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THE CASE FOR STRICT STATUTORY CONSTRUCTION OF MANDATORY AGENCY DEADLINES UNDER SECTION 706(1)

Administrative law is a complex field replete with regulations and delicate separation of powers issues. Indeed, “[a]dministrative law is not for sissies . . . .”1 The various factors at play in administrative law make the seemingly most elementary facets hard to understand.

The problems in administrative law are amplified by the role of politics. Administrative law influences the way agencies make policy.2 Agencies are thus among the most important players in the formation and approval of policy.3 Although the most obvious ways that agencies make policy are through positive rulemaking and adjudication measures,4 agencies also set policy through inaction.5

Agencies often set policy by not doing anything at all.6 When an agency does not make the requisite regulations through either rulemaking or adjudication, the agency maintains the status quo. This inaction is thus itself a form of policymaking in the sense that it prevents the legislative and executive branches from

3. See Charles H. Koch, Jr., Administrative Law and Process § 1.2, at 6 (2d ed. 1997) (noting that “[s]etting policy is the most important function assigned to agencies”).
4. Although the specifics of rulemaking and adjudication are beyond the scope of this Note, it is important to have a rudimentary understanding of the differences between the methods. Rulemaking is a process in which agencies undergo either formal or informal processes where they make regulations that are binding on future parties, allowing the agencies to create rules before actually enforcing them. See id. 4.1 at 317 (discussing how rulemaking occurs); see also Breyer et al., Administrative Law and Regulatory Policy: Problems, Text and Cases at 588-76 (4th ed. 1999) (comparing rulemaking and adjudication). The other positive route to create policy is through adjudication, which is a trial-like proceeding in which the policies are set after a violation has occurred. See Koch, supra note 3, § 5.1 at 3. Both methods are positive measures in the sense that they create rules and policies to be followed.
5. See Breyer et al., supra note 4, at 861 (noting that “the government is always acting . . . even if the particular agency appears to be sitting on its hands”).
6. See id.
implementing enacted legislation. Congress needs the agencies to carry out its laws by passing specific rules. Otherwise, congressional mandates are thwarted.

In an effort to ensure that agencies implement enacted legislation, Congress mandated judicial review of agency inaction and delay in section 706(1) of the Administrative Procedure Act (APA). Section 706(1) enables the judiciary to review agency behavior and ensure that it comports with the statutory requirements set forth by Congress either in the enabling statute or in the default standards of the APA.

Recent decisions out of the Tenth Circuit have invigorated the debate over the role of agency inaction in agency policymaking decisions. Although some courts have encouraged judicial discretion when determining whether agency inaction is unlawful, other courts have found that the language in section 706(1) is strictly binding in the area of statutorily imposed deadlines. Circuit courts are now split over whether courts have discretion when an agency misses a mandatory deadline or if they are mandated by law to force the agency to act without granting discretion to agency priorities.

This Note explores the problems of agency inaction and delay in violation of statutory requirements. First, this Note discusses the legislative history of section 706(1) to determine congressional intent. Second, this Note examines the conflicting cases that fuel

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8. See Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999) (finding a strict statutory construction of section 706(1)); see also Yu v. Brown, 36 F. Supp. 2d 922 (10th Cir. 1999) (agreeing with Forest Guardians in finding a strict requirement to force agencies to act under certain circumstances).
10. Section 706(1) requires the court to compel agency action when the agency has unlawfully withheld action, which, as discussed below, includes missing statutorily imposed deadlines.
11. A circuit split has developed concerning the interpretation of section 706(1). The District of Columbia Circuit uses a balancing technique to determine whether a court should compel an agency to act when it misses a statutory deadline. See In re Barr Lab., Inc., 930 F.2d at 72; Telecommunications Research and Action Ctr. v. Federal Communications Comm'n, 750 F.2d 70 (D.C. Cir. 1984). The Ninth and Tenth Circuits, however, have held that the courts have no discretion when an agency misses a deadline because such inaction constitutes "unlawfully withheld" conduct. See Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999); Environmental Defense Ctr. v. Babbitt, 73 F.3d 867 (9th Cir. 1995).
the confusion over the appropriate remedy for agency inaction. Finally, this Note concludes that section 706(1) requires strict statutory construction that requires judges to prohibit agencies from violating a mandatory statutory deadline unless the agency has an impossibility defense. As a result, although agencies are important policymaking entities, they must respect congressional intent evident in blatant statutory deadlines. When agencies do not abide by congressional mandates, courts must require immediate action in compliance with the law.

BACKGROUND: THE STATUTE AND ITS LEGISLATIVE HISTORY

The APA granted judicial review of agency behavior in section 706.12 Although section 706 as a whole grants judicial review,

12. The statute reads as follows:

§ 706. Scope of Review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. 5 U.S.C. §706 (emphasis added).

The APA was enacted as a compromise over the new regulations installed as part of the New Deal. Many politicians disagreed with the politics of the New Deal and wanted to ensure judicial review of agency decisions while others wanted agency autonomy. See BREYER ET AL., supra note 4, at 19-24. The APA acted as a compromise in which agencies were regulated while still maintaining considerable discretion in their decision-making capacity. See id. at 19-24 for a discussion of the reasons behind the Act.
section 706(1) specifically addresses the issue of agency inaction.\textsuperscript{13} On its face, the statute is extremely clear. Section 706(1) states that a court \textit{shall} "compel agency action unlawfully withheld or unreasonably delayed."\textsuperscript{14} Although this language is strong and does not appear to leave anything open for debate, courts disagree over whether Congress intended to allow any room for discretion.\textsuperscript{15}

\textit{Legislative History}

The legislative history of the APA supports the idea that Congress intended courts to force agencies to implement legislation. One basis for this support is the Senate Judiciary Committee report of May 1945 that discussed the upcoming APA.\textsuperscript{16} This report contained earlier versions of the APA that had the same language requiring the judiciary to force agency action when it was unlawfully withheld or unreasonably delayed.\textsuperscript{17} The Senate report noted that the authority granted to the judiciary under the judicial review clause did not allow the courts to strip agencies of discretion in determining how an agency should carry out legislation.\textsuperscript{18} Rather, the Senate simply wanted the court to direct the agency to act without dictating what process the agency should use.\textsuperscript{19}

The Senate Committee on the Judiciary Report on S.7, A Bill to Improve the Administration of Justice by Prescribing Fair Administrative Procedures,\textsuperscript{20} which was made public on November 19, 1945, also discussed the aims behind the Act. This report discussed the ability of interested parties to petition the court to

\begin{itemize}
  \item \textsuperscript{13} \textit{See id.}
  \item \textsuperscript{14} 5 U.S.C. § 706(1).
  \item \textsuperscript{15} The debate about the language in section 706(1) has primarily focused around "unreasonably delayed." \textit{See infra} notes 63-106 and accompanying text. This Note, however, argues that the correct language to apply is "unlawfully withheld." \textit{See infra} notes 174-75 and accompanying text.
  \item \textsuperscript{16} \textit{See Staff of Senate on the Judiciary Comm., 79th Cong.,} (Comm. Print 1945), \textit{reprinted in Administrative Procedure Act: Legislative History 1944-46,} at 11 (1997) [hereinafter \textit{Legislative History}].
  \item \textsuperscript{17} \textit{See id.} at 39 (noting that an earlier version of the Act also contained the language that "[the courts] shall . . . compel agency action unlawfully withheld or unreasonably delayed").
  \item \textsuperscript{18} \textit{See id.} at 40.
  \item \textsuperscript{19} \textit{See id.}
  \item \textsuperscript{20} \textit{See Legislative History, supra} note 16, at 213-14.
\end{itemize}
force agency action. Thus, this second report identified the problem of agencies not abiding by congressional guidelines. Congress wanted to fix this problem by allowing courts to force the agencies to listen to their mandates.

The Attorney General's Interpretation also discussed the passage of the judicial review clause of the APA. This report stated that the precursor to section 706(1) contained the entire scope of judicial review. Although the report noted that Congress was not granting the courts any nonjudicial powers, it did explicitly state that the purpose of the bill was to give the courts a tool with which they could force the agency to act according to congressional will. The Attorney General's Interpretation thus supports the proposition that courts should compel agencies to act without exercising any discretion.

Finally, the House Committee Proceedings help to determine the purpose behind the APA. The House of Representatives noted that the APA delegated the ability to decide issues of law to the judiciary. Furthermore, the statute enabled people to petition courts to force agencies to act when "they improvidently refuse to act." The House proceedings also noted that the Act was intended to speed up the process of requiring agencies to act when Congress so desired. When the House focused on compelling agencies to act when they "improvidently" refused to do so, it endorsed the idea that agencies should not be able to ignore congressional mandates. Although the House Committee Proceedings did not explicitly mention statutory deadlines, it does support the underlying idea of compelling agencies to observe congressional will.

The legislative history of the APA thus demonstrates that Congress was intent on finding a way to force the agencies to

21. See id. at 214 (noting that the provision "expressly recognizes the right of properly interested parties to compel agencies to act where they improvidently refuse to act").
22. See id. at 230.
23. See id.
24. See id. (defining what the Attorney General believes to be the purpose of the Act).
25. See LEGISLATIVE HISTORY, supra note 16, at 278.
26. See id. (noting that courts are exclusively able to decide questions of law).
27. Id.
28. See id. (noting that the language stating that a court shall compel an agency to act is in response to instances when there is "a withholding or a long delay, and that particular feature is intended to hasten action on the part of these agencies").
comply with legislation. Congress was concerned about lengthy delays resulting in a circumvention of legislation and intended section 706(1) to remedy the situation. The legislative history makes it clear that Congress intended for the judiciary to use the Act to ensure that its policies were fully implemented by agencies.

The Attorney General's Manual on the APA

Aside from congressional records, the Attorney General's Manual is one of the most comprehensive and respected reports on the APA. The Manual provided an explanation of the Act to be followed by the Justice Department. The Manual noted that the APA's section on judicial review is a "restatement of [the] existing judicial practice of mandamus" in the area of agency inaction and delay. Courts are not allowed to substitute their own discretion for agency discretion when forcing the agency to act on congressional mandates.

The Attorney General's Manual compared the APA to mandamus and noted that "[o]rders in the nature of a writ of mandamus have been employed to compel an administrative agency to act . . . or to compel an administrative agency or officer to perform a ministerial

29. See supra notes 12-28 and accompanying text.
31. The ATTORNEY GENERAL'S MANUAL has been cited by the Supreme Court and is an authoritative source on the meaning of the APA. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc., 435 U.S. 519, 546 (1978).
32. ATTORNEY GENERAL'S MANUAL, supra note 30, at 108.
33. Mandamus is a process in which courts compel agencies to execute their obligations. See KOCH, supra note 3, § 8.20(4) at 465. Writs of mandamus are restricted to forcing an agency to carry out their duties, and are not available to strip an agency of its discretion in its method of carrying out the duty. See id. at 466.
34. For an in-depth analysis of mandamus and its relationship to section 706(1), see Carol R. Miaskoff, Note: Judicial Review of Agency Delay and Inaction under Section 706(1) of the Administrative Procedure Act, 55 GEO. WASH. L. REV. 635 (1987). Miaskoff argues that section 706(1) acts as a writ of mandamus. She further discusses the implications of viewing section 706(1) as mandamus and traces the cases involving agency delay until the time of her publication in 1987. There has been much change since Miaskoff's work that will be reflected in this Note. Although Miaskoff predicted some trends in agency inaction and delay cases, a split has developed in the circuits that she was unable to address.
35. See ATTORNEY GENERAL'S MANUAL, supra note 30, at 108 (noting that the agency still has discretion in determining how to carry out its administrative duties).
or non-discretionary act. [The judicial review provision] was apparently intended to codify these judicial functions.  

This reference to mandamus illustrates how the judicial review provision works. The Manual used two cases, Safeway Stores, Inc. v. Brown and Interstate Commerce Commission v. United States of America ex. rel Humboldt Steamship Co., to discuss the APA's relationship to mandamus. In Humboldt, the Court noted that parties could petition the Court for mandamus in order to compel an agency to act. The case revolved around whether Alaska, not yet a state, fell under the definition of a territory under an act requiring railroads to post schedules. Mandamus was commonly used to direct officials to act without controlling the discretion of the officials. The Court noted that "if [the official or agency] absolutely refuse[s] to act, den[i]es its power, from a misunderstanding of the law, it cannot be said to exercise discretion." Mandamus could thus be used to force an administrative official to act without stripping the agency of discretion. Humboldt is important because it allowed the courts to have jurisdiction over agencies and to compel them to act when Congress had so required. Therefore, the Attorney General's Manual suggests that the judiciary does have jurisdiction to compel agencies to act as long as they do not strip them of their discretion in the manner in which agencies carry out congressional demands.

The second case that the Attorney General's Manual discussed is Safeway Stores, Inc. v. Brown. This case was decided close in time to the debate over the new APA. Although the court did not grant

36. Id.
38. 224 U.S. 474 (1912).
39. See id.
40. See id. at 480-82.
41. See id. at 484.
42. Id.
43. See id. at 485:

In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to so do as required—that is, to take jurisdiction, not in what manner to exercise it—is the effect of the decree of the Court of Appeals, the order of the court being that a peremptory writ of mandamus be issued directing the Commission "to take jurisdiction of said cause and proceed therein as by law required."
relief in this case, it did indicate that if the party had requested a writ of mandamus, it would have provided relief.\textsuperscript{44} Safeway Stores is important in understanding the APA because it demonstrates that Congress recognized a clear need for a mandamus-type action for the courts in agency inaction cases. Congress wanted to ensure that there was a remedy for agency inaction and to give parties access to a remedy.

The Attorney General's Manual provides insight into the basis for the APA. It, along with the relevant case law, makes clear that Congress intended to create a cause of action for interested parties to petition the court to compel agency action. This cause of action is similar to the common law writ of mandamus\textsuperscript{45} and is a solid method to ensure that agencies follow congressional will.

**HECKLER v. CHANEY: THE SUPREME COURT SPEAKS ON AGENCY DISCRETION IN INACTION CASES**

The preeminent case concerning agency discretion in inaction is Heckler v. Chaney.\textsuperscript{46} In Heckler, the Supreme Court held that there is a presumption of unreviewability when agencies decide not to act or enforce legislation “unless Congress has indicated otherwise.”\textsuperscript{47} This case demonstrates the rationale behind giving agencies discretion and discussed when there is “law to apply” that would negate agency discretion.

The unlikely source for Heckler was a suit by several death row inmates challenging the legality of lethal injection drugs.\textsuperscript{48} The

\textsuperscript{44} See Safeway Stores, Inc. v. Brown, 138 F.2d 278, 280 (Emer. Ct. App. 1945) (noting that there must be a remedy to agency inaction and that the writ of mandamus is capable of allowing the court to compel such action).

\textsuperscript{45} See Miaskoff, supra note 34 (discussing the similarities between section 706(1) and the writ of mandamus).


\textsuperscript{47} Heckler, 470 U.S. at 838.

\textsuperscript{48} See id. at 823.
prisoners brought suit against the FDA, claiming that the drugs used for lethal injection were never tested for such a purpose and that the drugs were "mislabeled" in that there were no warnings or instructions on how to use the drugs in order to achieve a painless lethal injection. The prisoners claimed that because the FDA had not sufficiently investigated and tested the drugs for the purpose of lethal injection, the Court had to compel more investigation before allowing the drugs to be used in such a manner.

The statute upon which the prisoners relied stated that "[t]he Secretary is authorized to conduct examinations and investigations" into, among other things, the current drugs used for lethal injection. Although the Court agreed that the FDA did have the discretion to investigate the use of the drugs, it claimed that there was "no law to apply" because there was no statement of when the Secretary should examine a drug situation. Furthermore, although the statute stated that the Secretary need not investigate minor problems, it also did not mandate an investigation of all major problems.

The Court concluded that it should not review agency decisions not to act unless there is specific law to apply demonstrating that Congress intended to strip the agency of discretion. The agency should usually be given discretion because of its expertise, ability to view priorities as a whole, and the history of prosecutorial discretion, unless explicitly negated by Congress. This ruling boosts agency discretion in their decisions to enforce regulation.

49. See id. at 824-25 (describing the nature of the claims).
50. See id. at 823.
51. Id. at 835 (emphasis added).
52. Id.
53. See id. at 837.
54. See id. at 830 (noting that "even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion").
55. See id. at 831 (discussing the importance of agency expertise and its ability to weigh competing regulations to determine which to act on first).
56. See id. at 827 (recognizing the dissenting judge's opinion in the lower court which placed importance on such prosecutorial discretion); see also id. at 831 (noting that "[t]his Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion").
Although the *Heckler* decision is beneficial to agency discretion, it can be overcome because it is a rebuttable presumption and not complete prohibition.\(^5\) The Court held that Congress can limit an agency's discretion through setting priorities or legislating how an agency should handle their cases.\(^6\) The use of deadlines falls under such limits.\(^7\) Therefore, the presumption of unreviewability of agency decisions not to act is far from absolute. When Congress explicitly gives the agency deadlines, the agency must comply because there is "law to apply."

**The Current State of Judicial Review**

The past several decades have seen much judicial review of agency inaction and delay. Although the Circuit Court for the District of Columbia has allowed agency discretion in the face of blatant violations of a statutory deadline,\(^0\) the Ninth and Tenth Circuits have recently decided that if there is a mandatory deadline, the agency must abide by it.\(^1\) In fact, the Tenth Circuit has held that an agency's tardiness in the face of a statutory deadline is per se a violation of section 706(1).\(^2\)

*The Case for Judicial Discretion in the Face of Statutory Deadlines: The Circuit Court of Appeals for the District of Columbia*

The Circuit Court of Appeals for the District of Columbia has forged a jurisprudence that grants agencies broad discretion, even in the face of statutory deadlines. The circuit has repeatedly ruled that statutory deadlines are not dispositive, but are only one factor

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57. See *id.* at 832-33 (discussing how a party can overcome the presumption of unreviewability).
58. See *id.* at 833.
59. Mandating time specific deadlines is a form of setting priorities which can reasonably negate the rebuttable presumption of agency discretion.
60. See *In re Barr Lab., Inc.*, 930 F.2d 72 (D.C. Cir. 1991).
61. See e.g. *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999) (holding that statutory deadlines must be observed by the agency); *Environmental Defense Ctr. v. Babbitt*, 73 F.3d 867 (9th Cir. 1995).
62. See *Forest Guardians*, 174 F.3d at 1191.
to balance when determining whether the court should compel agency action.

Telecommunications Research and Action Center v. Federal Communications Commission: The Creation of the Balancing Approach

The most prominent case dealing with agency delay and inaction in the District of Columbia Circuit is *Telecommunications Research and Action Center v. Federal Communications Commission* (TRAC). TRAC dealt with the Federal Communications Commission (FCC) and its regulation of long distance phone companies. The FCC promulgated a regulation that long distance phone companies, including AT&T, could not have profits that exceeded 10% of their revenues. When petitioners noted that AT&T's profits exceeded the 10% maximum, they petitioned the FCC to investigate. Although the FCC did institute notice and comment proceedings, it did not resolve the situation over a five-year time period. Petitioners then filed a cause of action to force the agency to act and investigate AT&T. The FCC claimed that it had a staffing problem which it would soon remedy. The FCC, however, never did anything to address the problem. The petitioner thus filed an interlocutory appeal to the Court of Appeals to issue a writ of mandamus that would require the FCC to act.

The court addressed two main issues in the case. First, the court stated that it needed to determine whether it had jurisdiction to compel agency action in a case of unreasonable delay. The All Writs Act gave the Court of Appeals jurisdiction over

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63. 750 F.2d 70 (D.C. Cir. 1984).
64. See id. at 73.
65. See id.
66. See id.
67. See id. at 73.
68. See id.
69. See id.
70. See id. at 72.
71. See id. at 74-79 (discussing the issue of jurisdiction over the interlocutory appeal).
72. 28 U.S.C. § 1651(a) (1995). The All Writs Act grants jurisdiction to federal appellate courts to deal with claims of unreasonable agency delay. See TRAC, 750 F.2d at 75. Furthermore, the All Writs Act provides that "(t)he Supreme Court and all courts established
"unreasonable Commission delay." The court noted that a lack of final judgment in the case did not preclude court action in the matter. Furthermore, the court found jurisdiction because Courts of Appeal have traditionally issued writs of mandamus. Appellate courts are particularly well situated to compel agency action because they are more experienced with administrative law than are district courts and are able to provide uniformity and efficiency in issuing such orders.

Second, the court questioned whether issuing a writ of mandamus was the proper method to compel an agency to act when the agency had refused to do so for an unreasonably long period of time. Congress intended that agencies should act within a reasonable time and that courts should play an important role in compelling agencies to act. Mandamus is a remedy that is to be used only when there are no other options. The court noted that although there are reasons to allow agency discretion, such as agency expertise and the importance of a record, the benefits of the agency do not exist when the agency does not act at all. Therefore, the court found that mandamus is applicable in cases where agencies have been unreasonably delayed.

The court formulated a six-part test to determine if an agency unreasonably delayed implementation of congressional mandates. First, the court noted that the time agencies take to make decisions by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

73. TRAC, 750 F.2d at 75.
74. See id. (finding that lack of final judgment "does not automatically preclude . . . jurisdiction").
75. See id. at 76 (noting that the All Writs Act allows mandamus); see also id. at 76 n.28 ("The Supreme Court has long recognized the authority of appellate courts to compel district court action through mandamus."). Congress designated appellate courts to have exclusive jurisdiction over compelling agency action. See id. at 77 (noting that "[b]y lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power").
76. See TRAC, 750 F.2d at 78 (explaining the policy reasons for appellate court review).
77. See id. at 79-81.
78. See id. at 77 (noting that section 555(b) combined with section 706(1) indicates congressional intent that courts be responsible for this area).
79. See id. at 78 (noting that mandamus is an "extraordinary remedy").
80. See id. at 79.
81. See id.
is governed by a "rule of reason." This rule of reason is a reasonable amount of time that preserves the rights of the public and economic opportunities without stripping due process rights. Second, where Congress legislated a speed at which the agency should act, that is enough to be considered the rule of reason. Third, delays involving human welfare are more important than economic hardships and should thus be given more weight. Fourth, agency priorities should be considered when determining if an agency unreasonably delays action. Fifth, the court should take into account the amount of damage produced by delay. Finally, there is no need to find bad faith or "impropriety" in order to find that an agency was unreasonably delayed.

TRAC addressed agency inaction when there was no statutory deadline. Although the D.C. Circuit has relied on the six-part test in TRAC for both delay and violation of deadlines, the test specifically says that Congress can legislate a timetable in the second step. Therefore, the use of TRAC's balancing factors in cases where there are actual statutory deadlines is puzzling. The mere presence of a deadline seems to satisfy the test, noting that there is no "rule of reason" involved. The first two factors involving the rule of reason test appear to be the most important factors of the test, yet later decisions have held that even if an agency violated a statutory deadline, the court still must indulge in a balancing of the other four TRAC factors.

In re Barr Laboratories: Continuing the Balance

One case that used the balancing factors, even in the face of a statutory deadline, is In re Barr Laboratories, Inc. Barr held that even when an agency blatantly violates a mandatory statutory

82. Id. at 80.
83. See id.
84. See id.
85. See id.
86. See id.
87. See id.
88. See id.
89. See In re Barr Lab., Inc., 930 F.2d 72, 74-75 (D.C. Cir. 1991).
90. 930 F.2d 72 (D.C. Cir. 1991).
deadline, the court still needs to balance the TRAC factors to determine whether the agency unreasonably delayed its required action. The FDA was required to approve an application for a drug within one hundred eighty days of the initial receipt, or if there was a "major" amendment to the application, the FDA had an additional one hundred eighty days. The FDA admittedly missed the deadline to act on the application but claimed that it should be excused due to a labor shortage. The FDA further admitted that without an order compelling action, future delays would be at least double then-existing delays.

Although the court candidly noted that the "FDA's sluggish pace violates the statutory deadline," it nonetheless ruled it inappropriate to grant relief by compelling the agency to act. Compelling the agency to act would simply make other deserving candidates wait longer and would not benefit society. The court thus decided to allow the agency some discretion even though it was facing a mandatory statutory deadline.

In making its decision, the Barr court focused on the TRAC factors even though there was a statutory deadline. The court stated that step three of the TRAC test was important in this case because generic drugs are not necessary for the welfare of the public. The name brand version of the drugs was already available and thus the generic brand was not a necessity. The court also pointed out that the petitioner was concerned about commercial

91. See id. at 74-75.
92. See id. at 74 (describing how the FDA was required to approve a drug within a certain amount of time).
94. See id.
95. See id.
96. Id. at 73.
97. See id.
98. See id.
99. See id.
100. See id.
interests, which should not be granted as much weight as interests affecting human welfare. 101

Barr focused on the policy behind allowing agency discretion in this case. Agencies, the court held, are experts who are better equipped to make decisions about priorities and that the court should not “reorder” agency priorities. 102 The court put much emphasis on the fact that agencies have expertise and are able to balance the regulations and policies they must enforce. 103 Barr was concerned that the agency should not be forced by an unwitting court to harm other projects that Congress authorized the agency to oversee.

Barr thus performed a balancing analysis. While the court said that statutory deadlines were not an absolute definition of unreasonable delay, it also said that when an agency has singled someone out in bad faith, it is unlikely to escape an order to compel agency action. 104 Therefore, the court recognized that the TRAC factors can be trumped by one issue: bad faith. This was not a factor in TRAC, and yet was granted special status in Barr.

The court made it clear that it did not give preference to statutory deadlines. 105 Such deadlines were only one of several factors to be balanced when determining if an agency had unreasonably delayed its action. It is perplexing that the court used the TRAC factors in the face of a statutory deadline; giving priority to identifying agency policy instead of to the plain language of the statute. Because the court used the TRAC factors, it apparently considered the agency’s violation of a statutory deadline as “unreasonably delayed.” By analyzing the agency’s delinquency under the rubric of “unreasonably delayed” instead of “unlawfully withheld,” the court was able to grant the agency more discretion. Although the court used the TRAC analysis in an effort to grant the

101. See id.
102. See id. at 75-76.
103. In fact, the court was quite emphatic when it stated that the “agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed . . . is not for us to hijack.” Id. at 76.
104. See id. at 76.
105. See id. at 73 (stating that violation of statutory deadlines alone does not require a court to compel agency action).
agency more discretion, it disregarded the actual language of the statutory deadline.

The Barr court's balancing analysis was inappropriate because it did not address the fact that section 706(1) instructs courts to compel an agency to act when the agency has "unlawfully withheld" action. If the court had used the "unlawfully withheld" category, it would be harder to allow agencies much discretion. Although the "unlawfully withheld" category would limit agency discretion, it is the more appropriate category when a mandatory statutory deadline is an issue. When an agency misses a statutory deadline, there is no ambiguity over whether the agency acted unreasonably. By definition, acting unlawfully should be considered to be unreasonable. There is thus no need for a balancing test, such as the test promulgated in TRAC. As discussed below, the TRAC factors should only be applied when agency action is unreasonably delayed, not unlawfully withheld.Agency inaction in the face of a deadline should be classified as unlawfully withheld, not unreasonably delayed, and thus not subject to the TRAC balancing factors.

Over the past decade, the District of Columbia Circuit has reinforced its position allowing agencies to take more time than allowed by statute. In In re United Mine Workers of America International Union, the court determined that the Mine Safety and Health Administration should be allowed more time to determine final regulations that would control diesel engine exhaust in mines, even though the Administration had blatantly missed its ninety-day deadline. The court noted that the Administration was already working on other methods of reducing exhaust and thus did not want to harm the administrative process. The court relied on TRAC to demonstrate that violation of a congressional timetable alone does not justify compelling an agency to act. Although the court ultimately retained jurisdiction over the case until the Administration was able to come up with a

106. See infra notes 170-77 and accompanying text.
107. 190 F.3d 545 (D.C. Cir. 1999).
108. See id. at 555-56.
109. See id. at 551.
"reasonable" schedule to promulgate the regulations,\textsuperscript{110} it did not find that the violation of the timetable alone was sufficient to compel the Administration to act.

More recently, in \textit{Western Coal Traffic League v. Surface Transportation Board},\textsuperscript{111} the court determined that the Surface Transportation Board was acting within its authority when it created a fifteen-month moratorium on filing railroad merger applications, even though the moratorium required the Board to violate statutory timetables.\textsuperscript{112} When the court determined that the Board was authorized to violate the timetable, it cited \textit{In re Barr} for the proposition that, regardless of deadlines, courts are not authorized to reorganize or "hijack" agency priorities.\textsuperscript{113} Furthermore, the court relied on \textit{TRAC} and held that a statutory timetable was only one of six factors and was not by itself dispositive.\textsuperscript{114} As in earlier cases, the court again relied heavily on the Board's expertise and "special cognizance."\textsuperscript{115}

Through \textit{TRAC}, \textit{In re Barr}, and their progeny, the Circuit Court for the District of Columbia has developed a jurisprudence that does not consider a missed statutory deadline as "unlawfully withheld." Although the court's approach does grant agencies the discretion that they arguably deserve because of their expertise, it does not adequately consider the importance of statutory deadlines. The court's approach is appropriate when Congress has not set specific deadlines because an agency's expertise is an important asset. The court's use of \textit{TRAC} factors in the face of specific deadlines, however, is not appropriate. When Congress specifically mandates agency action by a particular date, the agency should not be allowed to simply ignore congressional intent. Agencies should be required to abide by congressional mandates, even if they are inconvenient. If the deadlines are implausible, agencies must explore solutions other than simply violating the law.

\begin{itemize}
\item \textsuperscript{110} See id. at 556.
\item \textsuperscript{111} 216 F.3d 1168 (D.C. Cir. 2000).
\item \textsuperscript{112} See id. at 1175-77.
\item \textsuperscript{113} See id. at 1175.
\item \textsuperscript{114} See id. at 1174.
\item \textsuperscript{115} Id. at 1176-77.
\end{itemize}
The Case for Strict Statutory Construction of Section 706(1)

Other circuits have determined that if an agency misses mandatory statutory deadlines, there is no need for a balancing test.\textsuperscript{116} These courts have decided that they have no discretion to balance factors in such a situation because section 706(1) is clear. This jurisprudence treats violations of statutory deadlines as "unlawfully withheld" agency action as opposed to unreasonably delayed action.\textsuperscript{117}

\textit{Environmental Defense Center v. Babbitt}

The Ninth Circuit addressed the issue of statutory deadlines in \textit{Environmental Defense Center v. Babbitt}.\textsuperscript{118} In \textit{Environmental Defense Center}, the court held that it could not compel agency action because of a spending moratorium then in place.\textsuperscript{119}

At issue in the case was the failure of the Department of the Interior to list the California red-legged frog as an endangered species by its statutory deadline.\textsuperscript{120} The Department repeatedly missed subsequent deadlines to act on the proposed rule to list the frog.\textsuperscript{121} After the Department missed the 1994 deadline, a spending moratorium was passed on April 10, 1995.\textsuperscript{122} Petitioner, an environmental group, filed suit to compel the Department to act within a month after Congress instituted the moratorium.\textsuperscript{123}

The Ninth Circuit decided that it could not compel the agency to act in light of the then-present spending moratorium.\textsuperscript{124} Although

\begin{flushleft}
\textsuperscript{116} See, e.g., \textit{Forest Guardians v. Babbitt}, 174 F.3d 1178, 1191 (10th Cir. 1999); \textit{Biodiversity Legal Found. v. Babbitt}, 146 F.3d 1249 (10th Cir. 1998); \textit{Environmental Defense Ctr. v. Babbitt}, 73 F.3d 867, 872 (9th Cir. 1995).

\textsuperscript{117} See \textit{Forest Guardians}, 174 F.3d at 1191.

\textsuperscript{118} 73 F.3d 867 (9th Cir. 1995).

\textsuperscript{119} See \textit{id.} at 869. Later courts interpreted the case as saying that, were it not for the spending moratorium, the court would have compelled action and found that the agency unlawfully withheld action. See \textit{Forest Guardians}, 174 F.3d at 1188.

\textsuperscript{120} See \textit{Environmental Defense Ctr.}, 73 F.3d at 869.

\textsuperscript{121} See \textit{id.}

\textsuperscript{122} See \textit{id.}

\textsuperscript{123} See \textit{id.} at 869.

\textsuperscript{124} See \textit{id.}
\end{flushleft}
the court did not compel the agency to act, it stated that "the [Environmental Defense Center] would prevail except for the fact that between the time the Secretary failed to meet the deadline and the time the [Environmental Defense Center] filed suit, Congress passed an appropriations bill which precluded the expenditure. . . ." The moratorium thus did not strip the Department of its duties, but instead temporarily excused the Secretary from acting.

In Environmental Defense Center the Ninth Circuit clearly implied that it would have found for the petitioner if it were not for the moratorium. The court focused on the word "shall" and declared that section 706(1) requires a "mandatory, nondiscretionary duty." This is a strict statutory construction approach to section 706(1). The court made it clear that it did not have the discretion to refuse to compel the action except in cases in which there is an impossibility defense.

The Ninth Circuit maintained jurisdiction of the case until the moratorium ended. Ten days after the moratorium was lifted, the court held a hearing to determine what action to take. The court found that the Department needed to act immediately to list the red-legged frog as endangered. The Department did so within fourteen days of the hearing, which suggests that there were few problems in listing the frog as endangered.

With its holding in Environmental Defense Center, the Ninth Circuit contradicted the D.C. Circuit's approach. Unlike the D.C. Circuit, the Ninth Circuit placed more weight on the statutory language of section 706(1) than on agency expertise. The Ninth Circuit concluded that the words of Congress superseded the benefits of allowing an agency to decide how to handle its administrative duties. Although agencies are in a particularly good position to prioritize and execute congressional mandates because

125. See id. at 869-70.
126. Id.
127. See id. at 871.
128. Id.
129. See id.
130. See id. at 872.
of expertise, the Ninth Circuit nonetheless realized that agency expertise cannot trump the plain statutory language of section 706(1).

_Biodiversity Legal Foundation v. Babbitt_

The Tenth Circuit first addressed mandatory statutory deadlines in _Biodiversity Legal Foundation v. Babbitt_. In _Biodiversity Legal Foundation_, the Tenth Circuit was faced with the Department of the Interior’s Listing Priority Guidance (LPG) system, which was implemented after the congressional spending moratorium. The Department of the Interior created the LPG hierarchy of projects because the moratorium created a backlog of cases. The LPG created new deadlines for the projects consistent with the new priority system. Although the LPG guidelines were consistent with the agency’s new priority system, they were not consistent with previous congressional deadlines.

The petitioner in _Biodiversity Legal Foundation_ filed suit to require the Secretary to make a preliminary finding of whether the Colombian sharp-tailed grouse was eligible for endangered species status. The Secretary was required to make such a finding within ninety days "to the maximum extent practicable." Once the Secretary implemented the LPG system, the Department missed the recommended ninety-day deadline.

The court held that the LPG system, which basically preempted congressional timing guidelines, was lawful. Furthermore, the Endangered Species Act granted the Secretary broad discretion to prioritize issues. The court focused on the fact that there was no mandatory deadline in this case because of the language “to the

133. 146 F.3d 1249 (10th Cir. 1998).
134. See id. at 1251.
135. See id.
136. See id.
137. See id.
138. See id.
140. See id.
141. See id. at 1257.
142. See id. at 1255-56.
There was thus no statutory deadline to violate.

_Biodiversity Legal Foundation_ declined to address what would happen if the court were presented with an actual statutory deadline. Although the court did not address this issue, it did take a statutory construction approach to the deadline in this case. This indicates that if an actual statutory deadline were in effect, the court would hold that the LPG did violate congressional intent and section 706(1).

**Forest Guardians v. Babbitt**

One of the most recent cases to deal with statutory deadlines in the Tenth Circuit was _Forest Guardians v. Babbitt_, a case decided in April 1999. The Tenth Circuit, guided by precedent both in its circuit and in the Ninth Circuit, defined as unlawful an agency's delay of action beyond a mandatory deadline.

The petitioner was an environmental group concerned with the lack of action on an endangered species called the silvery minnow. The Department of the Interior proposed the minnow as an endangered species on March 1, 1993 and designated the fish as an endangered species on July 20, 1994. The Secretary was required to designate a critical habitat for the silvery minnow by March 1995. The Department did not meet the March 1, 1995 deadline.
deadline to designate a critical habitat for the silvery minnow and had not designated such a habitat at the time of the lawsuit, nearly four years after the deadline.\textsuperscript{151} The court noted the importance of the designation of a critical habitat for an endangered species in order to avoid serious harm to the species.\textsuperscript{152}

The Secretary argued that it was fiscally impracticable to designate a critical habitat for the silvery minnow.\textsuperscript{153} Congress had passed a spending moratorium prohibiting the Department from expending funds on projects such as the designation of critical habitats.\textsuperscript{154} The moratorium, however, was passed in April 1995, a month after the date of the deadline and was lifted in April 1996, over a year before the Forest Guardians filed suit.\textsuperscript{155} Therefore, the court found that it was possible for the Secretary to designate a critical habitat for the silvery minnow at the time of the suit.\textsuperscript{156}

Instead of designating a critical habitat for the silvery minnow, even though the deadline was more than a year overdue, the Secretary devised the LPG to determine new deadlines for a backlog of Department projects resulting from the moratorium.\textsuperscript{157} The LPG instituted new deadlines that governed the listing of endangered species and the designation of critical habitats based on perceived importance.\textsuperscript{158} The LPG program thus effectively stripped the Endangered Species Act of the congressional force provided by previously enacted mandatory statutory deadlines.

The court found that the Department violated the statutory deadlines imposed by the Endangered Species Act.\textsuperscript{159} It noted that the APA governs remedies available for parties petitioning for

\begin{footnotes}
\item[151] See Forest Guardians, 174 F.3d at 1182 (noting that the Secretary still had not designated a critical habitat at the time of the suit in 1999).
\item[152] See id. at 1185 (discussing the importance of the critical habitat in the preservation of endangered species).
\item[153] See id. at 1182.
\item[154] See id. at 1182-88.
\item[155] See id. at 1183-84 (discussing the duration of appropriations bills stripping the Department of funding for certain projects).
\item[156] See id. at 1193.
\item[157] See id. at 1183.
\item[158] See id. at 1184.
\item[159] See id. at 1186.
\end{footnotes}
agency action. It also noted that section 706(1) states that "Congress has stated unequivocally that courts must compel agency action unlawfully withheld or unreasonably delayed." The court stated that it had no choice but to compel agency action if it is clear from the statute and legislative history that Congress intended the agency to act within a specific time frame. Furthermore, the court noted that Congress can restrict a court's jurisdiction in equity by requiring injunctive relief for certain violations of the law.

Once the court held that the Secretary had violated his statutory duty to designate a critical habitat for the silvery minnow, it followed a strict statutory construction of section 706(1). Forest Guardians stated that "shall" means "shall" and that the Supreme Court had adopted this strict construction approach. The court discussed in depth Environmental Defense Center v. Babbitt to demonstrate that courts have found that shall means shall in the context of the Endangered Species Act. The court looked favorably on the Environmental Defense Center case, noting that if it were not for a spending moratorium in place at the time of the lawsuit, the Ninth Circuit would have been willing to compel agency action immediately.

Forest Guardians held that, although courts have discretion to determine when an agency took an unreasonably long time when there is no statutory deadline, a statutory deadline strips the court of discretion. Indeed, the court stated that

when Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld. To hold otherwise would be an affront to our tradition

160. See id. at 1186-87.
161. Id. at 1187.
162. See id. at 1187-89.
163. See id. at 1187.
164. See id. at 1187-89.
165. Id. at 1187.
166. See id. (listing a long line of cases in which the Supreme Court and other circuit courts have applied a strict statutory construction to the word "shall").
167. See id.
168. See id.
of legislative supremacy and constitutionally separated powers.\textsuperscript{169}

With regard to \textit{In re Barr Laboratories}, the court noted that when a court deems an action unreasonable or unlawful, it must compel agency action without a balancing of issues.\textsuperscript{170} The TRAC factors are helpful for determining when something is unreasonably delayed, but are irrelevant when agency action is unlawfully withheld.\textsuperscript{171} The court circumvented the problems involved in \textit{In re Barr} by deciding that when an agency misses a statutory deadline, it has unlawfully withheld action, not unreasonably delayed action.\textsuperscript{172} Therefore, when an agency misses a statutory deadline, there is no need to balance TRAC factors because the action is not unreasonably delayed, but is a violation constituting unlawfully withheld action.

This case eliminated the need to balance complicated factors when faced with a statutory deadline. \textit{Forest Guardians} simplified the process by which it decided whether to compel agency action. The court was comfortable with deciding that it had no discretion in this matter and stated that section 706(1) “explicitly removed from the courts the traditional equity balancing that ordinarily attends decisions whether to issue injunctions,”\textsuperscript{173} which is essentially what the APA requires.

\textbf{Courts Are Duty-Bound to Compel Agencies to Act When Agencies Do Not Meet Statutory Deadlines}

What is a court to do when an agency misses a statutory deadline? Should the court follow the D.C. Circuit and allow the agency to proceed at its own discretion? Or, should the court compel the agency to act regardless of the agency’s undisputed expertise? Although there is tension when deciding whether to compel an agency to act, courts should follow the strict constructionist jurisprudence advocated by the Ninth and Tenth Circuits. The strict

\textsuperscript{169} Id. at 1190.
\textsuperscript{170} See id. at 1191.
\textsuperscript{171} See id.
\textsuperscript{172} See id. at 1190-91.
\textsuperscript{173} Id. at 1192.
MANDATORY AGENCY DEADLINES

constructionist approach, although restrained from evaluating agency expertise, remains true to congressional intent. It is important for courts to analyze agency deadlines as law. Once a court determines that a statutory deadline is “law,” the court is bound to find that delinquent agencies have “unlawfully withheld” agency action. The statutory construction of the word “shall” subsequently strips the court of discretion when determining whether it should compel an agency to act when that agency has missed a statutory deadline.

**Missing Statutory Deadlines Is Unlawfully Withholding Agency Action**

When an agency misses an explicit statutory deadline, it is unlawfully withholding action. Statutory deadlines are written into the legislation of enabling statutes such as the Endangered Species Act for agencies to follow. When an agency ignores a statutory deadline, it is not merely unreasonably delaying action. Instead, it is ignoring the law mandated by Congress. Agencies therefore should be held to the unlawfully withheld portion of section 706(1) when ignoring statutory deadlines.

By recognizing that statutory deadlines are “law,” and that missing them is “unlawfully withholding agency action,” it is clear that courts possess no discretion when determining whether to compel an agency to act. Unlike open-ended deadlines that may be deemed “unreasonably delayed,” statutory deadlines leave no room for balancing. When Congress enacts a statutory deadline, it strips the court of the discretion to determine if the deadline is unreasonable. Refusing to implement congressional laws such as statutory deadlines is by definition unlawfully withholding action and is thus not subject to any judicial balancing test, regardless of intricacy.

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174. Black's Law Dictionary defines “law” as “[t]hat which is laid down, ordained, or established . . . a body of rules of action or conduct prescribed by controlling authority, and having binding legal force.” BLACK'S LAW DICTIONARY 884 (6th ed. 1990). Statutory deadlines can thus be characterized as “law” because they are “conduct prescribed by controlling authority,” in this case the authority of Congress.
The D.C. Circuit Court's continued use of the TRAC factors when dealing with statutory deadlines is misplaced. Although the TRAC factors are valuable when dealing with open-ended deadlines to determine if the inaction is unreasonable, they are not appropriate when analyzing a statutory deadline. Statutory deadlines are clear and there is no need for a balancing test. Instead of focusing on the "unreasonably delayed" portion of section 706(1), courts should utilize the "unlawfully withheld" language, because refusing to follow congressional deadlines is unlawful activity.

The D.C. Circuit Court's jurisprudence on section 706(1) and statutory deadlines is doubly flawed because TRAC eliminates the need for balancing in the second factor. The second TRAC factor specifically states that Congress may legislate a timetable for agency action. The need for balancing in the presence of a statutory deadline is therefore moot. If Congress mandates a statutory deadline, there is no need to balance the TRAC factors because Congress has already provided a timetable for agencies. When Congress creates a statutory deadline, the second TRAC factor is satisfied, the rule of reason is established, and there is no need for further balancing.

Shall Means Shall: Courts Must Compel Agencies to Act When Statutory Deadlines Are Involved

An agency's refusal to abide by congressional deadlines must be compelled without balancing or discretion. In order to determine congressional intent as to the deadlines, courts first look to the face of a statute before determining if agencies act reasonably. If the statutory language is clear, the court need not determine if the agency's actions are reasonable.

175. See supra notes 105-15 and accompanying text.

176. The Supreme Court established a two-part test to determine if an agency is acting within its delegated powers. Courts first look to "whether Congress has directly spoken to the precise question at issue." Chevron U.S.A. v. Natural Resources Defense Counsel, 467 U.S. 837, 842 (1984). The court then determines whether the agency regulation is a "permissible construction of the statute." Id. at 843. The Supreme Court put much weight on statutory construction. See id. at 842-43. In cases where the statutory language is clear, there is no need to progress to the second step. See id.

177. See id. at 842-44.
Courts shall compel agency action unlawfully withheld or unreasonably delayed.\textsuperscript{178} If a statute is clear and unambiguous, as is the case in section 706(1), courts must interpret the statute to stay true to the congressional purpose.\textsuperscript{179} Furthermore, "[a]dministrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform."\textsuperscript{180} Congress did not, however, intend to make courts "super-agencies" controlling executive branch functions.\textsuperscript{181}

Congress can restrict the scope of a court's discretion in determining what action to take.\textsuperscript{182} Although a court should not quickly infer that their discretion is limited, they must pay attention to the statutory language.\textsuperscript{183} Furthermore, Congress can limit a court's equitable discretion through statute.\textsuperscript{184}

The language of section 706(1) is clear. The statute states that a court shall compel agency action when an agency unlawfully withholds action. The word "shall" is interpreted strictly and "indicates a mandatory intent."\textsuperscript{185} Congress cannot find stronger language than "shall."\textsuperscript{186}

Once Congress has indicated a statutory deadline as law, it is not for the courts to balance factors in determining whether to follow congressional dictates.\textsuperscript{187} Instead, an agency's act of missing a

\textsuperscript{178.} See 5 U.S.C. § 706(1); Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167, 1170 (10th Cir. 1997).

\textsuperscript{179.} See Mt. Emmons Mining Co., 117 F.3d at 1170 (noting that "no deference is due an agency interpretation which fails to incorporate the plain meaning of the statute").

\textsuperscript{180.} Marathon Oil Co. v. Lujan, 937 F.2d 498, 500 (10th Cir. 1991).

\textsuperscript{181.} See Estate of Smith v. Heckler, 747 F.2d 583, 581 (10th Cir. 1984).


\textsuperscript{183.} See id.

\textsuperscript{184.} See id. at 321 (Powell, J., concurring).

\textsuperscript{185.} United States v. Myers, 106 F.3d 936, 941 (10th Cir. 1997); see also Association of Civilian Technicians v. Federal Labor Relations Auth., 22 F.3d 1150, 1153 (D.C. Cir. 1994) (stating that "[t]he word 'shall' generally indicates a command that admits no discretion on the part of the person instructed to carry out the directive").

\textsuperscript{186.} See Pierce v. Underwood, 487 U.S. 552, 569-70 (1998) (stating that "shall" is mandatory, not permissive, language); United States v. Monsanto, 491 U.S. 600, 607 (1989) (noting that "shall" is the strongest language Congress could possibly use).

statutory deadline is unlawfully withholding action, which must be treated by compelling agencies to act to implement the legislation.

Courts that hold agency expertise in particularly high esteem, such as the D.C. Circuit Court of Appeals, try to find a way to balance factors in order to grant agencies more discretion. It is apparent that agencies have an invaluable place in implementing legislation. Agencies include teams of experts who are trained to determine which projects must be attended to first. Furthermore, expertise allows agencies to have a more comprehensive understanding than Congress of many important issues. Although agencies are very important in their ability to prioritize and understand complex issues, they must remain loyal to congressional mandates. Even though it is tempting to grant agencies broad discretion to determine when particular legislation should be implemented, circumventing mandatory statutory deadlines through balancing schemes should not be allowed. The agency might have a more comprehensive understanding of a complex scientific issue than Congress possesses. The agency, however, is still subordinate to congressional will. The temptation to allow agencies discretion in the face of statutory deadlines is strong because agencies have added expertise. Yet, courts must not yield to this temptation because agency expertise cannot trump the plain language of a statute such as the APA.

Instead of allowing agencies to substitute their admittedly expert guidelines for congressional mandates, courts should recognize that there are other options that place the proper amount of importance on agency expertise. Agencies are capable of communicating with Congress without disobeying clear congressional intent. When an agency is incapable of reaching a deadline because of financial constraints or workload, the agency should communicate the problem to Congress before simply ignoring the law. Furthermore, if an agency finds that a congressional mandate is inconsistent with scientific reality, the agency could inform Congress of the problem and attempt to find a solution. Although this approach may not be the most efficient proposal, it avoids the problem of agencies running amok, refusing to follow congressional enactments.

When an agency misses a statutory deadline, it has unlawfully withheld action. There is no need for judicial discretion in such a case because there is clear law to apply. An agency's refusal to
follow congressional timetables is thus untouched by balancing and discretion. Courts simply must compel an agency to act when there is a specific deadline set by Congress.

CONCLUSION

Statutory deadlines are classified as law. When an agency misses such a deadline, it has unlawfully withheld action. Therefore, the reviewing court has no choice but to compel agency action in cases of statutory deadlines.

Courts may excuse agencies for missing deadlines only if compliance is fiscally impossible. When Congress passes spending moratoria, the agency has no option but to remain silent. Therefore, such congressional actions relieve the agency from acting until funding is available again.

Agencies are not without relief under this construct. They can petition Congress to get more time or funds to complete the regulations. Agencies cannot, however, simply avoid the words of Congress when administering regulations. Agencies owe their existence to Congress and are thus beholden to Congress. Agencies must learn to interact more freely with their creator.

Agencies are not the sole source of the problems that plague the administrative state. Congress must acknowledge the limitations of agencies and provide means by which agencies can effectuate congressional purpose. Perhaps the steady stream of missed deadlines may act as the proverbial canary to indicate the overburdened level of agency mandates, thus motivating Congress to rethink its methods of delegation.

Catherine Zaller