case Studies on the Costs of Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 467, 487 (1987) (finding that deadlines can "engender hastily considered, socially inefficient rules").

[27] *See* Sant'Ambrogio, *supra* note 1, at 1415 ("Congress often delegates the timeline for decisionmaking to the agencies because it does not have the time or expertise to make the decision itself . . . ."); Gregory L. Ogden, *Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedures, Procedural Reform, and Legislative Oversight*, 4 U. DAYTON L. REV. 71 (1979) ("[B]ecause of their expertise, agencies, as opposed to the courts and the legislature, are in the best position to determine what promptness standards they can live with and realistically hope to achieve.").

majority of federal regulations.[28] That said, given the potential costs of agency delay, Congress may not always want to leave the timing of regulations entirely up to the agency's discretion.

Nonbinding Time Frames

If Congress decides not to impose a firm deadline, but still wants to offer a general expectation of how much time is reasonable, it may impose a nonbinding time frame on the agency. For example, with respect to the processing of immigration benefit applications, a statute states that "[i]t is the sense of Congress that the processing" of such applications by the agency "should be completed not later than 180 days after the initial filing of the application."[29] Several commentators support such nonbinding time frames—whether set by the agency itself or by Congress—as encouraging timely agency action without the "problematic" aspects of true deadlines, which are less flexible and can sometimes prove unrealistic in practice.[30] Because congressionally established time frames are one of the factors that courts consider in determining whether to compel an agency to act, courts are generally more likely to compel agency action when a suggested time frame is violated than if no time frame was imposed by Congress.[31] Nonbinding time frames thus offer a middle ground between imposing no timing guidance at all and a hard statutory deadline.

Statutory Deadlines

When Congress chooses to control the timing of agency action, the most common means is the statutory deadline: legislation explicitly requiring that an agency shall take a particular action by a certain time.[32] Deadlines are frequently used with respect to environmental regulations and other public health matters.[33] For example, as part of the 1990 amendments to the Clean Air Act, the Environmental Protection Agency (EPA) was given twelve months to issue regulatory guidance on motor vehicle inspection and maintenance requirements that states could use to comply with

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[28] *See* Gersen & O'Connell, *supra* note 26, at 941 & tbl. 4 (finding that around 8% of agency rulemakings were associated with a statutory deadline); *accord* Jason Webb Yackee, Susan Webb Yackee, *From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Regulatory Authority*, 68 ADMIN. L. REV. 395, 423 (2016) (finding that about 7% of statutes in data set contained statutory deadlines for rulemaking); *see also* Sant'Ambrogio, *supra* note 1, at 1415 (arguing that Congress does not impose deadlines for the "vast majority" of agency actions because it lacks "the time or expertise" to do so).

[29] 8 U.S.C. § 1571(b) (2012).

[30] Sant'Ambrogio, *supra* note 1, at 1433; *see also* Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 200–204 (1987) (arguing that nonbinding "agency-set deadlines" or "recommendatory" congressional deadlines are superior to inflexible statutory deadlines).

[31] *See* Telecomms. Research & Action Ctr. v. FCC (*TRAC*), 750 F.2d 70, 80 (D.C. Cir. 1984) (considering whether "Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute" in determining reasonableness of agency delay); Indep. Mining Co. v. Babbitt, 105 F.3d 502, 507–09 (9th Cir. 1997) (finding this factor favored plaintiff because Congress had set a "[t]imetable" for the agency to act). *See also infra* notes 113–114 and accompanying text.

[32] *See* Gersen & O'Connell, *supra* note 26, at 941 & tbl. 4 (finding that around 8% of agency rulemakings were associated with a statutory deadline); M. Elizabeth Magill, *Congressional Control over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 190 n.17 (1995) ("The United States Code is littered with statutory deadlines requiring a particular agency to act within a time certain.").

[33] *See* Gersen & O'Connell, *supra* note 26, at 939 & tbl. 2 (finding that EPA faced more deadlines than any other agency, with over 600 of its rulemakings between 1987 and 2003 subject to a statutory deadline); *accord* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 13 (5th ed. 2012) (noting that "Congress has been particularly concerned about agency inaction and delay in the public health and environment areas" and citing examples of statutory deadlines in these areas).

national air quality standards.[34] Similarly, as part of the Oil Pollution Act of 1990 (passed in response to the *Exxon Valdez* oil tanker accident), Congress ordered the Coast Guard to issue regulatory standards for tank level and pressure monitoring devices within one year.[35]

Deciding how long a particular deadline should be can be a complicated issue for Congress.[36] On average, an administrative rulemaking takes somewhere between one and two years.[37] However, there is significant variation in the length of rulemaking depending on the agency[38] and the particular rule.[39] Many statutory deadlines are roughly the length of an average rulemaking, that is, between 12 and 24 months.[40] However, deadlines that are shorter[41] or longer[42] are common. In addition to (or in lieu of) setting a deadline for promulgation of a final rule, Congress may also enact separate deadlines for different stages of the rulemaking process. For example, Congress may set a deadline by which the agency must issue a proposed rule[43] or specify a maximum length for the public comment period.[44]

If speed is of paramount importance, Congress can exempt a particular rule from the usual procedural requirements of notice-and-comment rulemaking.[45] This could have a cost in that the regulation might be formed with less deliberation and input from stakeholders and the public.[46]

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[34] *See* 42 U.S.C. § 7511a(a)(2)(B)(ii); *see also* Nat. Res. Def. Council, Inc. v. EPA, 797 F. Supp. 194, 195–96 (E.D.N.Y. 1992).

[35] *See* Pub. L. No. 101-380 § 4110, 104 Stat. 484, 515 (1990); *see also In re* Bluewater Network, 234 F.3d 1305, 1308 (D.C. Cir. 2000).

[36] Sant'Ambrogio, *supra* note 1, at 1415 (observing that when "Congress passes legislation creating a new administrative or regulatory program," "[t]t is difficult if not impossible to know in advance how much time many decisions will reasonably require").

[37] Gersen & O'Connell, *supra* note 26, at 945–47 & 947 n.3 (finding that average duration for rulemaking was 511 days); *accord* Jason Webb Yackee & Susan Webb Yackee, *Delay in Notice and Comment Rulemaking: Evidence of Systemic Regulatory Breakdown?*, in REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 163, 168 (Cary Coglianese, ed. 2012) (finding that an average notice-and-comment rulemaking took around 18 months).

[38] Gersen & O'Connell, *supra* note 26 at 988 tbl. 12 (finding that, when neither agency is subject to a deadline, the Department of Agriculture rulemakings take 400 days on average, whereas the Department of Health and Human Services takes over twice as long—817 days on average); Yackee & Yackee, *supra* note 37, at 170 tbl. 3 (finding that the Securities and Exchange Commission had a median time of 8 months to finalize rules, whereas the Food and Drug Administration took 24 months on average).

[39] Yackee & Yackee, *supra* note 37, at 168–70 (finding that half of all regulations were finalized in 13 months or less, but that 25% took 41 months or longer).

[40] *See, e.g.*, *supra* notes 34–35 (12-month deadline for environmental regulations); 21 U.S.C. § 350i(b) (18-month deadline for regulations to protect against the intentional adulteration of food); 42 U.S.C. § 6914b-1 (24-month deadline for regulation of plastic ring carriers).

[41] *See, e.g.*, 25 U.S.C. § 5354 (2012) (ten-month deadline for final rules relating to funding to assist Indian education); 42 U.S.C. § 11925 (six-month deadline for regulations relating to drug abuse prevention in public housing).

[42] *See, e.g.*, 42 U.S.C. § 6924(f)(2) (45-month deadline for regulation of disposal of certain hazardous waste by underground injection into deep injection wells); 49 U.S.C. § 20153(g) (2012) (48-month deadline for regulations relating to audible warnings by trains at highway-rail grade crossings).

[43] *See, e.g.*, 25 U.S.C. § 1815 (six-month deadline for issuance of proposed rules relating to federal grants to colleges operated by Indian tribes); 21 U.S.C. § 360fff-6(b)(1) (18-month deadline for issuing proposed regulations).

[44] *See, e.g.*, Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 120-240 § 1029(c)(3), 105 Stat. 1914, 1969–70 (codified at 25 U.S.C. § 154) (requiring that "[n]ot later than 60 days after the date of publication of the proposed rule . . . the Secretary shall publish in the Federal Register a final rule").

[45] Gersen & O'Connell, *supra* note 26, at 959 n.128 (citing statutes where Congress has "simultaneously set deadlines and explicitly waive[d] APA [notice-and-comment] requirements").

[46] *See generally id.* at 977 ([D]eadlines can also produce a range of negative side effects, distorting agency procedures and reducing the quality of decisions.").

Even absent an express congressional exemption, agencies may claim that a looming deadline constitutes "good cause" to forgo notice-and-comment under the APA.[47] Although the mere existence of a statutory deadline will not suffice to establish good cause,[48] courts have permitted deviations from standard notice-and-comment rulemaking procedures "where congressional deadlines are very tight and where the statute is particularly complicated."[49]

Evidence of the practical effectiveness of statutory deadlines is mixed. Several studies have found that agencies miss statutory deadlines much more often than they meet them.[50] However, there is empirical evidence showing that, other things being equal, the presence of a statutory deadline does correlate with faster agency rulemaking.[51] This effect is fairly modest, though—on average, agencies act a few months faster when subject to a deadline.[52] As discussed below, explicit statutory deadlines do make it significantly easier for litigants to obtain a court order compelling an agency to act.[53]

Hammer Provisions

The most stringent means that Congress can use to encourage agency action are so-called "hammer provisions."[54] These statutes not only set hard deadlines for an agency to act, but also impose a specific penalty (the "hammer") on the agency if it fails to meet the deadline. The particular penalty imposed varies, but often the hammer comes in the form of a specific alternative regulatory result. For example, the Hazardous and Solid Waste Amendments of 1984 provided that if regulations of certain waste disposal methods were not issued by the deadline, those disposal methods would simply be prohibited outright.[55] Similarly, the Nutrition Labeling and Education Act of 1990 specified that if final rules regarding food labeling were not promulgated within 24 months, the agency's proposed regulations would be treated as the binding

[47] 5 U.S.C. § 553(b)(3)(B) (2012) (not requiring notice-and-comment procedures "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"); *see generally* LUBBERS, *supra* note 33, at 97–101 (reviewing case law on "the extent to which congressionally imposed deadlines justify an agency's issuance of rules without notice and comment").

[48] Petry v. Block, 737 F.2d 1193, 1203 (D.C. Cir. 1984) ("[S]trict congressionally imposed deadlines, without more, by no means warrant invocation of the good cause exception.").

[49] Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1236 (D.C. Cir. 1994).

[50] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-613, CLEAN AIR ACT: EPA HAS COMPLETED MOST OF THE ACTIONS REQUIRED BY THE 1990 AMENDMENTS, BUT MANY WERE COMPLETED LATE 3–4 (2005), https://www.gao.gov/assets/250/246543.pdf (finding that EPA missed statutory deadlines with respect to 256 of 338 (76%) actions required under the Clean Air Act); ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 78-3, TIME LIMITS ON AGENCY ACTIONS 2 (1978), https://www.acus.gov/report/project-report-recommendation-78-3 ("There has been a substantial degree of noncompliance with all the statutory time limits studied."); Gersen & O'Connell, *supra* note 26, at 949 n.84 (study of rulemakings from 1988–2003 finding that "the agency met the deadline in only 26.99% of the cases").

[51] Gersen & O'Connell, *supra* note 26, at 945–49 (finding that deadlines speed rulemakings by around 100 days on average, but noting that for many agencies "the effect is relatively modest").

[52] *See id.*

[53] *See infra* "Agency Delays in Violation of a Statutory Deadline."

[54] *See* LUBBERS, *supra* note 33, at 1; Magill, *supra* note 32, at 154–56.

[55] *See* 42 U.S.C. § 6924(d)(1)–(2) (2012) (prohibiting land disposal of certain hazardous wastes unless EPA determines within 32 months that "the prohibition on one or more methods of land disposal of such waste is not required in order to protect human health and the environment"); *id.* § 6924(f)(1)–(3) (prohibiting disposal of certain hazardous waste by underground injection into deep injection wells if EPA does not issue final regulations regarding such disposal within 45 months).

final regulations.[56] The hammer imposed need not be regulatory in nature, however: one statute, for example, withheld a percentage of the budget for certain agency offices until the agency issued a final rule.[57]

Hammer provisions, even more than statutory deadlines, appear to be fairly effective at encouraging agencies to accelerate their decision making and place a matter foremost among the agency's priorities.[58] However, especially if paired with a tight deadline and in the absence of additional resources for the agency, hammers can "distort[] the agency's other regulatory functions" and result in "hastily imposed rules."[59] One case study of hammer provisions found that the hammers, although effective at encouraging the agency to act quickly, resulted in the "neglect" of other agency duties, "delegation of decisions to lower-level staff," and a rushed process with arguably "inadequate time to resolve certain scientific issues."[60] In sum, 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.

Judicial Treatment of Agency Delay

The statutory requirements imposed by Congress shape the scrutiny that courts use to determine whether an agency's delay is unreasonable. The APA authorizes suit by a person "suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[61] In the absence of a specific statutory time frame or deadline, the APA requires that "each agency shall proceed to conclude a matter presented to it" within "a reasonable time."[62] Section 706(1) of the APA provides a remedy to enforce this requirement: reviewing courts shall "compel agency action unlawfully withheld or unreasonably delayed."[63]

The APA thus creates a private right of action to compel an agency to issue a regulation or complete an adjudication that has been unreasonably delayed. However, an individual can only sue to compel discrete actions that the agency is required to take.[64] Presuming that the agency is required to take a particular action, the plaintiff typically must show that the agency's delay is "unreasonable" under a multifactor balancing test.[65] However, some courts will dispense with this balancing test when the agency has violated a statutory deadline.[66]

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[56] Pub. L. No. 101-535 § 2(b), 104 Stat. 2353, 2357 (codified at 21 U.S.C. § 434 note)).

[57] *See* Department of Transportation and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-358 to -359.

[58] *See* Magill, *supra* note 32, at 180–81 (noting that hammer provisions in the Nutrition Labeling and Education Act succeeded in putting the issue "at or near the top of the agency's agenda" and resulted in the Food and Drug Administration (FDA) "substantially" meeting the deadline, which was a significant achievement given the agency's "habit[]" of missing deadlines).

[59] *See* ACUS RECOMMENDATION 93-4, *supra* note 10, at 3, 11.

[60] Magill, *supra* note 32, at 180–82, 187.

[61] 5 U.S.C. § 702 (2012).

[62] *Id.* § 555(b).

[63] *Id.* § 706(1).

[64] Norton v. S. Utah Wilderness All. (*SUWA*), 542 U.S. 55, 64 (2004).

[65] *See infra* "Agency Delays with No Statutory Deadlines: The *TRAC* Factors."

[66] *See infra* notes 125–133 and accompanying text.

Even if a litigant succeeds in proving that an agency has unreasonably delayed, judicial remedies are limited. Although courts can compel an agency to act in some situations, courts cannot "specify what the action must be."[67] For example, a court may order an agency to issue a regulation when the agency has missed a statutory deadline, but it cannot dictate the *content* of that regulation.[68] Essentially, the most that a court can do is order the agency to act promptly or impose a deadline on the agency.[69]

Reviewability: Is the Agency Required to Act?[70]

Not all persons complaining of agency delay or inaction will be able to have their claims heard in court. Rather, as the Supreme Court has held, "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*."[71] Thus, in addition to the usual justiciability requirements, such as standing,[72] litigants under section 706(1) must show that the agency action sought to be compelled is both (i) discrete, and (ii) nondiscretionary.

For persons complaining of agency delay in the rulemaking context, the requirement of discreteness is not usually a difficult barrier. The "agency action" referenced in section 706(1) is explicitly defined in the APA to encompass any "*agency rule*, order, license, sanction, relief, of the equivalent or denial thereof, or *failure to act*."[73] Accordingly, it is well established that a failure to act on a petition for rulemaking,[74] a denial of a petition for rulemaking,[75] a failure to undertake a required rulemaking,[76] or a failure to issue a final rule[77] are all discrete agency actions subject to judicial review if unreasonably delayed.

However, a section 706(1) claim will lie only if the rule at issue is nondiscretionary, that is, a rule that the agency is legally *required* to promulgate. The necessity of a "mandatory duty" reflects the

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[67] *See SUWA*, 542 U.S. at 65.

[68] *Id.*

[69] *See, e.g.*, *In re* A Cmty. Voice, 878 F.3d 779, 788 (9th Cir. 2017) (ordering EPA to issue a proposed rule within ninety days of the court's decision); Forest Guardians v. Babbitt, 174 F.3d 1178, 1193 (10th Cir. 1998) (ordering EPA to make critical habitat designation "as soon as possible"). Courts will often retain jurisdiction over the case until the agency action is completed, in order to monitor compliance with the judicially imposed deadline. *See, e.g.*, *In re* United Mine Workers of Am. Int'l Union, 190 F.3d 545, 556 (D.C. Cir. 1999).

[70] For a more general treatment of this issue, see CRS Report R43710, *A Primer on the Reviewability of Agency Delay and Enforcement Discretion*, by Todd Garvey.

[71] *SUWA*, 542 U.S. at 64.

[72] *See supra* note 16.

[73] 5 U.S.C. § 551(13) (emphasis added).

[74] *See, e.g.*, *In re* Am. Rivers & Idaho Rivers United, 372 F.3d 413, 418 (D.C. Cir. 2004) (holding that agency was obliged by the APA to respond to regulatory petitions, even for a discretionary action, within a reasonable time); *see generally* JASON A. SCHWARTZ & RICHARD L. REVESZ, PETITIONS FOR RULEMAKING: FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 15–17 (Nov. 5, 2014), https://www.acus.gov/report/petitions-rulemaking-final-report ("[C]ourts have nearly unanimously found that agency responses (or lack thereof) to petitions for rulemakings are reviewable under the APA.") (citing 5 U.S.C. §§ 701–706).

[75] *See* Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007) ("Refusals to promulgate rules are thus susceptible to judicial review, though such review is 'extremely limited' and 'highly deferential.'") (quoting Nat'l Customs Brokers & Forwarders Ass'n v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989)).

[76] *See, e.g.*, *In re* Bluewater Network, 234 F.3d 1305, 1315 (D.C. Cir. 2000).

[77] *See, e.g.*, *In re* Int'l Chem. Workers Union, 958 F.2d 1144, 1150 (D.C. Cir. 1992).

fact that "a delay cannot be unreasonable with respect to action that is not required."[78] In general, this second requirement necessitates clear statutory or regulatory language mandating that an agency issue a rule in a specific area or take some other discrete action. For example, courts have held that language declaring that an agency "shall establish, by regulation, minimum standards" for certain device within one year[79] or that an agency "shall promulgate regulations" in certain areas of food safety[80] will suffice to create a nondiscretionary duty to act.

In contrast, in *Anglers Conservation Network v. Pritzker*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit)[81] rejected a claim that the National Marine Fisheries Service (NMFS) failed to act to protect river herring and shad, which plaintiffs alleged were overfished in the mid-Atlantic region.[82] The court held that the relevant statute did not impose a mandatory duty on NMFS because it only stated that the Secretary of Commerce (who oversees NMFS) "*may*" develop "a fishery management plan" if the relevant regional council failed to timely submit such a plan.[83] A section 706(1) claim was therefore not viable because, in the court's view, the use of "may" in the statute implied that the Secretary was permitted to act, but not required to do so.[84]

Similarly, in *Center for Biological Diversity v. Zinke*, the court held that it could not compel an agency to act despite a delay of more than six years.[85] Following the *Deepwater Horizon* oil rig explosion, an independent presidential commission recommended reforms to the Department of the Interior's (DOI's) procedures for subjecting offshore oil and gas exploration to the National Environmental Policy Act (NEPA).[86] DOI commenced a review of its NEPA procedures in October 2011, but then took no further action.[87] In *Zinke*, the plaintiff sought to compel DOI to make a final decision on whether NEPA reforms were needed. The relevant law provided that the agency "shall continue to review their policies and procedures . . . to revise them as necessary to ensure full compliance with [NEPA]."[88] Although the mandatory language "shall" was used,[89] the

[78] Norton v. S. Utah Wilderness All. (*SUWA*), 542 U.S. 55, 64 n.1 (2004).

[79] *See* Oil Pollution Act of 1990, Pub. L. No. 101-380 § 4110, 104 Stat. 484, 515; *In re* Bluewater Network, 234 F.3d 1305, 1315 (D.C. Cir. 2000) (interpreting this language to impose a mandatory duty on the agency).

[80] *See* Food Safety Modernization Act of 2010, Pub. L. No. 111-353, 124 Stat. 3885 (2011); Ctr. for Food Safety v. Hamburg, 954 F. Supp. 2d 965, 966, 970 (N.D. Cal. 2013) (interpreting this language to impose a mandatory duty on the agency).

[81] For purposes of brevity, references to a particular circuit in the body of this report (e.g., the D.C. Circuit, the Second Circuit, etc.) refer to the U.S. Court of Appeals for that particular circuit. Collectively, the federal appellate courts are termed "federal courts of appeals."

[82] 809 F.3d 664, 667, 671 (D.C. Cir. 2016).

[83] *Id.* at 671 (quoting 16 U.S.C. § 1854(c)(1))).

[84] *See id.* ("Ordinarily, legislation using 'shall' indicates a mandatory duty while legislation using 'may' grants discretion.") (citations omitted).

[85] 260 F. Supp. 3d 11, 16 (D.D.C. 2017).

[86] *Id.* at 15–16.

[87] *Id.* at 16.

[88] *Id.* at 22 (quoting 40 C.F.R. § 1507.3(a)).

[89] *See generally* Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall" usually connotes a requirement.") (citations omitted); *but see* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434 n.9 (1995) (observing that "may" is sometimes used to mean "shall," and vice versa, depending on context).

court held that the agency only had a duty "to review" its NEPA procedures, which "does not plainly indicate that agencies must *complete* any such review."[90]

Although explicit statutory language requiring that an agency shall issue a rule in a particular area is generally sufficient for a section 706(1), it is not always necessary. On occasion, courts have sometimes found mandatory duties created by more ambiguous statutory language. For example, *In re A Community Voice* concerned the Residential Lead-Based Paint Hazard Reduction Act of 1992 (the "Paint Hazard Act"), through which Congress delegated authority to EPA to establish national standards for dust-lead hazards.[91] EPA issued initial rules in 2001, and subsequently granted a petition for rulemaking in 2009 to update its standards based on new evidence that lead exposure was more significantly dangerous to children than scientists had previously supposed.[92] After eight years of inaction, advocacy groups sued EPA to compel the agency to issue a proposed rule.[93] The Ninth Circuit held that EPA had a duty to update its dust-lead hazard regulations because (1) Congress was clear that the purpose of the Paint Hazard Act was to "eliminate lead-based paint hazards in all housing as expeditiously as possible";[94] and (2) the Toxic Substances Control Act made this directive an "ongoing duty" by stating that these regulations "may be amended from time to time as necessary."[95]

Agency Delays with No Statutory Deadlines: The *TRAC* Factors

If the agency is subject to a nondiscretionary duty, the required action must be either "unreasonably delayed" or "unlawfully withheld" to be actionable.[96] In this situation, most courts apply a six-factor test—known as the "*TRAC* test" or the "*TRAC* factors"—to determine whether a particular delay is unreasonable.[97]

The *TRAC* factors are named after a 1984 decision of the D.C. Circuit in *Telecommunications Research & Action Center v. FCC* (*TRAC*).[98] The plaintiffs in *TRAC* sought to compel the Federal Communications Commission (FCC) to determine whether AT&T was required to reimburse ratepayers for allegedly unlawful overcharges.[99] The D.C. Circuit observed that it had never articulated a "single test" for when "the agency's delay is so egregious as to warrant mandamus."[100] Distilling its prior case law, the court enumerated six considerations that form the "contours of a standard" to assess the reasonableness of agency delay:

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[90] *Center for Biological Diversity*, 260 F. Supp. 3d at 23.

[91] 878 F.3d 779, 782 (9th Cir. 2017).

[92] *Id.* at 782–83.

[93] *Id.* at 781.

[94] *Id.* at 784 (quoting 42 U.S.C. § 4851a(1)).

[95] *Id.* at 784 (quoting 15 U.S.C. § 2687).

[96] 5 U.S.C. § 706(1) (2012).

[97] *See generally* Aram A. Gavoor & Daniel Miktus, *Public Participation in Nonlegislative Rulemaking*, 61 VILL. L. REV. 759, 788 (2016) ("In the circuit courts . . . the most commonly used test [for reviewing agency inaction and delay] is the '*TRAC* test' . . . ."). In addition to the D.C. Circuit, the First, Fourth, Fifth, Ninth and Tenth Circuits have endorsed the *TRAC* factors for unreasonable delay. *See id.* at 788–89 n.203 (2016) (collecting cases). The Third Circuit uses a slightly different set of factors but weighs many of the same issues as *TRAC*, while the law in the Second Circuit is unclear. *See id.*

[98] 750 F.2d 70 (D.C. Cir. 1984).

[99] *Id.* at 72.

[100] *Id.* at 79–80. A writ of mandamus is a court order compelling a party to perform a particular act or duty. *See Mandamus*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/mandamus. Mandamus is available

> (1) the time agencies take to make decisions must be governed by a "rule of reason";
>
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
>
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
>
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
>
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is "unreasonably delayed."[101]

On the merits, the *TRAC* court held that the FCC's five-year delay did not warrant mandamus, relying primarily on the agency's assurance that "it is moving expeditiously" in resolving the matter.[102]

Applications of this contextual, six-factor balancing test are highly fact-specific and often difficult to predict.[103] The *TRAC* decision itself conceded that its standard "sometimes suffers from vagueness."[104] The D.C. Circuit has "never attempted to explain the relationship between the [*TRAC*] factors . . . or if any factors are absolutely necessary or independently sufficient."[105] As a result, one critic of the test asserts that "courts can use the *TRAC* analysis to support virtually any conclusion they want to reach."[106] Other commentators, however, consider *TRAC* to be a "useful blueprint" to guide courts when they evaluate the reasonableness of agency delay.[107]

The first *TRAC* factor—the length of the delay—is considered to be the most important factor.[108] In the absence of specific congressional guidance, there is "no per se rule as to how long is too long" for an agency to delay.[109] Nonetheless, a reasonable time for agency action is usually "counted in weeks or months, not years."[110] One survey of judicial decisions in this area found that the line between reasonable delay and unreasonable delay is typically "several years," with courts often finding delays beyond two or three years to be unreasonable.[111] Of course, as *TRAC*

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only in extraordinary circumstances and when the party to be compelled has a clear, nondiscretionary duty to act. *See* Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 392 (2004) (Stevens, J., concurring).

[101] *TRAC*, 750 F.2d at 80 (citations and quotations omitted) (spacing altered).

[102] *TRAC*, 750 F.2d at 80–81.

[103] *See* Gavoor & Miktus, *supra* note 97, at 790 ("Because applying the *TRAC* test is so 'fact-specific' and flexible . . . . court rulings on agency delays can vary widely."); Schwartz & Revesz, *supra* note 74, at 15–17 (describing results under the *TRAC* test as "unpredictable" and "all over the map").

[104] *TRAC*, 750 F.2d at 80.

[105] Sant'Ambrogio, *supra* note 1, at 1412.

[106] *Id.* at 1413.

[107] Gavoor & Miktus, *supra* note 97, at 891.

[108] *In re* Core Commc'ns, Inc., 531 F.3d 849, 855 (D.C. Cir. 2008) ("The first and most important factor is that 'the time agencies take to make decisions must be governed by a 'rule of reason.'") (quoting *TRAC*, 750 F.2d at 80).

[109] *In re* Am. Rivers & Ida. Rivers United, 372 F.3d 413, 419 (D.C. Cir. 2004).

[110] *Id.*

[111] *See* Schwartz & Revesz, supra note 68, at 15–16.

(which ruled for the agency despite a five-year delay) itself demonstrates, exceptions to this rule of thumb abound depending on the other *TRAC* factors.[112]

The second factor, when applicable, informs the first factor: any indication by Congress of the expected timetable for agency action provides a yardstick for courts to assess the reasonableness of the delay.[113] When there is no timetable or any "other indication of the speed with which [Congress] expects the agency to proceed," the second *TRAC* factor collapses into the first.[114]

Another key consideration under *TRAC* is the third factor, which relates to the nature of the regulatory area. Courts are significantly more willing to compel agency action if the regulation impacts a matter of public health or welfare than if it involves purely economic interests. For example, in *Public Citizen Health Research Group v. Auchter*, the court held that a three-year delay for rules regulating workplace exposure to ethylene oxide (EtO) was unreasonable and ordered the agency to issue a proposed rule within 30 days.[115] The court observed that three years is "simply too long given the significant risk of grave danger EtO poses to the lives of current workers and the lives and well-being of their offspring."[116]

Courts often give less attention to the fourth, fifth, and sixth *TRAC* factors (respectively, the agency's other priorities, the interests harmed by the delay, and any agency impropriety). The fourth factor nearly always favors the agency, which can point to other important matters on its docket as justifying the delay.[117] The fifth factor tends to overlap with the third: if the regulation affects public health (as opposed to economic matters), it follows that the "interests prejudiced by delay" will be more serious.[118] The sixth *TRAC* factor is simply a statement that bad faith by the agency is not a necessary condition for a finding of unreasonable delay. If there is bad faith by the agency, such as utter indifference to a deadline, some courts have found that this strongly favors the plaintiff.[119]

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[112] At one extreme, a delay of five months in deciding a petition for rulemaking was been found to be unreasonable, when the matter concerned public health and the agency had already thoroughly studied the issue. *See* Pub. Citizen v. Heckler, 602 F. Supp. 611, 613 (D.D.C. 1985). At the other end of the spectrum, delays as long as five years have been found to be reasonable when the matter is purely economic, *see, e.g.*, *TRAC*, 750 F.2d at 80–81, or if the regulatory issue is highly technical, the science is uncertain, and the agency has other competing priorities, *see* Oil, Chem. & Atomic Workers Union v. OSHA, 145 F.3d 120, 123–24 (3d Cir. 1998).

[113] *See, e.g.*, *In re* Barr Labs., Inc., 930 F.2d 72, 75 (D.C. Cir. 1991) ("Here, we may assume that Congress's 180–day deadline indeed supplies content for item one's 'rule of reason' . . . .").

[114] Telecomms. Research & Action Ctr. v. FCC (*TRAC*), 750 F.2d 70, 80 (D.C. Cir. 1984).

[115] 702 F.2d 1150, 1151, 1154 (D.C. Cir. 1983).

[116] *Id.* at 1157.

[117] *See* Sant'Ambrogio, *supra* note 1, at 1434 ("When plaintiffs challenge a delayed action, the agency often points to several other matters on its agenda and claims these competing priories are absorbing its time and attention."). Courts are generally loath to interfere with agency's discretion to set its own priorities. *See, e.g.*, *In re Barr Labs.*, 930 F.2d at 76 ("We have no basis for reordering agency priorities. The agency is in a unique—and authoritative—position to . . . allocate its resources in the optimal way."); Sierra Club v. Thomas, 828 F.2d 783, 797 (D.C. Cir. 1987) ([W]e are properly hesitant to upset an agency's priorities by ordering it to expedite one specific action, and thus to give it precedence over others.").

[118] *See* Indep. Min. Co. v. Babbitt, 105 F.3d 502, 509 (9th Cir. 1997) (noting that the third and fifth *TRAC* factors are "overlapping"); Sant'Ambrogio, *supra* note 1, at 1413 ("The third and fifth factors also frequently overlap . . . .").

[119] *See, e.g.*, *In re Barr Labs.*, 930 F.2d at 76 ("Where the agency has manifested bad faith, as by singling someone out for bad treatment or asserting utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities."); Cutler v. Hayes, 818 F.2d 879, 898 (D.C. Cir. 1987) ("If the court determines that the agency delays in bad faith, it should conclude that the delay is unreasonable.").

The D.C. Circuit case *In re International Chemical Workers Union* provides an example of how courts apply the *TRAC* factors.[120] *Chemical Workers* concerned the Occupational Safety and Health Administration's (OSHA's) regulations for occupational exposure to cadmium, which had been delayed for almost six years.[121] Applying the *TRAC* factors, the court found that six years was "an extraordinarily long time, in light of the admittedly serious health risks" associated with current, outdated cadmium standards."[122] OSHA pointed to resource constraints and "deadlines imposed by Congress with respect to other rulemaking proceedings" to explain the delay.[123] The court responded that it was "not unmindful" of the agency's other responsibilities, but the delay was "simply too lengthy" for any further extensions of time; accordingly, the court ordered the agency to issue a final rule within several months.[124]

Agency Delays in Violation of a Statutory Deadline

When Congress imposes an express statutory deadline on the agency and the agency misses that deadline, courts are more receptive to claims to compel the agency to act. Indeed, some courts have taken the position that courts *must* issue an order compelling agency action whenever a court finds that an agency has violated a statutory deadline.[125]

The leading case advancing that view is the Tenth Circuit's decision in *Forest Guardians v. Babbitt*, which concerned the Secretary of the Interior's delay in designating a critical habitat for the Rio Grande silvery minnow, an endangered species.[126] Under the Endangered Species Act (ESA), a final rule designating critical habitat for the silvery minnow was due one year after the publication of the proposed rule to list the species as endangered.[127] The Secretary acknowledged missing that deadline but argued that it was impossible to meet all of the ESA-imposed deadlines due to a backlog resulting from a 13-month spending moratorium imposed by Congress.[128] The Secretary thus urged the court to employ its "equitable discretion" to decline to issue an order compelling it to act under the circumstances.[129]

The Tenth Circuit held that it lacked discretion when a statutory deadline is violated because section 706(1) states that courts "*shall* . . . compel agency action unlawfully withheld," and, quite simply, "'shall' means shall."[130] *Forest Guardians* thus drew a distinction between the two prongs of section 706(1), arguing that the "unlawfully withheld" prong applies to situations where the agency has missed a specific statutory deadline, whereas the "unreasonably delayed" prong applies to delays not governed by an explicit statutory deadline.[131] Because Congress had already established the time by which the agency must act through a statutory deadline, *Forest Guardians*

[120] 958 F.2d 1144 (D.C. Cir. 1992).

[121] *Id.*at 1145.

[122] *Id.* at 1150.

[123] *Id.*

[124] *Id.*

[125] *See supra* note 19 (citing cases); *see generally* Sant'Ambrogio, supra note 1, at 1403 & n.100 ("Most courts take the position that an agency must abide by an express statutory deadline, and mandamus is required if the agency misses the deadline.") (collecting cases).

[126] 174 F.3d 1178, 1181 (10th Cir. 1999).

[127] *Id.* at 1181–82 (citing 16 U.S.C. § 1553(b)(6)(A)).

[128] *Id.* at 1181.

[129] *Id.* at 1187.

[130] *Id.* at 1187–88.

[131] *Id.* at 1190.

held that balancing the *TRAC* factors is inappropriate.[132] The Ninth Circuit follows the *Forest Guardians* approach.[133]

Courts in the D.C. Circuit, however, still apply the *TRAC* factors even when an agency has missed an explicit statutory deadline. In its view, the violation of a statutory deadline is relevant to the first and second *TRAC* factors, but not necessarily dispositive.[134] These courts reason that the "shall" imperative of section 706(1) is "qualif[ied]" by section 702 of the APA,[135] which states that "[n]othing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground."[136] On this view, courts retain equitable discretion to decline to compel agency action even if the agency violates a statutory deadline.

In *In re Barr Laboratories*, for example, the Food and Drug Administration (FDA) conceded that it had "repeatedly violated" a 180-day deadline imposed by Congress for processing generic drug applications.[137] The D.C. Circuit nonetheless found that equitable relief was not warranted after weighing the *TRAC* factors, placing particular emphasis on the effect that granting relief would have on other agency priorities.[138] Because the FDA's delays were systematic—it was behind in processing all such applications—granting an order to expedite the plaintiff's application would only put the plaintiff at the "head of the queue" while "simply mov[ing] all others back one space," resulting in no net benefit for society.[139]

Judicial Treatment of Hammer Provisions

Unlike statutory deadlines, hammer provisions are "self-enforcing" by their nature.[140] The penalty prescribed in the statute simply goes into effect, by operation of law, should the agency fail to act by the deadline.[141] Depending on the force of the penalty, the hammer provision may eliminate the need for a civil suit to compel agency action.[142] Indeed, the penalty imposed by Congress

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[132] *Id.* at 1190–91.

[133] Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1177 (9th Cir. 2002) ("The Service urges us to apply the *TRAC* factors . . . . [However, i]n this case, Congress has specifically provided a deadline for performance by the Service, so no balancing of factors is required or permitted."). The Federal Circuit also followed *Forest Guardians* in an unpublished decision. *See In re* Paralyzed Veterans of Am., 392 F. App'x 858, 860 (Fed. Cir. 2010) ("Congress clearly imposed on the Secretary a date-certain deadline to issue a final regulation. Under such circumstances, the agency has no discretion in deciding to withhold or delay the regulation, and failure to comply is unlawful.") (citing *Forest Guardians*, 174 F.3d at 1190).

[134] *See, e.g.*, *In re* Barr Labs., Inc., 930 F.2d 72, 75 (D.C. Cir. 1991) ("[Violation of a statutory deadline] does not, alone, justify judicial intervention.").

[135] Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113, 119 (D.D.C. 2002), *vacated as moot sub nom.* Ctr. for Biological Diversity v. England, No. 02-5163, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003) ("This Court reads the more specific language of § 702, expressly recognizing courts' discretion to balance the equities, to qualify rather than contradict the more general language of § 706.").

[136] 5 U.S.C. § 702 (2012).

[137] *In re Barr Labs.*, 930 F.2d at 189.

[138] *Id.* at 190.

[139] *Id.*

[140] *See* Magill, *supra* note 32, at 183 ("The key feature of the hammer is its self-enforcing character . . . .").

[141] *See generally* LUBBERS, *supra* note 33, at 13–14; Magill, *supra* note 32, at 154–56.

[142] Magill, *supra* note 32, at 183 (observing that the "chief attraction of the hammer is its ability to obviate litigation as the primary mechanism to enforce statutory deadlines").

through the hammer provision may well be more severe than any remedy that a court has the power to impose.[143] As result, a section 706(1) suit is usually unnecessary in the context.[144]

For this reason—in combination with the infrequent use of hammer provisions, and their effectiveness at compelling agencies to act by the deadline—there are no reported judicial decisions directly addressing challenges to compel agency action subject to hammer provisions.[145] The few judicial decisions that reference hammer provisions at all do so only in passing.[146]

Congressional Tools to Address Agency Delay *Ex Post*

As discussed above, Congress possesses a variety of means to reduce the likelihood of agency delay and influence the lawsuits under section 706(1) to compel agency action. In addition, Congress has a number of tools to address agency delays *after* they arise. If troubled by a particular agency's delay, Congress can use its oversight powers to put pressure on the agency to act.[147] Individual Members may send letters to agencies expressing concern about delays that affect their constituents.[148] Congressional committees can hold hearings, call agency leaders as witnesses to explain their inaction, and issue committee reports, all of which can bring public attention to the matter and put political pressure on the agency.[149]

Perhaps the most potent weapon at Congress's disposal is the power of the purse, which Congress can use either as a carrot or a stick to motivate the agency to act.[150] If there are systematic delays at an agency due to insufficient resources, Congress may appropriate money for that agency to

[143] *See, e.g.*, *supra* note 57 (hammer provision jeopardizing agency funding if particular rule was not finalized).

[144] Judicial challenges to hammer provisions would more likely concern, for example, whether a proposed rule that is "hammered final" because the agency missed a deadline comports with the APA or due process. *See generally* Magill, *supra* note 32, at 173–77 (evaluating hypothetical legal challenges to hammer provisions based on the APA or the Due Process Clause).

[145] A Westlaw search of all reported federal cases for "hammer /3 provis!" yields 11 results. Only 4 of these results actually relate to penalties for agency inaction. *See infra* note 146.

[146] *See* Sweet v. Sheahan, 235 F.3d 80, 87 (2d Cir. 2000) (citing to academic article referencing "Congress's increased use of 'hammer' provisions" in tort case alleging failure to warn of lead-paint hazards under the Paint Hazard Act); Steel Mfrs. Ass'n v. EPA, 27 F.3d 642, 645 (D.C. Cir. 1994) (noting, in challenge to final agency rule, that agency had "acknowledged the need to act promptly" in light of statute's "hammer provisions"); Nat'l Res. Def. Council, Inc. v. EPA, 907 F.2d 1146, 1154 (D.C. Cir. 1990) (noting that agency was subject to hard hammer provisions if it had failed to act); Chem. Waste Mgmt., Inc. v. EPA, 869 F.2d 1526, 1530 n.3 (D.C. Cir. 1989) (noting that EPA was subject to hammer provisions if it had failed to regulate by the deadline).

[147] For a general introduction to Congress's oversight powers, see CRS Report R41079, *Congressional Oversight: An Overview*, by Walter J. Oleszek.

[148] Sant'Ambrogio, *supra* note 1, at 1418 ("[I]ndividual members of Congress frequently write to agencies on their constituents' behalf [to address delays].").

[149] *See* LUBBERS, *supra* note 33, at 15 ("Congressional committees frequently hold oversight hearings on rulemaking issues and, in some cases, file reports expressing strong views on agency performance on particular matters."); Sant'Ambrogio, supra note 2, at 1419 ("[C]ongressional hearings can be embarrassing to agency personnel that must defend the agency . . . .").

[150] *See* Sant'Ambrogio, supra note 2, at 1419 ("Congress's most effective tool for controlling the bureaucracy is the power of the purse . . . .").

hire new staff to clear a backlog.[151] Alternatively, Congress may threaten to eliminate funding for an agency if it does not take action more quickly.[152]

Finally, if Congress is concerned with agency delays more programmatically, it has the power to shape the procedures and requirements of agency rulemaking as a general matter. The APA is a statute; it can be reformed and amended like any other law. For example, the Regulatory Flexibility Act requires that agencies prepare an initial regulatory flexibility analysis of the regulation's impact on small business when the agency publishes a notice of proposed rulemaking under the APA.[153] Congress could amend the APA to exempt more rules from notice-and-comment requirements[154] or otherwise streamline agency procedures for rulemaking.[155]

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[151] *See, e.g.*, *In re* Barr Labs., Inc., 930 F.2d 72, 76 (D.C. Cir. 1991) (suggesting "more resources" as possible remedy for systematic FDA delays in processing generic drug applications); Sant'Ambrogio, supra note 2, at 1431 ("Congress can provide agencies with additional resources for staff, infrastructure, technology, or other improvements that can alleviate sources of delay.").

[152] *See, e.g.*, *supra* note 57 and accompanying text.

[153] See 5 U.S.C § 603(a); see generally CRS Report R41974, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, coordinated by Maeve P. Carey, at 12–14 (overviewing requirements of the Regulatory Flexibility Act).

[154] *See* LUBBERS, *supra* note 33, at 52 & n.52 (noting that the APA's default rulemaking procedures do apply not if a "statute otherwise specifies" and that "[o]ccasionally, Congress will exempt particular rulemakings from notice-and comment [procedures required by the APA]"); *see also* Carey, *supra* footnote 3, at 1 ("Unless an agency's authorizing statute provides for different procedures, the APA provides the default practice that all agencies must follow . . . .").

[155] *See, e.g.*, ACUS RECOMMENDATION 93-4, *supra* note 10, at 10–14 (proposing amendments to the APA to make rulemaking processes more efficient).