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# Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging

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# Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging

Michael D. Sant'Ambrogio\*

## ABSTRACT

*How long should it take a government agency to act on a nondiscretionary duty? When does the agency's decisionmaking process become unreasonably delayed, warranting judicial intervention to compel agency action? These questions are central to the operation and accountability of the modern administrative state. Agency delays in decisionmaking and action have been widely acknowledged as a fundamental impediment to the effective functioning of federal agencies for over thirty years, and more recently, significant delays in regulatory action have raised serious concerns about the political legitimacy of unfettered presidential control of the bureaucracy. Yet the appropriate role for courts to play in reviewing agency delays has garnered little attention in the academic literature, and the judicial doctrine is ad hoc, incoherent, and difficult to apply consistently. Thus, this Article argues, judicial review of agency delay is ripe for reform.*

*Drawing upon the insights of positive political theory, this Article reframes agency delays as a principal-agent problem between congressional enacting coalitions and the agency, rather than merely a conflict between the agency and its beneficiaries, as the problem has traditionally been understood. Therefore, courts should assess whether agencies have abused their discretion over when to act in light of the type of decision delegated to the agency, whether the motivation behind the agency's timeline comports with its delegated authority, and the costs and benefits of inaction to the enacting coalition's statutory goals. This Article proposes that plaintiffs should have the burden of proving that the costs of delay due to other priorities outweigh the benefits, but that the burden of proof should shift to the agency once substantive decisionmaking is underway. This burden-shifting framework preserves agencies' discretion over their agendas while preventing foot-dragging caused by agency dysfunction, agency capture, or regulatory obstructionism by com-*

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*peting political principals. In addition, this Article proposes ways in which agencies' regulatory submissions to the Office of Information and Regulatory Affairs can facilitate political oversight and provide additional tools for curing unreasonable delays.*

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## INTRODUCTION

Complaints about inaction and delay by government officers are almost as old as the Republic itself,<sup>1</sup> but such complaints burgeoned with the dramatic expansion of the administrative state in the twentieth century.<sup>2</sup> In the wake of the Great Society programs and broad

1 See, e.g., *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 10 (1817) (noting that a surveyor of customs for the Port of Newport, Rhode Island, could be judicially compelled to hold a forfeiture hearing after seizing property); *ICC v. United States ex rel. Humboldt S.S. Co.*, 224 U.S. 474, 485 (1912) (affirming a writ of mandamus compelling the Interstate Commerce Commission to take jurisdiction over a petition to require competitors to file rate schedules); *Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587, 590 (1926) (affirming an injunction against enforcement of an old rate schedule by a state agency that had delayed adjudicating a new schedule for several years); *Safeway Stores v. Brown*, 138 F.2d 278, 278–280 (Emer. Ct. App. 1943) (affirming the dismissal of a complaint regarding delays by the Price Administrator in adjudicating a protest of maximum price regulations).

2 See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 105–07 (2d. ed. 1999) (describing severe delays in rulemaking by administrative agencies); Neil R. Eisner, *Agency Delay in Informal Rulemaking*, 3 ADMIN. L.J. 7, 7 (1989) (“In recent years all three branches of government have been concerned with delay in the rulemaking process.”); Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 115 (1992) (“While there are

health, safety, and environmental protection legislation, an expanding class of government beneficiaries and their advocates complained about the pace of agency decisionmaking. By 1977, the Senate Committee on Government Affairs described agency delays as “staggering” and a “fundamental impediment to the functioning of regulatory agencies.”<sup>3</sup>

The best-known recent instance of agency foot-dragging is probably the resistance of the Bush Administration Environmental Protection Agency (“EPA”) to regulating greenhouse gas (“GhG”) emissions. The agency took four years to deny a petition for rulemaking by environmental groups, green-energy companies, and trade associations seeking the regulation of GhG emissions from new motor vehicles under the Clean Air Act (“CAA”),<sup>4</sup> claiming both that the EPA lacked jurisdiction and that, even if it had jurisdiction, the time was not appropriate to set GhG emission standards for motor vehicles.<sup>5</sup> Even after the Supreme Court ordered the EPA to reexamine the matter,<sup>6</sup> the agency continued to dawdle, ultimately leaving the decision for the Obama Administration.<sup>7</sup>

The case of GhGs is relatively well known, but it is hardly unique. Agency delays affect a wide range of areas, including our health and safety,<sup>8</sup> environmental regulation,<sup>9</sup> the administration of public bene-

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no firm criteria for how long it should take to write regulations, there is widespread consensus that it generally takes too long.”).

<sup>3</sup> Kerwin & Furlong, *supra* note 2, at 115; see also Richard P. Barke, *Regulatory Delay as Political Strategy*, in *FEDERAL ADMINISTRATIVE AGENCIES* 144, 145, 148–54 (Howard Ball ed., 1984) (arguing that regulatory delays sometimes represent a “deliberate device for affecting regulatory decisions” and providing examples of such delays).

<sup>4</sup> Clean Air Act, 42 U.S.C. §§ 7401–7515 (2006).

<sup>5</sup> Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,922–33 (Sept. 8, 2003); see also Press Release, U.S. Env’t Prot. Agency, EPA Denies Petition to Regulate Greenhouse Gas Emissions from Motor Vehicles (Aug. 28, 2003), available at <http://yosemite.epa.gov/opa/admpress.nsf/fb36d84bf0a1390c8525701c005e4918/694c8f3b7c16ff6085256d900065fdad>.

<sup>6</sup> *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007).

<sup>7</sup> See Darren Samuelsohn, *Will Much-Maligned EPA Reg Blueprint Emerge as “Climate Change Bible”?*, GREENWIRE (Aug. 7, 2008), <http://www.eenews.net/public/Greenwire/2008/08/07/1>. With climate change at the top of President Obama’s agenda, on December 7, 2009, the EPA reversed itself, concluding that GhGs pose a danger to human health and the environment. John M. Broder, *Greenhouse Gases Imperil Health*, *E.P.A. Announces*, N.Y. TIMES, Dec. 8, 2009, at A18. Thus, after more than eleven years, the EPA finally took the first step in regulating GhG emissions.

<sup>8</sup> The Food and Drug Administration (“FDA”), for example, still has not set efficacy standards for hundreds of drugs currently on the market that were approved for safety but not efficacy under the pre-1962 Food and Drug Act. See 2 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 12.3, at 847 (4th ed. 2002); see also *Solvay v. ETHEX Corp.*, No. 03-2836(JRT/FLN), 2006 WL 2255375, at \*1–2 (D. Minn. Aug. 7, 2006) (noting that although the

fits,<sup>10</sup> economic regulation,<sup>11</sup> and even our national security policy.<sup>12</sup> And although the pace of regulatory activity picked up significantly at the beginning of the Obama Administration,<sup>13</sup> as it often does with an incoming Democratic administration,<sup>14</sup> agency delays are unlikely to vanish anytime soon. Even Presidents committed to an active administrative state have difficulty supervising all of its many responsibilities. There were significant agency delays during the Clinton Administration,<sup>15</sup> and there have already been complaints about de-

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FDA had declared that pancreatic enzyme supplements would require FDA approval, it had not set new standards for the supplements but had instead adopted the existing standards of the private United States Pharmacopoeia Convention). Between 2001 and 2007, the Occupational Safety and Health Administration (“OSHA”) issued eighty-six-percent fewer economically significant rules and regulations than during the Clinton Administration. R. Jeffrey Smith, *Under Bush, OSHA Mired in Inaction*, WASH. POST, Dec. 29, 2008, at A1. Officials at OSHA reported that political appointees ordered the withdrawal of work-place health regulations and “slow-rolled” others in response to industry pressure. *Id.*

<sup>9</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (ordering the EPA to respond to a petition for rulemaking on GhGs). Under President Bush, the EPA did not add a single industrial chemical to the list of water contaminants regulated by the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j–25 (2006), despite hundreds of potential candidates; nor did the EPA update many existing regulatory standards to account for new evidence that the chemicals posed greater risks than previously believed. Charles Duhigg, *That Tap Water Is Legal but May Be Unhealthy*, N.Y. TIMES, Dec. 17, 2009, at A1.

<sup>10</sup> The average processing time for citizenship applications by the United States Citizenship and Immigration Services (“USCIS”), for example, rose from approximately six months in 2003 to fifteen months in 2008, 2008 CITIZENSHIP & IMMIGR. SERVICES OMBUDSMAN ANN. REP. 2, available at <https://www.ilw.com/immigrationdaily/news/2008,0703-ombudsman.pdf>, with some applicants waiting as long as six years for the adjudication of their applications, e.g., First Amended Complaint at 1, *Rangoonwala v. Swacina*, No. 08-21588-CIV, 2008 U.S. Dist. LEXIS 99053 (S.D. Fla. Nov. 25, 2008). In 2007–2008, I represented two classes of lawful permanent residents who had waited more than six months for adjudication of their naturalization applications by USCIS. See *Milanes v. Chertoff*, No. 08 Civ. 2354(LMM), 2008 WL 4219078, at \*1, \*3 (S.D.N.Y. Sept. 10, 2008), *vacated in part*, No. 08-4749-cv, 2009 WL 4281969 (2d. Cir. Dec. 2, 2009); *Yakubova v. Chertoff*, No. 06 CV 3203(ERK)(RLM), 2006 WL 6589892, at \*1 (E.D.N.Y. Nov. 2, 2006).

<sup>11</sup> The Federal Energy Regulatory Commission, for example, took nearly twenty years to implement some provisions of the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370f (2006). KERWIN, *supra* note 2, at 106–07.

<sup>12</sup> Some detainees at Guantánamo Bay have been waiting more than eight years for a decision governing their fate. See, e.g., *Guantánamo Detainee Release Blocked by Appeals Court*, N.Y. TIMES, Feb. 15, 2011, at A18 (reporting that Saeed Hatim has been detained at Guantánamo since June 2002).

<sup>13</sup> See, e.g., Eric Lipton, *With Obama, Regulations Are Back in Fashion*, N.Y. TIMES, May 13, 2010, at A15.

<sup>14</sup> See *infra* Part II.B.2.

<sup>15</sup> See, e.g., *Pub. Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 146–47, 157 (3d Cir. 2002) (ordering mediation to address an OSHA delay in regulating hexavalent chromium due in part to the Clinton Administration’s other priorities); *Chen v. INS*, 95 F.3d 801, 804 (9th Cir. 1996) (noting that President Clinton, upon taking office, ordered agencies to withdraw regula-

lays under President Obama.<sup>16</sup> Although President Obama has sought to influence agency decisionmaking in several ways,<sup>17</sup> his Administration has not given any attention to agency inaction or delay.<sup>18</sup> Moreo-

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tions not yet published in the *Federal Register*); *Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191, 1200-01 (D.C. Cir. 1996) (describing the withdrawal of regulations scheduled for final publication when the Clinton Administration took office); *Cobell v. Norton*, 283 F. Supp. 2d 66, 232 (D.D.C. 2003) (describing the Department of the Interior's "continued refusal to comply with the clear directives of Congress and the courts to perform an adequate accounting" of an Indian trust fund during the Clinton Administration); *Independence Mining Co. v. Babbitt*, 885 F. Supp. 1356, 1369 (D. Nev. 1995) (upholding a Clinton Administration order that contributed to a delay in the issuance of mineral patents); *Barrick Goldstrike Mines Inc. v. Babbitt*, No. CV-N-93-550-HDM(PHA), 1995 WL 408667, at \*2, \*7-8 (D. Nev. Mar. 21, 1994) (describing the byzantine review process instituted by the Secretary of the Interior to slow down the issuance of mineral patents while the Clinton Administration sought to change the mining law).

<sup>16</sup> In June 2009, for example, disabled veterans of the Iraq and Afghanistan wars reported delays of nearly eighteen months in the adjudication of their disability benefit claims. James Dao, *Veterans Affairs, Already Struggling With Backlog, Faces Surge of Disability Claims*, N.Y. TIMES, July 13, 2009, at A10. One veteran's group reported that veterans were calling suicide hotlines as a result of the delays. *Id.* The Obama Administration has already failed to meet its most highly publicized deadline—the closing of Guantánamo Bay by January 22, 2010. See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009); Janie Lorber, *Missed Guantánamo Deadline Stirs Protest*, N.Y. TIMES, Jan. 21, 2010, <http://thecaucus.blogs.nytimes.com/2010/01/21/missed-gitmo-deadline-stirs-protest>. In March 2011, after missing the deadline by more than a year, President Obama appeared to put his plan to close the base on hold due to congressional opposition. Scott Shane & Mark Landler, *Obama, In Reversal, Clears Way for Guantánamo Trials to Resume*, N.Y. TIMES, Mar. 8, 2011, at A19. Scientists have also complained about the slow response of the Obama Administration to the Deepwater Horizon oil spill in the Gulf of Mexico. Justin Gillis, *Scientists Fault Lack of Studies over Gulf Oil Spill*, N.Y. TIMES, May 19, 2010, at A1.

<sup>17</sup> See Exec. Order No. 13,497, 74 Fed. Reg. 6113, 6113 (Feb. 4, 2009) (abandoning the Bush Administration's requirement that agencies identify specific market failures when considering new regulations); Presidential Memorandum on Preemption, 2009 DAILY COMP. PRES. DOC. 00384 (May 20, 2009) (initiating a review of state law preemption statements included in regulatory preambles over the past decade and restricting their use going forward).

<sup>18</sup> Soon after taking office, President Obama solicited recommendations on improving the White House's regulatory review process and instructed the Director of the Office of Management and Budget ("OMB") to produce a set of recommendations for a new Executive order within 100 days. Presidential Memorandum on Regulatory Review, 2009 DAILY COMP. PRES. DOC. 00287 (Jan. 30, 2009). Nearly 200 comments were submitted to the Office of Information and Regulatory Affairs ("OIRA") by scholars, interest groups, and commentators. See Office of Info. & Regulatory Affairs, *Public Comments on OMB Recommendations for a New Executive Order on Regulatory Review*, REGINFO.GOV, <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp> (last visited May 4, 2011). Some scholars urged the Administration to consider the problem of agency inaction and delay in reforming OIRA. See, e.g., Letter from Jacob Gersen & Anne Joseph O'Connell to Jessica Hertz, Office of Mgmt. & Budget (posted Feb. 27, 2009), available at [http://www.reginfo.gov/public/jsp/EO/fedRegReview/Anne\\_Joseph\\_OConnell.pdf](http://www.reginfo.gov/public/jsp/EO/fedRegReview/Anne_Joseph_OConnell.pdf); Memorandum from Richard L. Revesz & Michael A. Livermore, Inst. for Pub. Integrity, to the Office of Info. and Regulatory Affairs (Feb. 13, 2009), available at [http://www.reginfo.gov/public/jsp/EO/fedRegReview/Revesz\\_Livermore.pdf](http://www.reginfo.gov/public/jsp/EO/fedRegReview/Revesz_Livermore.pdf). On January 18, 2011, after much delay, President Obama finally issued his new Executive Order on "Improving Regulation

ver, the healthcare and financial reform legislation passed during Obama's first term delegated a plethora of new policymaking responsibilities to the administrative state.<sup>19</sup> Where Congress has not made its intent clear, the agencies will inevitably have to decide which legislative mandates to implement first and which to defer until a later date.

Although few would dispute that agency delays have long been a significant problem for the administrative state, they have garnered remarkably little attention in the academic literature. Administrative law scholars generally frame agency delays, when they discuss them at all, as a subset of agency inaction.<sup>20</sup> But the literature on judicial review of agency inaction has focused on whether the doctrines of nonreviewability or standing shield certain agency decisions not to act.<sup>21</sup> The literature has not addressed how courts should evaluate the reasonableness of an agency's timeline for decisionmaking if the agency has a nondiscretionary duty to act. Because an agency can defend its inaction by claiming either that it has no duty to act<sup>22</sup> or that, even if it does have a duty, it should control the pace and timing of its action,<sup>23</sup> the question of reasonableness of agency delay is as important to the efficient operation, political accountability, and public transparency of the administrative state as the nonreviewability and

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and Regulatory Review," but it did not address agency inaction or delay. See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

<sup>19</sup> See generally Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1326 (2010); Health Care and Education Affordability Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>20</sup> See Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 13 (2008) [hereinafter Biber, *Resource Allocation*] (arguing that "there is no articulated principled basis" for treating agency action and inaction differently, but not discussing agency delay as a separate issue); Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 467 (2008) [hereinafter Biber, *Two Sides of the Same Coin*] (addressing "unreasonable delay" as a subset of agency inaction and arguing that it should be treated in the same way as agency action); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 672 (1985) ("Inaction may be the result of delay in agency decisionmaking rather than evidence of a decision not to act."). But see 4 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 11:52, at 183 (3d ed. 2010) (distinguishing delay from a choice of inaction because "[d]elay is not the exercise of discretion or any other type of decisionmaking but rather is the result of agency failures"); Eisner, *supra* note 2, at 13 ("There exists a fine distinction between 'inaction' and 'delay.'").

<sup>21</sup> See Biber, *Resource Allocation*, *supra* note 20, at 13–16; Biber, *Two Sides of the Same Coin*, *supra* note 20, at 466–67; Lisa Schultz Bressman, *Judicial Review of Agency Inaction*, 79 N.Y.U. L. REV. 1657, 1657 (2004); Sunstein, *supra* note 20, at 683.

<sup>22</sup> See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 824 (1985).

<sup>23</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 511 (2007).



standing issues that are more frequently discussed. Indeed, it is often easier for an agency to shirk a congressional mandate by slow rolling its implementation than by claiming it has no duty to act.<sup>24</sup>

In the absence of express statutory timelines, and sometimes even with them, courts struggle to assess the timing and pace of agency decisionmaking. The Administrative Procedure Act (“APA”)<sup>25</sup> instructs agencies to complete matters presented to them in a “reasonable time”<sup>26</sup> and authorizes courts to compel agency action “unreasonably delayed,”<sup>27</sup> but the Supreme Court has never instructed courts on how to assess the “reasonableness” of an agency’s pace under the APA or enabling statutes imposing similar “reasonable time” requirements on agency action. The approach developed in the lower courts is ad hoc, incoherent, and difficult to apply consistently. The courts consider a mishmash of factors, but in the end, typically weigh the interests of the individuals harmed by delay against the agency’s interest in controlling the manner and pace of its decisionmaking, thus using an individual-rights framework without any of the constitutional bite.<sup>28</sup> The weak and ad hoc judicial review of agency delays creates opportunities for agencies and those who shape their decisionmaking to thwart legislative mandates.<sup>29</sup>

This Article reconceives agency delay as a principal-agent problem between congressional enacting coalitions and the agency, rather than merely a conflict between the agency and its beneficiaries, as the problem has traditionally been understood.<sup>30</sup> In political science and

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<sup>24</sup> See Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 933 (2008) (“[I]t will generally be more difficult for Congress to distinguish ‘good delay’ from ‘bad delay’ than ‘good regulation’ from ‘bad regulation.’”).

<sup>25</sup> Administrative Procedure Act (APA), 5 U.S.C. §§ 500–596, 701–706 (2006).

<sup>26</sup> *Id.* § 555(b).

<sup>27</sup> *Id.* § 706(1).

<sup>28</sup> See *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984) (outlining the most common approach used by the lower courts to evaluate agency delays); see also *In re Core Commc’ns., Inc.*, 531 F.3d 849, 857–58 (D.C. Cir. 2008); *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 512 (9th Cir. 1997).

<sup>29</sup> See RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 188 (2008) (criticizing the weakness of judicial review of agency inaction).

<sup>30</sup> Of course, adjudicatory delays can also raise constitutional due process concerns, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985) (“At some point, a delay in the post-termination hearing would become a constitutional violation.”), but generally the delay must be quite extreme, compare *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 490 (3d Cir. 1980) (three-year and nine-month delay in processing disability application violates due process), with *Mathews v. Eldridge*, 424 U.S. 319, 342 (1976) (one year delay in final decision on appeal of termination of disability benefits does not violate due process).

economics, the “principal-agent problem” describes the challenge of ensuring that an agent pursues the interests of its principal given the agent’s opportunities for self-dealing due to the information asymmetries inherent in the relationship and to the potential for divergent interests.<sup>31</sup> Positive political theorists have long used the principal-agent framework to describe the problem confronted by Congress in controlling the discretionary authority delegated to the administrative state.<sup>32</sup> Due to limitations on Congress’s ability to monitor and control ex post agency action, there is always a risk of agency drift in which the agency’s actions diverge from the policy preferences of the congressional enacting coalition—i.e., the members of Congress that, with or without the President, passed the underlying statute giving rise to the agency’s duty to act. The principal-agent relationship between the enacting coalition and the agency (i.e., the delegation of decision-making authority) creates opportunities for delay, which the agency or powerful competing principals—such as the President, interest groups, regulated industries, and influential members of Congress—can use to thwart the enacting coalition’s legislative goals.

Framing agency delays as a principal-agent problem calls for a doctrine that (1) identifies sources of delay that undermine the agency’s political accountability, such as agency capture by regulated

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<sup>31</sup> See Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984) (“[T]here is no guarantee that the agent . . . will . . . choose to pursue the principal’s best interests or to do so efficiently. The agent has his own interests . . . and is induced to pursue the principal’s objectives only to the extent that the incentive structure imposed in their contract renders such behavior advantageous.”).

<sup>32</sup> See, e.g., Matthew D. McCubbins, et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter McCubbins, et al., *Administrative Procedures*] (using the principal-agent framework to analyze congressional control of the administrative state); Matthew D. McCubbins, et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McCubbins, et al., *Structure and Process*] (same); Moe, *supra* note 31, at 758 (noting early uses of the principal-agent model by political scientists studying public bureaucracy). The principal-agent framework has also made some inroads into normative legal scholarship that engages positive political theory. See generally Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549 (2009) (reimagining judicial interpretation of congressional delegation using the insights of positive political theory); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239 (1989) (developing a theory of judicial review using the principal-agent framework); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 50–51 (1994) (noting the difficulties of applying the principal-agent framework to the relationship between the President, Congress, the courts, and the administrative state); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006) (analyzing congressional decisions whether to delegate decisionmaking authority to agencies or courts as a principal-agent problem).

industries, agency shirking of legislative mandates, or obstructionism by Presidents opposed to legislative goals; (2) tailors judicial deference to an agency's pace according to the type of decision delegated by Congress; (3) judges the reasonableness of an agency timeline by whether it enables the agency to make a sufficiently better decision, such that the costs to the enacting coalition's goals are outweighed by the benefits of further time for decisionmaking; and (4) provides agencies with better incentives to rationally prioritize their many responsibilities.

This Article proceeds in four parts. Part I describes the causes and consequences of delay in both administrative programs and regulatory initiatives. It identifies delays that can be appropriately characterized as the result of a principal-agent problem as well as the limits of the model. Part II delves into the jurisprudence of agency inaction and elaborates on how the academic literature has not yet addressed agency discretion over timing while the doctrine in the courts has been ad hoc and too weak to ensure the efficient operation and accountability of the administrative state. Part III compares the institutional capacities and competencies of the three branches to address agency delays. It argues that information deficiencies and political and structural impediments make it difficult for Congress to cure certain delays. Although the President is often in a better position to expedite action related to administration priorities, the President has a tendency to exacerbate delays in other areas. Consequently, the judiciary is often the only branch of government willing and able to address delays that thwart legislative goals. Part III concludes that courts are in a better position than Congress to address many discrete agency delays but less well equipped to review agency decisions regarding priorities.

Finally, Part IV offers several proposals for enhancing political and judicial review of agency delays that address them as a principal-agent problem. Due to the vast number of responsibilities entrusted to agency action—and the limited resources of the White House, Congress, and the judiciary—tackling agency delays requires interbranch cooperation and coordination.

## I. THE PROBLEM WITH AGENCY DELAYS

### A. *The Causes of Agency Delays: The Good, the Bad, and the Ugly*

Some interval between the passage of legislation and its implementation is a necessary and beneficial consequence of congressional

delegation of decisionmaking authority to the administrative state.<sup>33</sup> Congress delegates decisions that it has neither the time nor the expertise to make, or to make efficiently.<sup>34</sup> This is true of both adjudication and rulemaking proceedings delegated by Congress. In the case of the adjudication of public benefits, for example, although Congress often sets relatively specific criteria for eligibility,<sup>35</sup> Congress does not have the time to review, debate, and vote on the merits of benefits for millions of individual applicants.<sup>36</sup> Moreover, a specialized adjudicatory agency can make iterative decisions more efficiently and fairly by employing rules of general applicability. Similarly, in the case of regulatory standards, Congress has neither the time nor the expertise to determine the tens of thousands of rules promulgated by the administrative state that give meaning and content to broad regulatory statutes.<sup>37</sup> Congress struggles simply to address all the legislation proposed by its members each term.<sup>38</sup>

Public choice theorists have also identified less savory reasons for Congress to delegate policymaking decisions to regulatory agencies. Congress may wish to avoid setting specific regulatory standards for

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<sup>33</sup> See *Pierce*, *supra* note 32, at 1244 (noting the diminishing number of policy decisions made by Congress); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 383 (1989) (noting that agencies must engage in either adjudication or rulemaking to implement legislative directives).

<sup>34</sup> This is known as the “public interest” theory of congressional delegation of broad policy-making authority. See *Pierce*, *supra* note 32, at 1245 & n.22; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695–97 (1975) (discussing reasons why Congress enacts broad and nonspecific legislation).

<sup>35</sup> See, e.g., 8 U.S.C. §§ 1423, 1427(a), (c), 1445(a)–(b) (2006) (eligibility criteria for naturalization); 42 U.S.C. § 402(a) (2006) (eligibility criteria for old-age insurance benefits under Social Security Act); *id.* § 423(a)(1) (eligibility criteria for disability insurance benefits under the Social Security Act).

<sup>36</sup> Until the Supreme Court declared the legislative veto unconstitutional, however, Congress sometimes retained the ability to overrule certain decisions of the administrative state, although it exercised the power infrequently. See *INS v. Chadha*, 462 U.S. 919, 968–74 (1983) (White, J., dissenting) (describing the history of the legislative veto in restraining agency discretion).

<sup>37</sup> See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“Congress simply cannot do its job absent an ability to delegate power under broad general directives.”); Kerwin & Furlong, *supra* note 2, at 113 (“Serial delegations of vast regulatory powers by Congress in the 1970s and 1980s authorized the writing of tens of thousands of rules.”). The policy choices confronting agencies charged with protecting our health, safety, and the environment frequently require an uncommon level of expertise and specialization. *Id.* at 116; see also *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (noting that agencies make decisions “at the frontiers of science”).

<sup>38</sup> The 109th Congress (2005–2006) introduced 6540 bills but passed only 770 of them. NORMAN J. ORNSTEIN, ET AL., *VITAL STATISTICS ON CONGRESS 2008*, at 124 (2008).

fear of incurring the ire of a regulated constituency,<sup>39</sup> Congress may be uncertain or unable to agree on the most politically desirable policy choice to pursue,<sup>40</sup> or Congress may wish to avoid the temptation to shape important policy decisions based on short-term political expediency rather than the merits.<sup>41</sup> Thus, there are advantages for Congress to delegate rulemaking authority to agencies with the time and expertise to make better decisions implementing broad policy objectives than Congress itself could or would make, even if it had the time and wherewithal to do so.<sup>42</sup>

Agencies need time for quality decisionmaking when confronting complex problems that require them to marshal and analyze a large amount of information and to choose among competing policy alternatives.<sup>43</sup> Thus, some delay in the implementation of statutory mandates is inevitable and desirable, so long as it produces decisions more closely aligned with Congress's policy goals than Congress itself could produce or than the agency could produce with less thoughtful consideration.

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<sup>39</sup> See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 81 (1991) (describing a theory positing that "members of Congress . . . prefer broad delegations so they can 'pass the buck' and avoid taking responsibility for the consequences of legislation"); Pierce, *supra* note 32, at 1245 (noting that public choice theorists contend that broad delegations to the agencies allow legislators to curry favor with constituencies with conflicting policy preferences).

<sup>40</sup> See Pierce, *supra* note 32, at 1246–47 (explaining that democratic reforms of Congress broke the agenda-setting power of party leaders and committee chairs, sacrificing legislative decisiveness).

<sup>41</sup> See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 68 (1990) (noting that Congress's ignorance with respect to auto safety led it to provide vague directions to the administrative state in the hope that professionals would resolve the details); McCubbins, et al., *Administrative Procedures*, *supra* note 32, at 256–57 (noting that politicians may delegate when they are unsure of what the best policy would be); Glen O. Robinson, Commentary, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Political Uses of Structure and Process*, 75 *V.A. L. REV.* 483, 485 (1989) (noting that some scholars have explained legislative delegations as reflecting "the legislature's lack of relevant information or uncertainty due to frequent changes in the state of knowledge").

<sup>42</sup> The relative impotence of the nondelegation doctrine means that there is little judicial check on broad delegations of decisionmaking authority to the agencies. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (noting that the Court had only twice invalidated a statute under the doctrine). *But see* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 *V.A. L. REV.* 1407, 1429–30 (2008) (suggesting that Congress has exceeded even the weak limits that the Court places on the delegation of decisionmaking authority).

<sup>43</sup> See KERWIN, *supra* note 2, at 107–08 (describing the complexity of issues often faced by rulemaking agencies). Of course, the procedural requirements imposed upon agencies by the APA also delay final agency action. See 5 U.S.C. § 553(b)–(c) (2006) (requiring that agencies provide notice of proposed actions and allow opportunity for comment); *id.* §§ 556–557 (laying out more stringent procedures for formal rulemaking).

But delays in agency decisionmaking are not always caused by the agency's desire to produce a decision that is more faithful to the goals of the enacting coalition. Delays may also stem from divergent policy preferences of the agency or a competing political principal, from agency mismanagement or inefficiencies unrelated to policy preferences, or from Congress's failure to provide the agency with the resources necessary to achieve its mandated goals.

### 1. *Agency Priorities*

In a world of limited resources, agencies prioritize their agendas and defer initiating or prolong completing matters they deem less pressing. On the one hand, to the extent that agencies prioritize based on the most important or time-sensitive legislative goals, such decisions do not raise concerns of democratic accountability because the agency is not attempting to thwart a legislative mandate. On the other hand, the agency may deem a matter to be a low priority merely because it involves a new area in which the agency does not have experience, expertise, or contacts.<sup>44</sup> The agency may also stall because of disagreement among agency staff over the proper course of action or fear of the political costs of a decision.<sup>45</sup> More troubling still, agency staff may ignore a mandate from Congress that differs from the agency's understanding of its mission, what positive political scientists call "agency drift."<sup>46</sup> Such policy preferences raise democratic accountability concerns because the agency is using delay, intentionally or unintentionally, to diverge from the enacting coalition's policy goals.

### 2. *"Agency Capture"*

In its extreme form, "agency capture" denotes an agency that is effectively controlled by an industry that it regulates.<sup>47</sup> Consequently,

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<sup>44</sup> See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 101 (new ed. 2000) ("[T]asks that are not part of the [agency] culture will not be attended to with the same energy and resources as are devoted to tasks that are part of it.").

<sup>45</sup> KERWIN, *supra* note 2, at 108–09, 113–14.

<sup>46</sup> See McCubbins, et al., *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 184 (1999) ("Agency drift refers to the circumstance when an agency adopts policies that are not consistent with the agreement among elected officials that is embodied in its statutory mandate . . ."); McCubbins, et al., *Structure and Process*, *supra* note 32, at 435–40 (modeling agency drift within the parameters of certain legislative preferences).

<sup>47</sup> The concept has its roots in public choice theory's view of the political process as driven by economic rather than ideological interests. See, e.g., George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971). For a classic study of capture in four agencies, see PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES*

the agency's policies are manipulated to serve the interests of the regulated industry rather than the intended beneficiaries of congressional action, even if Congress intends some benefits to accrue to the industry itself.<sup>48</sup> But many commentators have recognized a subtler agency bias towards the interests of regulated industries.<sup>49</sup> Because agencies generally have limited resources, they often rely on regulated parties for information, encouraging the agency to develop a productive working relationship with the industry.<sup>50</sup> Moreover, an adversarial posture toward the regulated industry is expensive and potentially dangerous for the agency. A well-organized industry backed up against a wall might take its complaint to Congress and succeed in gutting the agency's funding or altering its mandate, and litigation has uncertain outcomes.<sup>51</sup> Thus, agencies generally prefer to foster volun-

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(1981). See also Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990) (reviewing agency capture literature); Stewart, *supra* note 34, at 1685 & nn.75–76. The primary mechanism of capture traditionally has been assumed to be the prospect of future employment in the regulated industry. See QUIRK, *supra*, at 143–74.

<sup>48</sup> For example, the Department of Interior's Minerals Management Service ("MMS"), which allocates oil and gas exploration rights and collects about ten billion dollars in royalties annually from the oil and gas industry, was recently accused of literally being in bed with its regulated industry. See Charlie Savage, *Sex, Drug Use and Graft Cited in Interior Department*, N.Y. TIMES, Sept. 11, 2008, at A1. Officials at MMS reportedly accepted gifts from energy companies in violation of ethics rules, used drugs and alcohol at industry functions, had sexual relationships with industry representatives, and obtained outside consulting jobs with the companies with which the agency conducted business. *Id.* As a result of this "capture," the MMS allowed companies that purchased oil and gas to revise their bids downward after winning contracts on 118 occasions, costing taxpayers over four million dollars. *Id.* The costs of MMS's capture became manifest in the wake of the gulf oil spill, which many blamed on MMS's failure to issue adequate safety rules. See Richard S. Dunham & Stewart Powell, *Critics Blame Energy Lobby for Lax Safety Rules*, HOUS. CHRON., May 8, 2010, <http://www.chron.com/dispatch/story.mpl/business/deepwaterhorizon/6996736.html>. The criticisms were so strong that they forced an overhaul of MMS in an attempt to insulate it from industry influence. See Mike Soraghan, *Interior's New Oil Industry Watchdog Has Little Energy Experience*, N.Y. TIMES, June 16, 2010, <http://www.nytimes.com/gwire/2010/06/16/16greenwire-interiors-new-oil-industry-watchdog-has-little-43108.html>.

<sup>49</sup> See, e.g., Stewart, *supra* note 34, at 1684–87 (arguing that agencies are predisposed to favor interests of regulated industry because (1) they are held accountable if industry suffers serious economic harm, (2) regulation may reduce competition, solidifying position of key players and their relation to the agency, (3) limited resources make conflict with the regulated industry costly or impossible, and (4) agencies must rely on outside resources and information, much of which comes from the regulated industry).

<sup>50</sup> *Id.* at 1686.

<sup>51</sup> For example, after the National Traffic Safety Administration ("NTSA") proposed passive-restraint safety regulations in 1969, Inflatable Occupant Restraint Systems, 34 Fed. Reg. 11,148 (proposed July 2, 1969), the automobile industry fought the agency both in court and the halls of Congress, ultimately securing an amendment to the Motor Vehicle Safety Act to emphasize recalls of defective automobiles over technology-forcing safety standards, see Motor Vehicle

tary cooperation and compliance, which inevitably demands compromises. Because regulated industries with significant interests at stake also tend to be well organized and able to lobby the agency effectively, whereas intended beneficiaries of legislation are often diffuse and poorly organized, the agency's policies tend to tilt in favor of the regulated industry.<sup>52</sup>

There are several ways in which a regulated industry can delay agency decisionmaking: the industry can signal to the agency that it will fight particular regulation, motivating the agency to work on other less contentious issues to preserve a cooperative relationship; the industry can delay responding to requests for information or otherwise interfere with research, making it difficult for the agency to obtain the knowledge necessary to formulate policy;<sup>53</sup> or alternatively, the industry can churn the administrative record as the agency moves forward with regulation, producing pro-industry studies and threatening legal action if the agency closes the administrative record or does not adequately consider the industry's submissions.<sup>54</sup>

Regulated industries should be heard on the substantive policies that affect them given that Congress rarely intends the ruin of an industry. But postponing or prolonging decisionmaking to thwart an enacting coalition's policy goals, as opposed to delaying the implementation of regulations as a part of a negotiated compromise, raises democratic accountability and transparency concerns.

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and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, § 152, 88 Stat. 1470, 1470-71 (current version at 49 U.S.C. § 30118 (2006)). For two different accounts of the death of NTSA's passive-restraint proposal, see MASHAW & HARFST, *supra* note 41, and Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 315-20 (2009).

<sup>52</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53-65 (7th prtg. 1977) (explaining that small, organized groups are often more effective than larger groups); Pierce, *supra* note 32, at 1280-81; Stewart, *supra* note 34, at 1684-85 (arguing that small groups with large stakes in an agency's decision can overwhelm larger groups' abilities to influence agency action).

<sup>53</sup> See, e.g., David C. Vladeck, *Unreasonable Delay, Unreasonable Intervention: The Battle to Force Regulation of Ethylene Oxide*, in *ADMINISTRATIVE LAW STORIES* 190, 208-11 (Peter L. Strauss ed., 2006) (explaining how off-the-record meetings with industry led to the halting of a crucial agency study, the absence of which was later used to justify agency inaction).

<sup>54</sup> See, e.g., Pub. Citizen Health Research Grp. v. Chao, 314 F.3d 143, 148 (3d Cir. 2002) (noting that rulemaking had been delayed when industry groups pressured the Occupational Safety and Health Administration to wait for the results of ongoing studies); Amy Whritenour Ando, *Waiting to Be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J.L. & ECON. 29, 48-50 (1999) (noting interest group influence on the rates at which the U.S. Fish and Wildlife Service lists endangered species).



### 3. Presidential Priorities

The President can delay the implementation of regulations contrary to the administration's goals, at least with respect to executive branch agencies that are not insulated from presidential control. Upon taking office, the George W. Bush Administration announced that any new regulatory actions would have to be reviewed and approved by a department or agency head appointed by the new Administration,<sup>55</sup> effectively suspending regulatory action during the nomination and confirmation process. Once Bush's nominees were in place, the Administration and its appointees continued to check the pace of regulatory activity, particularly with respect to health, safety, and the environment.<sup>56</sup> Indeed, the fear of a negative White House response is often enough to deter agencies from acting contrary to the President's preferences.<sup>57</sup> Moreover, merely by focusing the attention of agencies on administration priorities, the President can divert resources from other activities.<sup>58</sup> Thus, even a President committed to an activist government, such as President Obama,<sup>59</sup> may cause delays in certain areas by pushing agencies in others.

Although advocates of strong presidential control over the administrative state extol it as a solution to the problem of democratic legitimacy,<sup>60</sup> unchecked agency inaction caused by the President constitutes an extralegislative veto on duly enacted statutes. Thus, delays

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<sup>55</sup> *Pub. Citizen Health Research Grp.*, 314 F.3d at 150.

<sup>56</sup> See Declaration of Peter Lurie, M.D., M.P.H. ¶ 24 & Ex. 19, *Pub. Citizen Health Research Grp.*, 314 F.3d 143 (No. 02-1611) (stating that OSHA's agenda in 2001 included few rulemaking proceedings and no proposals to regulate in new areas); KERWIN, *supra* note 2, at 109–10 (noting that policy disagreements between political appointees and career bureaucrats can prolong rulemaking proceedings); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 55 (reviewing White House pressure to block climate change regulation by the EPA); Duhigg, *supra* note 9 (recounting the EPA's inaction under the SDWA).

<sup>57</sup> Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1065 (1986).

<sup>58</sup> See, e.g., *Pub. Citizen Health Research Grp.*, 314 F.3d at 147, 157 (explaining that OSHA delayed regulating hexavalent chromium due to the Clinton Administration's push to quickly develop ergonomics standards); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1431 (1992) ("[R]ulemaking initiatives that are low on OMB's agenda languish, even if they are high priorities for the agencies."); Vladeck, *supra* note 53, at 198 (noting that OSHA justified a delay in regulating ethylene oxide due to focus on the Reagan Administration's deregulatory efforts).

<sup>59</sup> See Lipton, *supra* note 13.

<sup>60</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570 (1994) (arguing that the text of the Constitution "unambiguously gives the President the power to control the execution of all federal laws"); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2252 (2001) (arguing that presidential in-

caused by presidential priorities raise democratic accountability and separation of powers concerns.<sup>61</sup>

#### 4. *Congressional Capture*

Members of Congress can exert pressure on agencies to defer or postpone regulatory actions, particularly if they sit on a congressional committee with oversight responsibility for the agency or power over appropriations.<sup>62</sup> The mere threat of adverse congressional action may cause agencies to shy away from certain matters and shape their priorities. Indeed, some political scientists argue that Congress encourages agency delay in decisionmaking so that members of Congress can influence the regulatory process if they do not approve of the direction in which the agency is headed.<sup>63</sup> Although members of Congress can hardly be faulted for advocating on behalf of their constituents,<sup>64</sup> agency capture by individual members of Congress or congressional committees raises accountability and transparency concerns by functioning as an extralegislative stealth veto on agency action.

#### 5. *Agency Mismanagement*

Some agency delays are the result of simple mismanagement or administrative inefficiencies.<sup>65</sup> Mismanagement may go unchecked because of divergent policy preferences of the agency, but it may be completely unrelated.<sup>66</sup> Agencies, like humans, sometimes make mistakes and often do not work as efficiently as they might in an ideal

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fluence on administrative regulation “renders the bureaucratic sphere more transparent and responsive to the public”).

<sup>61</sup> Cf. Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988 (1997) (emphasizing the complex separation of powers and democratic implications of political involvement in the administrative process); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578–79 (1984) (same).

<sup>62</sup> See KERWIN, *supra* note 2, at 112 (describing how a congressional appropriations committee pressured an agency to rescind an offer to aid the Department of Transportation with establishing rules for alcohol testing of public transportation workers); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 130–35 (2006) (describing informal efforts by members of Congress to influence agency decisions to take or forego actions).

<sup>63</sup> McCubbins, et al., *Structure and Process*, *supra* note 32, at 442.

<sup>64</sup> See *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981) (“We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies . . . so long as individual Congressmen do not frustrate the intent of Congress . . . as expressed in statute . . .”).

<sup>65</sup> See KOCH, *supra* note 20, § 11:52, at 183 (“While there are many practical excuses for delay, delay must be justified.”).

<sup>66</sup> See Seidenfeld, *supra* note 51, at 259 (noting that agency determinations of whether to act are sometimes made “in a purposive manner” based on specific agency goals, but that other

world. Mismanagement and inefficiencies do not necessarily undermine accountability or transparency, but they can still raise concerns about the efficient functioning of the agency from a principal-agent perspective.

#### 6. *Dysfunctional Principals*

Finally, some delays, particularly in the context of large screening programs, such as the adjudication of benefits, patents, licenses, and the like, are caused in whole or in part by the failure of Congress to appropriate sufficient funds to get the job done. The enacting coalition may have passed the underlying legislation for purely symbolic reasons and may not actually want the agency to engage in much regulatory or administrative activity, or it may prefer that the agency move slowly.<sup>67</sup> Alternatively, the current Congress may not share the policy goals of the original enacting coalition and, rather than attempt to repeal or significantly amend the underlying statute, may prefer to let the program wither on the vine by cutting the agency's funding. In such cases, the delays that ensue are the result of a dysfunctional principal (i.e., Congress) rather than a principal-agent problem.

In sum, agency delays constitute a principal-agent problem that raises democratic accountability concerns when foot-dragging stems from divergent policy preferences of the agency itself, a regulated interest group, or a competing political principal acting outside the legislative process. In many cases, delay is a more effective strategy for competing principals seeking to obstruct legislative goals than shaping the agency's substantive decisions, which would likely result in judicial review against the standards in the enabling statute.<sup>68</sup> Similarly, delays caused by agency mismanagement and inefficiencies raise basic principal-agent concerns, although they do not raise the same concerns with democratic accountability or separation of powers as divergent policy preferences. Finally, delays that are mostly a function of inadequate congressional appropriations do not constitute a principal-agent problem at all; rather they are indicative of a dysfunctional principal.

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times "the problems agencies decide to address are a matter of the coincidence of a variety of factors conducive to agency action").

<sup>67</sup> See John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 234 (1990) (noting that agencies often respond to symbolic legislation by resisting or delaying its implementation).

<sup>68</sup> See Gersen & O'Connell, *supra* note 24, at 932–33.

### B. *The Costs of Agency Delays*

The failure by agencies to implement statutory mandates obstructs the bestowal of economic and social goods on intended beneficiaries of legislative action.<sup>69</sup> Injured workers and veterans who wait for disability benefits to be adjudicated must scramble for support in the interim; lawful permanent residents who await the adjudication of their citizenship applications remain separated from family members, face the risk of deportation, and cannot fully participate in our political system.<sup>70</sup> But agency delays do not merely affect applicants for public entitlements. Delays by the Food and Drug Administration (“FDA”) in approving new prescription drugs and medical devices affect one of our most dynamic industries. While the FDA reviews a new drug application, the company must wait to recoup the costs of development and the profitability of the drug diminishes as the clock runs on the company’s patents.<sup>71</sup>

Moreover, agency delays reallocate enacting coalitions’ intended distribution of costs and benefits over time. Put differently, delays impose unintended costs on intended beneficiaries and unintended benefits on those intended to bear the costs of regulation.<sup>72</sup> Consider the Occupational Safety and Health Act of 1970 (“OSH Act”),<sup>73</sup> which requires the Occupational Safety and Health Administration (“OSHA”) to set standards that “eliminat[e], as far as feasible, significant risks of harm” in the workplace.<sup>74</sup> The OSH Act provides a benefit to workers by reducing the risk of illness caused by hazards in the workplace and imposes a cost on employers by requiring them to meet stricter workplace safety standards. Delays by OSHA in setting stan-

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<sup>69</sup> See Kerwin & Furlong, *supra* note 2, at 115 (“Without the rules needed to specify the form and content of programs, the obligations of regulated parties, and the responsibilities of enforcement officials, the public policy objectives articulated in statutes cannot be pursued.”).

<sup>70</sup> See *Roshandel v. Chertoff*, No. C07-1739MJP, 2008 U.S. Dist. LEXIS 90899, at \*3 (W.D. Wash. May 5, 2008) (describing the injuries alleged by plaintiffs whose applications for citizenship had been delayed for multiple years).

<sup>71</sup> See Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1035 (1983) (“[U]nder screening systems it is the regulatee who bears the risk and cost of regulatory delay.”). These delays also affect the patient populations that need these drugs. In 1990, the chairman of a presidential advisory panel on drug approval estimated that thousands of lives were lost each year due to delays by the FDA in approving cancer and AIDS drugs. Robert Pear, *Faster Approval of AIDS Drugs Is Urged*, N.Y. TIMES, Aug. 16, 1990, at B12.

<sup>72</sup> See Huber, *supra* note 71, at 1035 n.44 (discussing how drug-approval delays at the FDA harmed the patients the regulations were intended to help by withholding lifesaving medication).

<sup>73</sup> Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2006).

<sup>74</sup> *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 641 (1980) (plurality opinion); see also 29 U.S.C. § 655(b) (granting OSHA the power to set standards and providing guidelines for their issuance).

dards for workplace hazards deny workers intended benefits of the OSH Act and provide employers with a windfall by postponing the intended costs. Decades-long delays in implementing or updating such standards can have significant redistributive effects, which are difficult if not impossible to correct.<sup>75</sup>

Or consider the 2010 Patient Protection and Affordable Care Act<sup>76</sup> and the Health Care and Education Affordability Reconciliation Act,<sup>77</sup> the products of the Obama Administration's push for health-care reform. Congress drafted the law in such a way that various consumer protections become effective at different times over the next decade.<sup>78</sup> Delays by the agencies tasked with implementing the legislation could alter this schedule significantly, reducing the law's value to consumers and creating a windfall for the insurance industry.

Agency delays also create uncertainty among regulated entities, making it difficult for them to plan for the future.<sup>79</sup> For example, delays in promulgating pollution emission standards make it difficult for businesses to plan new projects or capital improvements;<sup>80</sup> more cost effective alternatives in the short run might need to be replaced in a few years once the agency acts.<sup>81</sup> Alternatively, because agencies tend to regulate new construction more aggressively than existing plants,<sup>82</sup> delay may encourage businesses to preempt the agency to obtain the benefit of grandfathered status, further diminishing the benefits intended to be delivered by the enacting coalition.<sup>83</sup> Moreover, regard-

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<sup>75</sup> Tort suits may be cold comfort to injured, seriously ill, or deceased workers.

<sup>76</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>77</sup> Health Care and Education Affordability Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

<sup>78</sup> For a helpful summary of the effective dates of major provisions of the laws, see THE COMMONWEALTH FUND, TIMELINE FOR HEALTH CARE REFORM IMPLEMENTATION: HEALTH INSURANCE PROVISIONS (2010), available at [http://www.commonwealthfund.org/~media/Files/Publications/Other/2010/Timeline\\_Coverage\\_818\\_v4.pdf](http://www.commonwealthfund.org/~media/Files/Publications/Other/2010/Timeline_Coverage_818_v4.pdf).

<sup>79</sup> KERWIN, *supra* note 2, at 106.

<sup>80</sup> Potomac Elec. Power Co. v. ICC, 702 F.2d 1026, 1034 (D.C. Cir. 1983) (“[E]xcessive delay . . . creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans.”); British Airways Bd. v. Port Auth., 564 F.2d 1002, 1010 (2d Cir. 1977) (noting that delay can threaten introduction of new technology); Nader v. FCC, 520 F.2d 182, 207 (D.C. Cir. 1975) (noting that excessive delay can lead to the breakdown of the regulatory process).

<sup>81</sup> See Huber, *supra* note 71, at 1064 & n.180 (“[R]etrofitting is anathema to engineering cost accountants because it is usually vastly more costly than making an identical but prospective change in design.”).

<sup>82</sup> *Id.* at 1040–41.

<sup>83</sup> See generally Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 Nw. U. L. REV. 1677 (2007) (analyzing systemic effects of grandfathering in environmental law).

less of how the entity decides to proceed in the face of uncertainty, the failure of the agency to give specificity to legislative acts will increase the costs of obtaining legal advice concerning the meaning and import of the law.<sup>84</sup>

The uncertainty produced by delay can also create conflicts among regulated parties. In 1962, Congress required the FDA to review the efficacy of 16,573 prescription drugs that had been approved under the preexisting regulatory regime for safety but not efficacy.<sup>85</sup> Manufacturers were permitted to continue marketing the drugs until the FDA set new standards.<sup>86</sup> But the FDA still has not finished reviewing all the drugs within the class.<sup>87</sup> In 2006, the FDA estimated that there were thousands of unapproved drug products, representing hundreds of drugs, on the market.<sup>88</sup> The FDA's delay in reviewing these products led to dozens of lawsuits among competing pharmaceutical manufacturers over the products' advertising and promotional claims.<sup>89</sup> In the absence of definitive FDA judgments about the products' efficacy, juries had to do the FDA's job in a series of false advertising lawsuits across the country.

Finally, prolonged decisionmaking is inefficient for the agency. As rulemaking proceedings drag on, the agency must continue to review new information, old findings must be revisited, new personnel must be trained as staff depart, and the agency's institutional memory is inevitably diminished. Moreover, as the number of delayed matters multiply and continue to consume agency resources, they impair the

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<sup>84</sup> Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 622-23 (1992).

<sup>85</sup> PIERCE, *supra* note 8, § 12.3, at 847.

<sup>86</sup> See U.S. DEP'T OF HEALTH AND HUMAN SERVS., CTR. FOR DRUG EVALUATION & RESEARCH, MARKETED UNAPPROVED DRUGS—COMPLIANCE POLICY GUIDE 9 (2006), available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM070290.pdf> ("It is the Agency's longstanding policy that products subject to an ongoing . . . proceeding may remain on the market during the pendency of the proceeding.").

<sup>87</sup> See *id.* at 8-9

<sup>88</sup> *Id.* at 2; see also Fla. Breckenridge, Inc. v. Solvay Pharm., Inc., No. 98-4606, 50 U.S.P.Q.2d (BNA) 1761, 1763 (11th Cir. May 11, 1999) (depublished) ("[T]here are still thousands of these unapproved drugs on the market."); Solvay Pharm., Inc. v. Ethex Corp., No. 03-2836(JRT/FLN), 2006 WL 2255375, at \*1 (D. Minn. Aug. 7, 2006) (noting that, even though the FDA had declared that pancreatic enzymes would require approval by the agency, it had not set its own standards for the drugs).

<sup>89</sup> See, e.g., *Solvay Pharm., Inc.*, No. 03-2836(JRT/FLN), 2006 WL 2255375; *Solvay Pharm., Inc. v. Global Pharm.*, 419 F. Supp. 2d 1133 (D. Minn. 2006); *Schwarz Pharm., Inc. v. Breckenridge Pharm., Inc.*, 388 F. Supp. 2d 967 (E.D. Wis. 2005); *Healthpoint Ltd. v. Ethex Corp.*, No. SA-01-CA-646-OG, 2004 WL 2359420 (W.D. Tex. July 14, 2004).

ability of the agency to focus its attention and resources on new priorities.<sup>90</sup>

In sum, although it is important for agencies to have the necessary time to make quality decisions under the authority delegated to them, excessive and unnecessary delays in decisionmaking can have serious consequences inasmuch as the administrative state touches upon nearly every aspect of our lives.

## II. THE LAW OF AGENCY ACTION, INACTION, AND DELAY

Legal scholars have devoted little attention to judicial review of agency delays or to the role that courts might play in curing them. When agency delays do appear in the academic literature, scholars usually treat them as a form of agency inaction.<sup>91</sup> The literature focuses on the nonreviewability and standing doctrines and whether there is any meaningful distinction between judicial review of agency action and inaction.<sup>92</sup> The literature has not addressed how courts should assess whether agency decisionmaking has become unreasonably delayed.

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<sup>90</sup> See DAVID FRUM, *HOW WE GOT HERE: THE '70s*, at 180 (2000) (noting that all but one of the fourteen drugs that the FDA categorized as priorities in the 1970s were approved in foreign countries before the United States).

<sup>91</sup> See Biber, *Resource Allocation*, *supra* note 20, at 13; Biber, *Two Sides of the Same Coin*, *supra* note 20, at 467; Sunstein, *supra* note 20, at 673. *But see* KOCH, *supra* note 20, § 11:52, at 183 (noting that “delay might be a different conceptual category from a choice of inaction” because it “is not the exercise of discretion or any other type of decisionmaking but rather is the result of agency failures”); Freeman & Vermeule, *supra* note 56, at 81 (discussing reasons why agencies may delay decisionmaking); Gersen & O’Connell, *supra* note 24 (conducting an empirical study of deadlines in rulemaking proceedings and their affect on the pace of agency action).

In contrast to the dearth of literature on delay in administrative law, there is a sizable body of literature discussing delays in criminal proceedings. See generally Harold J. Krent, *The Continuity Principle, Administrative Constraint, and the Fourth Amendment*, 81 NOTRE DAME L. REV. 53 (2005) (discussing Fourth Amendment limitations to delays in criminal proceedings); Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115 (2008) (considering legislative and judicial responses to pre-indictment delays); Michael J. Cleary, Comment, *Pre-Indictment Delay: Establishing a Fairer Approach Based on United States v. Marion and United States v. Lovasco*, 78 TEMP. L. REV. 1049 (2005) (discussing judicial responses to constitutional pre-indictment delay claims); *Preliminary Proceedings: Prosecutorial Discretion*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 219, 220 n.668 (2009) (discussing constitutional protections against delays in criminal procedural system).

<sup>92</sup> See Biber, *Resource Allocation*, *supra* note 20, at 13; Biber, *Two Sides of the Same Coin*, *supra* note 20, at 467; Bressman, *supra* note 21, at 1678–84; Pierce, *supra* note 32, at 1267–68; Sunstein, *supra* note 20, at 660.

A. *Review of Agency Action, Inaction, and Delay Under the Administrative Procedure Act*

The APA provides the basic framework for judicial review of agency action, inaction, and delays. The APA defines “agency action” to include “the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”<sup>93</sup> Any person “suffering legal wrong . . . or adversely affected or aggrieved by agency action”<sup>94</sup> or inaction<sup>95</sup> is entitled to judicial review unless the relevant statutes “preclude judicial review” or the agency’s action or inaction is “committed to agency discretion by law.”<sup>96</sup> Agencies are required to conclude matters presented to them in a “reasonable time”<sup>97</sup> and courts may “compel agency action unlawfully withheld or unreasonably delayed.”<sup>98</sup>

In addition to the APA’s restrictions on unreasonable delay, many enabling statutes governing specific agencies and their programs contain express statutory deadlines or provisions similar to the APA’s requirement that agencies either expressly or impliedly complete certain actions within a reasonable time.<sup>99</sup> 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.<sup>100</sup> But courts

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<sup>93</sup> 5 U.S.C. § 551(13) (2006).

<sup>94</sup> *Id.* § 702.

<sup>95</sup> *See id.* § 551(13) (defining agency action to include “failure to act”); *id.* § 701(b)(2) (noting that “agency action,” as used in chapter seven of 5 U.S.C., is defined by § 551(13)).

<sup>96</sup> *Id.* § 701(a)(1)–(2).

<sup>97</sup> *Id.* § 555(b).

<sup>98</sup> *Id.* § 706(1).

<sup>99</sup> *See, e.g.*, 21 U.S.C. § 360f(b) (2006) (requiring “prompt notice . . . [and] reasonable opportunity for an informal hearing” on proposed regulations to ban devices under the Food, Drug, and Cosmetic Act); 29 U.S.C. § 659(a) (2006) (directing the Secretary of Labor to notify employers of a penalty “within a reasonable time after the termination of [an] inspection or investigation” under the Occupational Safety and Health Act); 38 U.S.C. § 7261(a)(2) (2006) (authorizing the Court of Appeals for Veterans Claims to compel action “unlawfully withheld or unreasonably delayed”); 42 U.S.C. § 405(b) (2006) (entitling disability claimants under the Social Security Act to “reasonable notice and opportunity for a hearing with respect to” unfavorable disability determinations); *id.* § 7409(a)(1)(B) (directing the EPA Administrator to promulgate proposed national ambient air quality standards under the Clean Air Act “after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards)”).

<sup>100</sup> *See, e.g.*, *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (compelling agency rulemaking in light of “a clear statutory mandate, a deadline nine-years ignored, and an agency that has admitted its continuing recalcitrance”); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) (“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 of legislative supremacy and constitutionally separated powers.”). *But see In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991) (“[F]inding that delay is unreason-



struggle to judge the reasonableness of an agency's pace when Congress has not provided a statutory deadline.<sup>101</sup>

### B. *Heckler v. Chaney and the Literature of Agency Inaction*

In the wake of the Supreme Court's decision in *Heckler v. Chaney*,<sup>102</sup> there was some question whether agency inaction was generally reviewable at all. In *Chaney*, the Court interpreted section 706(a)(2) of the APA to hold that agency decisions not to institute enforcement proceedings are presumptively immune from judicial review.<sup>103</sup> The plaintiffs in *Chaney* were prison inmates convicted of capital offenses and sentenced to death who petitioned the FDA to take enforcement actions concerning drugs used in lethal injections to carry out the death penalty.<sup>104</sup> The plaintiffs alleged that the drugs were not approved for use in human executions (although approved for other uses) and therefore such use violated the Food, Drug, and Cosmetic Act ("FDCA").<sup>105</sup> The agency argued that it was not required to undertake any enforcement action because (1) it did not have jurisdiction over state criminal justice systems; and (2) even if it did have jurisdiction, it would exercise its inherent discretion not to pursue enforcement proceedings based on the Commissioner's conclusion that there was no "serious danger to the public health or a blatant scheme

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able does not, alone, justify judicial intervention."); R. Shep Melnick, *The Political Roots of the Judicial Dilemma*, 49 ADMIN. L. REV. 585, 596-97 (1997) (criticizing statutory deadlines and urging courts to deny standing to enforce them).

<sup>101</sup> Agency interpretations of the APA are not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the courts, rather than the agencies, administer the APA. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (rejecting *Chevron* deference to agency's interpretation of a statute because the agency did not administer the statute); *Crandon v. United States*, 494 U.S. 152, 174 (1990) (Scalia, J., concurring) (same); *Prof'l Reactor Operator Soc'y v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (denying *Chevron* deference to an agency's interpretation of the APA because Congress did not assign the agency a special role in construing it); *Air N. Am. v. Dep't. of Transp.*, 937 F.2d 1427, 1436-37 (9th Cir. 1991) (same); see also Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 312 (1988) ("[W]hen a court concludes that Congress left unresolved a policy issue in a statute that is not administered by an agency, the court should acknowledge explicitly that it must resolve the policy issue . . . ."); cf. *Chevron*, 467 U.S. at 842-44 (holding that courts should defer to agency interpretations of ambiguous terms in statutes that they are entrusted by Congress to administer unless their interpretations are arbitrary, capricious, or manifestly contrary to the statute). Congress did not entrust the administration of the APA to a particular agency; rather the APA regulates the actions of multiple and diverse agencies.

<sup>102</sup> *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>103</sup> *Id.* at 832-33.

<sup>104</sup> *Id.* at 823.

<sup>105</sup> *Id.* at 823-24; see also Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399 (2006).

to defraud.”<sup>106</sup> The prisoners sought judicial review of the FDA’s refusal to act under the APA.<sup>107</sup>

In an opinion by Justice Rehnquist, the Court held 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” under section 701(a)(2) of the APA.<sup>108</sup> The Court presented four reasons why the refusal to institute enforcement proceedings were generally unsuitable for judicial review. First, it reasoned that the decision whether to enforce involves a complex balancing of several factors peculiarly within an agency’s expertise, including whether a violation has occurred, whether agency resources are best spent on that violation or another, whether the enforcement proceeding is likely to succeed, whether the action best fits the agency’s overall policies, and whether the agency has enough resources to undertake the action at all.<sup>109</sup> Second, the Court believed that an agency’s refusal to act “generally does not exercise its *coercive* power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.”<sup>110</sup> Third, the Court was concerned that agency inaction did not provide the same focus for judicial review as agency action.<sup>111</sup> And fourth, the Court suggested that an agency decision not to act “shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”<sup>112</sup>

The Court explained that Congress could limit an agency’s enforcement discretion “either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”<sup>113</sup> By contrast, the enforcement provi-

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<sup>106</sup> *Chaney*, 470 U.S. at 824–25 (internal quotation marks omitted).

<sup>107</sup> *Id.* at 825.

<sup>108</sup> *Id.* at 831. The Court claimed that it had “recognized [this principle] on several occasions over many years.” *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 832.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (citing U.S. CONST. art. II, § 3).

<sup>113</sup> *Id.* at 833. The Court cited the Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA”), 29 U.S.C. §§ 401–531 (2006), at issue in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), as a statute circumscribing an agency’s discretion to act. *Chaney*, 470 U.S. at 833. The LMRDA provided that upon filing of a complaint by a union member, “[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has

sions of the FDCA, the Court held, do not circumscribe the FDA's inherent discretion to decide which enforcement actions to pursue.<sup>114</sup>

Although the Court announced a presumption against reviewability only for agency decisions not to undertake enforcement proceedings (and carved out some exceptions at that),<sup>115</sup> because three of the Court's four rationales arguably applied to agency inaction more broadly, *Chaney* generated interest among legal scholars about its applicability to other types of agency inaction. Several scholars have criticized the presumption against reviewability of enforcement decisions as well as any distinction in the reviewability of agency action and inaction.<sup>116</sup> Professor Cass Sunstein argues that the Court in *Chaney* had upset a workable standard of reviewability set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*.<sup>117</sup> Regardless of whether a plaintiff complains about action or inaction, the question for a court, according to Professor Sunstein, is whether the governing statute imposes legal restraints on the action or inaction at issue.<sup>118</sup> The key is simply whether the court has a way to judge the plaintiff's claim based on (1) the governing substantive statute, which will "almost always set out standards by which to assess the legality of agency behavior or to evaluate a claim of arbitrariness," and (2) "the precise allegation made by the plaintiff."<sup>119</sup>

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occurred . . . he shall . . . bring a civil action . . ." 29 U.S.C. § 482(b). Thus, the statute required the Secretary to file suit if certain factors were present and the decision whether or not to act was consequently appropriate for judicial review. *Chaney*, 470 U.S. at 834.

<sup>114</sup> *Chaney*, 470 U.S. at 837.

<sup>115</sup> The Court expressly disavowed the applicability of its holding to situations in which (1) an agency refuses to institute enforcement proceedings based on the belief that it lacks jurisdiction; (2) an agency has adopted a policy "so extreme as to amount to an abdication of its statutory responsibilities"; or (3) an agency's refusal to institute proceedings violates a constitutional right. *Id.* at 833 n.4, 838. Justice Brennan in his concurrence noted these exceptions to the rule and suggested that the Court also did not address cases in which an agency refuses to enforce a regulation lawfully promulgated. *Id.* at 839 (Brennan, J., concurring) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 40–44 (1983)).

<sup>116</sup> See Biber, *Two Sides of the Same Coin*, *supra* note 20, at 467; Bressman, *supra* note 21, at 1661; Sunstein, *supra* note 20, at 658–60. Professor Sunstein attributes the Court's opinion in *Chaney* to an effort to restrict the role of the federal judiciary in supervising the administrative state, particularly with respect to suits by beneficiaries of regulatory statutes. *Id.* at 660. The tools used by the Court to implement this project are the doctrines of nonreviewability and standing. *Id.* Professor Bressman ascribes the Court's approach to its solicitude for preserving presidential control of enforcement priorities. Bressman, *supra* note 21, at 1678–79.

<sup>117</sup> Sunstein, *supra* note 20, at 658–60 (discussing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)).

<sup>118</sup> *Id.* at 659.

<sup>119</sup> *Id.* at 658.

Professor Lisa Schultz Bressman suggests that the Court has overlooked a better understanding of nonreviewability grounded in the political question doctrine.<sup>120</sup> Nonreviewability as an analog of the political question doctrine would “prevent[ ] courts from examining conduct committed to the unfettered discretion of administrative officials.”<sup>121</sup> Professor Bressman advocates using the political question test articulated in *Baker v. Carr*,<sup>122</sup> which focuses on “(1) ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department’; [and] (2) ‘a lack of judicially discoverable and manageable standards for resolving it.’”<sup>123</sup>

Professor Eric Biber also eschews any fundamental distinction between agency action and inaction but argues that courts should “defer to agency decisions regarding resource allocations” and that “[s]uch decisions are almost always implicated when a court is considering a claim that an agency has not acted, or has not acted quickly enough.”<sup>124</sup> Thus, the Supreme Court’s immunization of certain types of agency decisions from judicial review, such as decisions not to pursue enforcement proceedings, is merely an extreme example of judicial deference to agency resource allocation.<sup>125</sup>

Since *Chaney*, the Court has expanded the category of agency decisions shielded from judicial review because they are “committed to agency discretion”<sup>126</sup> to include agency refusals to grant reconsideration of an action,<sup>127</sup> agency employment termination decisions,<sup>128</sup> and agency allocation of lump-sum appropriations.<sup>129</sup> But none of these decisions turned on the action/inaction distinction that has concerned scholars. Indeed, the Court did not even mention inaction in these decisions and it would be hard to describe any of these cases as examples of inaction as they involved dissatisfaction with decisions that the agencies had indeed made.

The next time the Court addressed a challenge to agency inaction, in *Norton v. Southern Utah Wilderness Alliance* (“SUWA”),<sup>130</sup> the

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<sup>120</sup> Bressman, *supra* note 21, at 1662.

<sup>121</sup> *Id.*

<sup>122</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>123</sup> Bressman, *supra* note 21, at 1700 (quoting *Baker*, 369 U.S. at 217).

<sup>124</sup> Biber, *Two Sides of the Same Coin*, *supra* note 20, at 467.

<sup>125</sup> *Id.* at 488–89.

<sup>126</sup> 5 U.S.C. § 701(a)(2) (2006).

<sup>127</sup> *ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 280 (1987).

<sup>128</sup> *Webster v. Doe*, 486 U.S. 592, 601 (1988).

<sup>129</sup> *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

<sup>130</sup> *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55 (2004).

Court did not mention *Chaney* nor discuss any presumption of nonreviewability. In *SUWA*, plaintiffs sought to compel the Department of Interior, Bureau of Land Management to exclude off-road vehicles from wilderness study areas pursuant to section 706(1) of the APA and the Federal Land Policy and Management Act of 1976,<sup>131</sup> which directs the Secretary to “manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.”<sup>132</sup> The Court held that the APA did not contemplate courts entering general orders compelling compliance with broad statutory mandates.<sup>133</sup> According to the Court, section 706(1) of the APA authorizes courts to compel agency action only where the agency has “failed to take a *discrete* agency action that it is *required to take*.”<sup>134</sup>

Finally, in 2007, the Court settled any remaining debate about the reach of *Chaney* with respect to denials of rulemaking petitions, at least those that are expressly authorized by statute. In *Massachusetts v. EPA*,<sup>135</sup> several states, local governments, and environmental organizations sought review of the EPA’s denial of their rulemaking petition asking the EPA to regulate GhG emissions from new motor vehicles under the CAA.<sup>136</sup> The CAA provides that the EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any . . . new motor vehicles or new motor vehicle engines, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>137</sup>

The EPA denied the petition on the grounds that (1) the CAA did not give the EPA jurisdiction to issue regulations concerning GhGs (in other words, GhGs did not constitute “air pollutants”), and (2) even if the agency had authority to regulate GhGs, “it would be unwise to do so at this time.”<sup>138</sup> Before the Court, the EPA defended its interpretation of jurisdiction and contended that, even if it had ju-

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<sup>131</sup> Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1782 (2006).

<sup>132</sup> *SUWA*, 542 U.S. at 59 (omission in original) (quoting 43 U.S.C. § 1782(c)).

<sup>133</sup> *Id.* at 66–67.

<sup>134</sup> *Id.* at 64. Thus, Professor Sunstein’s criticism of *Chaney* and his prescription for reviewing agency action and inaction may have carried the day. See Sunstein, *supra* note 20, at 660.

<sup>135</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>136</sup> *Id.* at 510, 514. The CAA provides the reviewing court with authority to overturn any action that is “arbitrary, capricious, . . . or otherwise not in accordance with law.” 42 U.S.C. § 7607(d)(9) (2006). Although the plaintiffs sought review of the EPA’s denial under the CAA, the Court’s analysis regarding rulemaking and delay is equally applicable to suits under the APA, which includes the same language. See 5 U.S.C. § 706(2)(a) (2006).

<sup>137</sup> 42 U.S.C. § 7521(a)(1).

<sup>138</sup> *Massachusetts v. EPA*, 549 U.S. at 511.

jurisdiction, the EPA had not exceeded its “considerable discretion” to deny rulemaking petitions.<sup>139</sup> Although the EPA did not argue that *Chaney* applied to rulemaking decisions, perhaps feeling constrained by the D.C. Circuit’s longstanding position that it did not,<sup>140</sup> the EPA contended that the same considerations motivating *Chaney* applied to the rulemaking decisions and therefore a “particularly deferential standard applies on judicial review of such a decision.”<sup>141</sup>

In an opinion by Justice Stevens, the Court held that the EPA had jurisdiction to regulate GhG emissions,<sup>142</sup> the EPA’s discretion to deny rulemaking petitions was subject to review,<sup>143</sup> and the EPA had abused its discretion by grounding its denial in nonstatutory factors.<sup>144</sup> With respect to reviewability, the Court identified two “key differences” between rulemaking and enforcement decisions.<sup>145</sup> First, rulemaking decisions are “less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including public explanation.”<sup>146</sup> Second, rulemaking decisions arise out of denials of petitions for rulemaking that the plaintiff generally has a right to file.<sup>147</sup> Accordingly, they are subject to judicial review, although such review is “extremely limited” and “highly deferential.”<sup>148</sup>

Although the four dissenting Justices did not expressly endorse the majority’s view of the reviewability of rulemaking decisions, neither did they voice any disagreement on this score.<sup>149</sup> Thus, for the moment, the Court’s presumption against reviewability of inaction appears to be limited to decisions about enforcement,<sup>150</sup> reconsideration of actions,<sup>151</sup> employment,<sup>152</sup> and allocation of lump-sum appropriations.<sup>153</sup>

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<sup>139</sup> Brief for Federal Respondent at 36, *Massachusetts v. EPA*, 549 U.S. 497 (No. 05-1120), 2006 WL 3043970.

<sup>140</sup> See *Am. Horse Prot. Ass’n, v. Lyng*, 812 F.2d 1, 3–4 (D.C. Cir. 1987).

<sup>141</sup> Brief for Federal Respondent, *supra* note 139, at 37–39.

<sup>142</sup> *Massachusetts v. EPA*, 549 U.S. at 528.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 534.

<sup>145</sup> *Id.* at 527.

<sup>146</sup> *Id.* (internal quotation marks omitted).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 527–28 (internal quotation marks and citation omitted). The Court essentially adopted the position of the D.C. Circuit in *Lyng*.

<sup>149</sup> See *Massachusetts v. EPA*, 549 U.S. at 535–49 (Roberts, J., dissenting); *id.* at 549–69 (Scalia, J., dissenting).

<sup>150</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

<sup>151</sup> *ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 282 (1987).

<sup>152</sup> *Webster v. Doe*, 486 U.S. 592, 601 (1988).

<sup>153</sup> *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

In contrast to its decisions with respect to some types of agency inaction, the Court has never suggested that agency delays as a category are not reviewable.<sup>154</sup> Quite the contrary, in *Massachusetts v. EPA*, the Court compelled agency decisionmaking—the endangerment finding—that the EPA sought to defer.<sup>155</sup> The Court held that the Agency could not justify deferring the decision by pointing to factors unrelated to the statute that might make the endangerment finding unnecessary or a low priority for the agency, such as the response of other programs and agencies to global warming, fear that the EPA would impair the President’s ability to negotiate climate change treaties with other nations, or concern on the part of the Agency that curtailing motor-vehicle emissions would constitute an “inefficient, piecemeal approach to address the climate change issue.”<sup>156</sup> The Court held that the EPA must “ground its reasons for . . . inaction in the statute.”<sup>157</sup>

Moreover, in *Heckler v. Day*,<sup>158</sup> the Court approved judicial remedies for agency delay even though it rejected the specific remedy chosen by the district court in the case under review. The Court held that it was inappropriate for the district court to prescribe deadlines for agency adjudication of social security disability claims by a class of plaintiffs where Congress had repeatedly considered but rejected such deadlines in amending the Social Security Act.<sup>159</sup> But the Court went out of its way to make clear that the decision was “limited to the question whether, in view of the *unequivocally clear intent of Congress to the contrary, it is nevertheless appropriate for a federal court to prescribe mandatory deadlines with respect to the adjudication of disability claims under Title II of the Act.*”<sup>160</sup> The Court did not disturb the lower courts’ determination that the agency delays were “unreasona-

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<sup>154</sup> To be sure, agency delays in enforcement, employment, motions for reconsideration, and lump-sum appropriation decisions are no more reviewable than agency failures to act in these areas. But delays in other types of decisionmaking should be no less reviewable than the decisions themselves.

<sup>155</sup> *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007). For this reason, Professors Dean Revesz and Michael Livermore believe that *Massachusetts v. EPA* may presage stronger judicial review of agency inaction. REVESZ & LIVERMORE, *supra* note 29, at 185.

<sup>156</sup> *Massachusetts v. EPA*, 549 U.S. at 533–34.

<sup>157</sup> *Id.* at 535.

<sup>158</sup> *Heckler v. Day*, 467 U.S. 104 (1984).

<sup>159</sup> *Id.* at 110–11; *see also* Social Security Act, 42 U.S.C. §§ 301–1397mm (2006). The plaintiffs in *Day* charged the Social Security Administration with unreasonable delay under the Social Security Act, but there is no reason to think that delay claims would be less reviewable under the APA given that the APA expressly authorizes courts to compel agency action “unreasonably delayed.” 5 U.S.C. § 706(1) (2006).

<sup>160</sup> *Day*, 467 U.S. at 119 n.33 (emphasis added).

ble” and acknowledged that class members were entitled to resolution of disputed benefit determinations within a “reasonable time.”<sup>161</sup> Thus, there is no per se bar to the reviewability of claims of unreasonable delay by government agencies and the APA and other statutes expressly authorize it.

### C. Judicial Review of Agency Delays: The TRAC Analysis

The Supreme Court has never addressed how a court should assess agency delay nor interpreted the meaning of “reasonable time”<sup>162</sup> or “action . . . unreasonably delayed”<sup>163</sup> as used in the APA. The most common approach used by the lower federal courts to review delays in both rulemaking proceedings and adjudications is the “TRAC analysis,” a multi-factor test that the D.C. Circuit stitched together from prior caselaw in *Telecommunications Research & Action Center v. FCC* (“TRAC”).<sup>164</sup>

The TRAC analysis instructs courts that

(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 lurk-

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<sup>161</sup> *Id.* at 111.

<sup>162</sup> 5 U.S.C. § 555(b).

<sup>163</sup> *Id.* § 706(1).

<sup>164</sup> *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984); *see also* *Brower v. Evans*, 257 F.3d 1058, 1068 (9th Cir. 2001) (adopting the TRAC analysis); *In re City of Va. Beach*, 42 F.3d 881, 885 (4th Cir. 1994) (same); *Nat’l Grain & Feed Ass’n v. OSHA*, 903 F.2d 308, 310 (5th Cir. 1990) (same). *But see* *Reddy v. Commodity Futures Trading Comm’n*, 191 F.3d 109, 120 (2d Cir. 1999) (directing that, in determining reasonableness under the APA, courts should “look to the source of delay—e.g., the complexity of the investigation as well as the extent to which the [challenger] participated in delaying the proceeding”); *Karimushan v. Chertoff*, No. 07-2995, 2008 U.S. Dist. LEXIS 47167, at \*7 n.4 (E.D. Pa. June 13, 2008) (declining to apply the TRAC analysis but considering similar factors under Third Circuit precedent). The Second Circuit has never elaborated on the *Reddy* test and it has had little impact on the doctrine. *But see* *Saleh v. Ridge*, 367 F. Supp. 2d 508, 512 (S.D.N.Y. 2005) (acknowledging the *Reddy* test when considering whether the delay in adjudicating a plaintiff’s application for adjustment status is unreasonable).



ing behind agency lassitude in order to hold that agency action is unreasonably delayed.<sup>165</sup>

The D.C. Circuit describes the *TRAC* analysis as the “hexagonal contours of a standard”<sup>166</sup> and has never attempted to explain the relationship between the factors, their comparative importance, or if any factors are absolutely necessary or independently sufficient for a finding of unreasonable delay. Although none of the factors are offensive in and of themselves, their meaning and the boundaries between them are sometimes far from clear.<sup>167</sup>

Take the first factor: what is a “rule of reason”? On its face it adds little in meaning to the APA’s mandate that agency actions be completed within a “reasonable time.”<sup>168</sup> In *MCI Telecommunications Corp. v. FCC*,<sup>169</sup> the D.C. Circuit held that the “rule of reason” “assumes that rates will be finally decided [by the FCC] within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade.”<sup>170</sup> Should the same “rule of reason” apply to other agency decisions? It does not appear so because courts routinely decline to compel agency action delayed for several years.<sup>171</sup> But if the “rule of reason” is supplied by the applicable statutory scheme, how does the first *TRAC* factor differ from the second, which expressly instructs the court to look at whether Congress has supplied meaning for the rule of reason?

Indeed, the second, third, and fifth *TRAC* factors frequently overlap. The second factor exhorts courts to look to the statute and legislative history for any indication of the timeline that Congress might have had in mind.<sup>172</sup> But in many cases, there is no timetable or concern with delay expressed by Congress, in which case the second

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<sup>165</sup> *Telecomms. Research & Action Ctr.*, 750 F.2d at 80 (internal quotation marks and citations omitted).

<sup>166</sup> *Id.*

<sup>167</sup> The court admitted that its approach “sometimes suffers from vagueness.” *Id.*

<sup>168</sup> 5 U.S.C. § 555(b).

<sup>169</sup> *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980).

<sup>170</sup> *Id.* at 340. In *MCI*, the petitioners challenged the FCC’s delay in issuing a final decision regarding a tariff rate filed by AT&T, which under the Act remained effective until approved or rejected by the FCC. *Id.* at 324.

<sup>171</sup> See, e.g., *Oil, Chem. & Atomic Workers Union v. OSHA*, 145 F.3d 120, 122, 124 (3d Cir. 1998) (holding that a delay of five years in regulating safety standards was not unreasonable); *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 120 (D.D.C. 2005) (delay of four years not unreasonable); *Independence Mining Co. v. Babbitt*, 885 F. Supp. 1356 (D. Nev. 1995) (declining to compel the U.S. Department of the Interior to act on mining patent applications pending for five years).

<sup>172</sup> See, e.g., *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983) (holding ICC delays unreasonable in light of Congress’s desire, evident in the text and legislative history

factor is remarkably similar to the third, which considers the regulatory sphere.<sup>173</sup> The third and fifth factors also frequently overlap inasmuch as the regulatory sphere will shape the “nature and extent of the interests prejudiced by delay.”<sup>174</sup> Put differently, delays in the implementation of human health and welfare statutes affect the health and welfare of the individuals the statute is intended to benefit. But notwithstanding that three *TRAC* factors call for swifter action where human health and welfare are at stake, this principle is often ignored.<sup>175</sup>

More troubling than the factors’ ambiguity, however, is what is missing. Although impropriety should not be a necessary condition for a court to find delay unreasonable (the sixth *TRAC* factor), it ought to be something close to sufficient.<sup>176</sup> After all, if an agency’s timeline is not motivated by a desire to achieve a statutory mandate, what possible justification could there be for further delay? The analysis thus ignores the way in which delays undermine the democratic accountability of the administrative state.

Due to the lack of clarity in the doctrine, courts can use the *TRAC* analysis to support virtually any conclusion they want to reach. If Congress has provided a clear indication of how fast it desires the agency to act, the courts will try to compel the agency to meet Congress’s expectations. But in the absence of such an indication, the en-

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of the act, to “change . . . the speed with which the Commission performed its regulatory duties”).

<sup>173</sup> For example, in *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983), the court explained that OSHA’s delay in setting standards regulating exposure to ethylene oxide could not be justified under the OSH Act’s concern with protecting worker’s health. *Id.* at 1158. Similarly, in *Public Citizen Health Research Group v. FDA*, 740 F.2d 21 (D.C. Cir. 1984), the court concluded that if a statutory scheme’s “paramount concern is protection of the public health, the pace of agency decisionmaking must account for this statutory concern.” *Id.* at 34.

<sup>174</sup> *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984).

<sup>175</sup> See, e.g., *Oil, Chem. & Atomic Workers Union*, 145 F.3d at 122, 124 (holding that a delay of more than two decades in amending safety standards, including five years since the petition for rulemaking, was not unreasonable); *In re Int’l Chem. Workers Union*, 830 F.2d 369, 370 (D.C. Cir. 1987) (declining to compel the agency to amend decades-old safety standard); *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 41 (D.D.C. 2000) (declining to grant mandamus after finding that agency delays implicated health and welfare interests). Of course, agency action is not always easily divisible between “economic regulation” and “human health and welfare.” Delays by the FDA in approving new drugs, for example, affect both the commercial interests of the applicants as well as the health of consumers who stand to benefit from the drugs.

<sup>176</sup> Some courts have held that bad faith on the part of the agency, such as singling someone out for bad treatment or “asserting utter indifference to a congressional deadline,” may weigh against the agency. See, e.g., *In re Barr Labs.*, 930 F.2d 72, 76 (D.C. Cir. 1991).

acting coalition drops out of the picture and the courts weigh the individual harm caused by the delay against the burden on the agency, with inconsistent results. The *TRAC* analysis makes no attempt to distinguish between legitimate and illegitimate causes of delay, rulemaking versus adjudication, specific versus broad statutory mandates, or decisions about priorities versus substantive action.

### III. AGENCY DELAYS AND THE POLITICAL BRANCHES

Some legal scholars contend that the problem of agency inaction and delay should be left to the political branches.<sup>177</sup> If agency delays are creatures of congressional delegations and represent interference with the goals of enacting coalitions, why not rely on Congress to address them? Alternatively, we could look to the President, who is constitutionally obliged to “take Care that the Laws be faithfully executed,”<sup>178</sup> to monitor and cure agency delays.

This Part argues that Congress is often ill equipped to handle agency delays either *ex ante* or *ex post*. In addition, although the President is in a better position to compel agency action related to administration priorities, the President often causes delays in areas that are either low priority or contrary to the administration’s political goals. Thus, the judiciary is frequently the only institution capable of addressing agency delays.

#### A. *Impediments to Congressional Control of Agency Timing*

Congress sets some statutory deadlines for agency action. Professors Jacob E. Gersen and Anne Joseph O’Connell’s comprehensive review of agency rulemaking actions between 1987 and 2003 found that approximately eight percent of all agency rulemaking actions were associated with a statutory deadline.<sup>179</sup> Courts will generally compel agency action that violates a clear statutory deadline.<sup>180</sup> So

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<sup>177</sup> See *PIERCE*, *supra* note 8, § 12.4, at 859 (“A party who is displeased with agency delay in a particular case is more likely to achieve success in expediting the matter through political pressure than through judicial pressure.”); Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1027–36 (2000) (arguing that action-forcing by courts disrupts agendas and contributes to the ossification of the administrative state). Similarly, Justice Scalia contends that the standing doctrine should be limited so that the political branches, not the courts, hear complaints “of an agency’s unlawful *failure* to impose a requirement or prohibition upon *someone else*.” Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

<sup>178</sup> U.S. CONST. art. II, § 3.

<sup>179</sup> Gersen & O’Connell, *supra* note 24, at 941, 983 tbl.4.

<sup>180</sup> See, e.g., *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (compelling agency rulemaking in light of “a clear statutory mandate, a deadline nine-years ignored, and an

why does Congress not set deadlines for the vast majority of agency actions? We know Congress has some concern with the timeliness of agency action because it enacts legislation against the background of the APA's requirement that agency action be completed within a "reasonable time."<sup>181</sup> Moreover, Congress often complains about delays *ex post* and calls for swifter agency action.<sup>182</sup> Yet in the vast majority of cases Congress does not impose deadlines on the agencies.<sup>183</sup>

### 1. *The Difficulty of Determining Appropriate Deadlines Ex Ante*

Congress often delegates the timeline for decisionmaking to the agencies because it does not have the time or expertise to make the decision itself or cannot agree on how long the agencies legitimately need.<sup>184</sup> Thus, as with any difficult decision on which the enacting coalition cannot reach agreement, the timeline for action is ready made for delegation to the agency.

This is particularly true *ex ante* when Congress passes legislation creating a new administrative or regulatory program. It is difficult if not impossible to know in advance how much time many decisions will reasonably require.<sup>185</sup> At the very least, determining an appropriate deadline will demand an additional level of factfinding by Congress, which has opportunity costs.<sup>186</sup>

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agency that has admitted its continuing recalcitrance"); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) ("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 of legislative supremacy and constitutionally separated powers."). *But see Barr Labs., Inc.*, 930 F.2d at 75 ("[F]inding that delay is unreasonable does not, alone, justify judicial intervention."); R. Shep Melnick, *The Political Roots of the Judicial Dilemma*, 49 ADMIN. L. REV. 585, 597 (1997) (criticizing statutory deadlines and urging courts to deny standing to enforce them).

<sup>181</sup> 5 U.S.C. § 706(1) (2006).

<sup>182</sup> See *Heckler v. Day*, 467 U.S. 104, 112–14 (1984) (describing repeated congressional expressions of concern regarding delays in disability claim adjudications).

<sup>183</sup> Delays in the adjudication of disputed social security disability determinations, which took an average of 288 days in 1975, prompted almost annual complaints by various congressional subcommittees between 1975 and 1982. See *id.* at 111 n.16, 112. Congress considered several bills proposing statutory deadlines and directed the Secretary of Health and Human Services to recommend "appropriate and realistic deadlines" for the resolution of disputed claims. *Id.* at 115. Although the Secretary proposed such deadlines, Congress neither imposed them nor directed the Secretary to impose them herself. See *id.* at 114–15 & n.26.

<sup>184</sup> See *supra* notes 34–38 and accompanying text.

<sup>185</sup> See Complaint for Declaratory and Injunctive Relief at ¶ 7, tbl.A, *Sierra Club v. Johnson*, No. 01-1537(PLF) (D.D.C. Mar. 31, 2006) (noting an agency's failure to meet 81 out of 189 deadlines issued by Congress); Joshua D. Sarnoff, *The Continuing Imperative (but Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225, 304–05 (1997) (recounting the EPA's struggle with congressional deadlines).

<sup>186</sup> See, e.g., *To Amend the Federal Water Pollution Control Act: Hearing on H.R. 9560*

Consider Congress's charge that the FDA screen generic drugs for bioequivalence to their branded counterparts—i.e., determine whether the active ingredients of the generic drug become available at the site of action at the same rate and extent when administered in the same dose and under similar conditions as the brand drug.<sup>187</sup> In order to determine an appropriate deadline for the FDA's screening, Congress will have to grapple with the scientific subtleties of bioequivalence standards and the complicated problems presented by different categories of drugs. Assuming the necessary information and expertise is even available, the decision will entail a significant investment of congressional time and resources.<sup>188</sup>

In many cases, the information that Congress needs to determine an appropriate timeline for agency decisionmaking is not available. The Ninety-First Congress that passed the CAA in 1970 had no idea what decisions the EPA would make thirty or forty years later. Statutes such as the CAA are drafted broadly to enable an agency to address unforeseen and changing circumstances.<sup>189</sup> It is impossible for Congress to consider intelligently how much time the agency needs to make decisions that Congress does not even know the agency will need to make.<sup>190</sup>

Even if Congress were able to agree on an appropriate timeline in the first instance, changes in circumstances might render the deadline too tight or too lax. Many administrative programs were enacted long before the advent of high-speed internet connections, e-mail, and the use of advanced software and databases. Technological improvements can drastically reduce the time it takes agency personnel to process large numbers of applications for benefits, licenses, or permits. Conversely, unforeseen developments may render congressional deadlines unrealistic. Thus, if the enacting coalition wishes to set a timeline that

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*Before the Subcomm. on Water Res. of the H. Comm. on Pub. Works and Transp.*, 94th Cong. 140 (1975) (statement of David Zwick, Clean Water Action Project) (recognizing that setting deadlines for water pollution control in municipalities would require additional information); Stewart, *supra* note 34, at 1695 ("Such a task would require resources that Congress has, in most instances, been unable or unwilling to muster.").

<sup>187</sup> CTR. FOR DRUG EVALUATION & RESEARCH, OFFICE OF GENERIC DRUGS, REVIEW OF BIOEQUIVALENCE STUDIES WITH CLINICAL ENDPOINTS IN ANDAs 2 (2006), available at <http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/ManualofPoliciesProcedures/ucm079585.pdf>.

<sup>188</sup> See Kerwin & Furlong, *supra* note 2, at 115.

<sup>189</sup> Both the SDWA and the CAA, for example, mandate that the EPA set regulatory standards for pollutants as they become known and revise those standards as the science evolves. See 42 U.S.C. §§ 300g-300g-1 (2006); *id.* § 7408.

<sup>190</sup> See Sarnoff, *supra* note 185, at 304-05.

will stand the test of time, it will need to allow for flexibility based on changing circumstances and the particular issues that the agency must address. But of course this is exactly what Congress has done with the APA, which mandates that agencies decide matters within a “reasonable time” and authorizes courts to compel agency action “unreasonably delayed.”<sup>191</sup>

To be sure, setting deadlines need not always be about factfinding—i.e., determining the time that an agency needs to make a decision. Deadlines can also shape the agency’s decisionmaking process by signaling to the agency that a matter is a high priority or that time is of the essence. Congress frequently sets deadlines for administrative processes, such as the adjudication of benefits, in which the agency is making large numbers of decisions about applicants’ eligibility using the same criteria.<sup>192</sup> Such deadlines may signify a determination by Congress about how the agency should balance the timeliness and quality of its decisions.<sup>193</sup> There are political and structural impediments, however, to reaching legislative consensus on the timing of agency action.

## 2. *Political Impediments to Congressional Action*

There can be significant political costs to setting statutory deadlines. Because deadlines effectively strengthen legislation, members of Congress will oppose them wherever there are political costs for supporting more stringent regulation. A constituency concerned about the effect of environmental regulations on local industry, for example, may accept vaguely worded statutes promoting “clean air,” but object to deadlines for regulating pollutants emitted by factories that employ local residents. Thus, statutory deadlines need strong advocates in Congress.

Few delays in and of themselves directly affect a sufficient number of sufficiently powerful constituents to guarantee congressional attention. Each delay in adjudicating an application for benefits, a license, or a permit directly impacts only the individual applicant.<sup>194</sup>

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<sup>191</sup> 5 U.S.C. §§ 555(b), 706(1) (2006).

<sup>192</sup> See, e.g., 8 U.S.C. § 1447(b) (2006) (deadlines for adjudication of naturalization applications); 21 U.S.C. § 348(c)(2) (2006) (deadlines for adjudication of food additive petitions); 42 U.S.C. § 405(q)(2) (deadlines for Social Security payments).

<sup>193</sup> See *Heckler v. Day*, 467 U.S. 104, 113–15 (1984) (noting Congress’s “concern that mandatory deadlines would jeopardize the quality and uniformity of agency decisions”); *Pierce*, *supra* note 32, at 1271 (“[I]mposition of decisional deadlines always involves balancing the competing goals of timeliness, accuracy, and consistency.”).

<sup>194</sup> There may also be indirect costs to other parties, such as consumers unable to obtain

In addition, administrative screening programs rarely affect all applicants in the same way. Some applications speed through the process, while others linger. Delays in standard setting may also affect intended beneficiaries differently depending on where they live, work, and play. Thus, those most directly harmed by agency delays are often like Tolstoy's unhappy families—each is unhappy in its own way—making it difficult to lobby Congress effectively.

Many parties affected by delays are poor, diffuse, or politically disadvantaged in the halls of Congress. Applicants for disability or immigration benefits are unlikely to have the resources for a vigorous lobbying campaign, and the organizations that advocate on their behalf struggle to find the resources to focus congressional attention on their substantive program needs. Similarly, the beneficiaries of consumer and environmental regulations are diffuse and, despite impressive efforts by advocacy organizations such as Public Citizen and the National Resources Defense Council, are often outgunned by the industries that oppose regulatory action.<sup>195</sup> Although individual members of Congress frequently write to agencies on their constituents' behalf,<sup>196</sup> only when delays begin to affect large numbers of intended beneficiaries of politically popular programs will Congress begin to hold hearings and consider imposing statutory deadlines.<sup>197</sup>

Even when members of Congress wish to cure agency delays, legislative action risks reopening dormant policy disputes and causing unintended consequences. An attempt to tighten the deadline for adjudication of naturalization applications may provoke efforts to reduce the number of immigrants permitted to enter the country.

Finally, it will be particularly difficult for Congress to cure delays that serve the President's policy preferences, given the supermajority requirements of overriding a presidential veto. Accordingly, there are serious political impediments to curing agency delays with new legislation.

### 3. *The Costs of Ex Post Monitoring, Rewards, and Sanctions*

Positive political theorists have long noted that congressional control of the bureaucracy by means of monitoring, rewards, and sanc-

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new drugs because of FDA delays in premarketing approval. If the indirect costs of delays are significant to a politically mobilized group, as was the case with FDA delays in approving HIV/AIDS treatments in the 1990s, Congress is more likely to act.

<sup>195</sup> PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 162 (2009).

<sup>196</sup> See McCubbins, et al., *Administrative Procedures*, *supra* note 32, at 290.

<sup>197</sup> See *Day*, 467 U.S. at 112–15 & nn.16, 18, & 26; PIERCE, *supra* note 8, § 12.4, at 860.

tions is costly and imperfect.<sup>198</sup> These activities impose significant opportunity costs on Congress because the time devoted to acquiring information, evaluating potential noncompliance, and deciding on sanctions could be spent providing new legislative benefits to constituents.<sup>199</sup> Furthermore, there may be significant gaps in Congress's understanding of agency action because monitoring ultimately depends on the information agencies supply.<sup>200</sup>

Finally, for monitoring to be effective, the potential sanctions that the agency risks incurring from delay must be credible. Although congressional hearings can be embarrassing to agency personnel that must defend the agency, their record of accelerating action is mixed.<sup>201</sup> Congress's most effective tool for controlling the bureaucracy is the power of the purse, but cutting the budget of an agency is likely only to exacerbate the problem of delay. Although additional funding sometimes helps, it is hardly an effective sanction and might even encourage inaction as justification for additional appropriations. Statutory deadlines are a stronger sanction, because they restrict the agency's discretion, but they may not be a credible threat because of how difficult they are to enact *ex post*.

#### 4. *Structural Impediments to Curing Agency Delay Ex Post*

It is exceedingly difficult for Congress to pass new legislation even when a majority of the voters favor legislative action. It requires the coordination of multiple committees, both houses of Congress (possibly a supermajority in the Senate), and in most cases, the President. Positive political theorists studying congressional control of the bureaucracy have observed that the difficulty is compounded when Congress seeks to pass legislation to correct "agency drift"—i.e., departures, within certain defined parameters, from the enacting coalition's policy preferences.<sup>202</sup> Because legislative outcomes are highly dependent on the status quo that the legislation seeks to alter, the enacting coalition may not be able to regroup to correct agency drift

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<sup>198</sup> Committee and subcommittee oversight and constituent services accounted for more than half of congressional staff time in the 1970s, MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 58 (1977), and the number of congressional staff working on constituent services tripled between 1972 and 1990, Larry Liebert, *Hill's Growth Industry: Constituent Service*, 52 CONG. Q. WKLY. REP. 1758 (1994). There is no reason to think the time spent on constituent services has declined since then.

<sup>199</sup> McCubbins, et al., *Administrative Procedures*, *supra* note 32, at 250.

<sup>200</sup> *Id.* at 251.

<sup>201</sup> See *supra* note 183.

<sup>202</sup> McCubbins, et al., *Administrative Procedures*, *supra* note 32, at 250–51; McCubbins, et al., *Structure and Process*, *supra* note 32, at 435–40.



after the enacting legislation and the agency's response has changed the status quo.

Consider a hypothetical piece of environmental legislation that imposes certain costs on industry to reduce pollution. The Senate and the House have different preferences as to how stringent the legislation should be. The House would like environmental legislation that rates about seven on a scale of one to ten, where one represents the least stringent regulation and ten represents the most stringent; the Senate would like regulation that rates only about four. Current regulation is rated two and the two houses settle on regulation that rates five because it is closer to each house's policy preferences than the status quo of two. If the agency now promulgates regulation that rates three and the policy preferences of each house remain unchanged, it will be difficult for the enacting coalition to correct the agency drift because the new status quo of three is equally desirable to the Senate as the enacted legislation's goal of five. Similarly, if the agency regulates in a range of six to eight, the House will have no interest in correcting the agency. Thus, the agency can regulate in a range of three to eight with little fear of a legislative response.<sup>203</sup>

Although the range of congressional preferences and agency responses is generally much more complicated than the foregoing stylized model, the model explains the difficulty that Congress has in curing agency delays. Because delays in the implementation of legislation dilute the force of the statute, unless the enacting coalition has homogeneous policy preferences (an exceedingly unlikely scenario), some members of the coalition will have no interest in changing the status quo by stopping the agency's foot-dragging. Consequently, Congress will not be able to enact new legislation unless and until the agency's recalcitrance becomes extreme.<sup>204</sup>

Consider the history of the 1970 amendments to the CAA, in which Congress directed the EPA to set standards for stationary and mobile sources of hazardous air pollutants.<sup>205</sup> Congress instructed the

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<sup>203</sup> See McCubbins, et al., *Administrative Procedures*, *supra* note 32, at 248 (noting that congressional responses to agency action are generally adopted only if there is "some blunder or radical departure" from Congress's intended policy).

<sup>204</sup> The complexities posed by the fragmented authority of the political branches under our constitutional system only compounds collective action problems. *Id.* Even a relatively cohesive coalition constituting a simple majority will be powerless to act without the President's acquiescence or in some cases the willingness of a few Senators or Representatives to vote a bill out of committee.

<sup>205</sup> See Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 112, 84 Stat. 1676, 1685 (codified as amended at 42 U.S.C. § 7412 (2006)). The history of EPA delays in regulating under

EPA to publish a list of pollutants it intended to regulate and periodically review the list to add new pollutants as necessary.<sup>206</sup> Over the next eighteen years, the EPA listed only eight pollutants and promulgated regulations for only some sources of seven hazardous air pollutants.<sup>207</sup> It took Congress until 1990 to respond with legislation declaring one hundred eighty-nine new “hazardous pollutants” and setting deadlines for the EPA to issue standards for them over the next ten years.<sup>208</sup>

Congress encountered similar problems with the EPA under the Safe Drinking Water Act (“SDWA”).<sup>209</sup> Twelve years after the Act’s passage, the EPA had established standards for only a “small fraction” of the contaminants found in the public water system that posed potential health risks.<sup>210</sup> Congress finally acted in 1986, amending the SDWA and establishing schedules and deadlines for standard setting, including a list of eighty-three contaminants to regulate within three years.<sup>211</sup>

In sum, it is exceedingly difficult for Congress to cure agency delays either *ex ante* or *ex post*. Although Congress may be in a better position *ex post* to determine an appropriate deadline for action or an alternative legislative fix, it is politically and structurally difficult for Congress to act unless and until delays become extreme, directly affect significant numbers of constituents in similar ways, or harm a po-

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the CAA and Safe Drinking Water Act (SDWA), Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f–300j-25), and Congress’s response is discussed in Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1275 (2006).

<sup>206</sup> Clean Air Act Amendments of 1970 § 112(b) (codified as amended at 42 U.S.C. § 7412(b)).

<sup>207</sup> S. Rep. No. 101-228, at 111 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3513.

<sup>208</sup> Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2398, 2532–2535, 2537–2539 (codified at 42 U.S.C. § 7412(b)(1), (c)(1), (c)(3), (c)(5), (c)(6), (e)(1)). Congress provided tiered deadlines along with guidance on how to prioritize among the 189 new pollutants. 42 U.S.C. § 7412(e)(1), (2). Nevertheless, when the ten-year deadline expired, the EPA still had not promulgated standards for 81 pollutants on the list. Complaint for Declaratory and Injunctive Relief, *supra* note 185, at ¶ 7, tbl.A. The Sierra Club subsequently filed suit and in 2006, the U.S. District Court for the District of Columbia ordered the EPA to promulgate standards for the remaining pollutants by 2009. *Sierra Club v. Johnson*, No. 01-1537 (PLF), 2006 WL 889801, at \*1–2 (D.D.C. Mar. 31, 2006), *amended in part by* 2011 WL 181097 (D.D.C. Jan. 20, 2011).

<sup>209</sup> Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f–300j-25).

<sup>210</sup> S. Rep. No. 99-56, at 2 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1566, 1567.

<sup>211</sup> Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat 642 (codified as amended at 42 U.S.C. § 300g-1(b)(2)(A)). As noted above, the problem returned during the last administration. *See supra* note 9 and accompanying text.

litically powerful constituency. Consequently, it should not be surprising that Congress rarely sets statutory deadlines<sup>212</sup> or enacts other legislative cures for agency delays.<sup>213</sup>

### *B. The Executive Branch and Agency Delays*

The President sits at the apex of the administrative state and is constitutionally obliged to “take Care that the Laws be faithfully executed.”<sup>214</sup> With his ultimate responsibility for ensuring that the bureaucracy functions properly, why not rely on the President to cure agency delays? The President possesses significant tools to control the administrative state. But the President’s power over the bureaucracy is a double-edged sword. The President competes with enacting coalitions as a principal seeking control over agency agendas. Consequently, when the President’s policy preferences diverge from those of the enacting coalition, the President can be another source of delay.

#### *1. Informal Presidential Control of the Administrative State*

The President appoints the heads of the executive departments, most executive branch agencies, many of the independent agencies and regulatory commissions, and more than two thousand other senior noncareer positions in the executive branch.<sup>215</sup> Most of these administrators serve at the pleasure of the President and are likely to share the President’s political ideology and policy goals.<sup>216</sup> They over-

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<sup>212</sup> Professors Gersen and O’Connell found that although most agencies faced few statutory deadlines during the period under review, a handful of agencies faced more than 100 deadlines, including the EPA (611), Department of Commerce (940), Department of Interior (279), Department of Transportation (350), Department of Agriculture (350), and Department of Health and Human Services (323). Gersen & O’Connell, *supra* note 24, at 939, 981 tbl.2. Professors Gersen and O’Connell do not speculate on why these agencies faced the brunt of congressional action, but they do conclude from the data that deadlines are more frequently associated with “significant regulatory actions” than with more mundane agency decisions and that Congress uses deadlines to constrain agency actions that may affect powerfully situated political interests. *Id.* at 941–42.

<sup>213</sup> Congress can also amend statutes to eliminate procedural bottlenecks or alleviate the costs of the delays, as Congress did when it provided interim relief while disability beneficiaries challenged the termination of their benefits. See *Heckler v. Day*, 467 U.S. 104, 127 n.8 (1984) (citing Act of Jan. 12, 1983, Pub. L. No. 97-455, § 2, 96 Stat. 298, (codified as amended at 42 U.S.C. § 423(g))). But passing such legislation entails the same political and status quo challenges as correcting other forms of agency drift.

<sup>214</sup> U.S. CONST. art. II, § 3.

<sup>215</sup> James P. Pfiffner, *Recruiting Executive Branch Leaders: The Office of Presidential Personnel*, BROOKINGS (Spring 2001), [http://www.brookings.edu/articles/2001/spring\\_governance\\_pfiffner.aspx](http://www.brookings.edu/articles/2001/spring_governance_pfiffner.aspx).

<sup>216</sup> David B. Spence, *Agency Policy Making and Political Control: Modeling Away the Delegation Problem*, 7 J. PUB. ADMIN. RES. & THEORY 199, 211 (1997). When Comptroller of the

see the day-to-day operations of the agencies and are in the best position to compel agency action. Thus, the White House has significant informal influence over both the substance and pace of agency decisionmaking by virtue of senior agency managers.<sup>217</sup>

But there are limits to the ability of agency heads to cure delays, particularly in areas that are not White House priorities. Presidential appointees serve for only about two years on average.<sup>218</sup> This is not much time to hasten the pace of decisionmaking. Moreover, unless the agency manager is appointed with a mandate to eliminate certain delays, dealing with those delays is unlikely to be a priority during such a short tenure. In addition, the high turnover of administrators can make it difficult for the President to exert consistent and continuous influence over the agencies. As the White House identifies, vets, nominates, and waits for Senate confirmation of a new appointee, the President's control over the agency will wane, particularly if civil service employees who do not share the President's priorities manage the agency in the interim.

## 2. *Formal Presidential Control of the Administrative State*

The President's formal control over the administrative state has increased substantially in the last three decades as a series of Executive orders have centralized review of the regulatory initiatives of executive branch agencies in the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget ("OMB").<sup>219</sup> Upon taking office, President Reagan issued Executive Order 12,291, requiring agencies to assess the net costs and benefits of all major regulations, set regulatory priorities with the aim of maximizing the aggregate net benefits to society, and provide OIRA with a regulatory impact analysis for all major regulations.<sup>220</sup> Then, on the

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Treasury Robert W. Talyer reportedly told President Ulysses S. Grant that he could not change a ruling with which the President disagreed, President Grant asked: "If you can't change your decision, I can change Controllers, can't I?" Nixon Plummer, *Another Effort to Rid Uncle Sam of Red Tape*, N.Y. TIMES, Aug. 30, 1925, at X4.

<sup>217</sup> The President's control over an agency head may be weaker if the President must appoint someone with particular technical or managerial skills. See C. Frederick Beckner, III, *The FDA's War on Drugs*, 82 GEO. L.J. 529, 541-42 (1993) (noting that FDA commissioners have consistently been strong advocates of drug regulation despite the different political ideologies of their presidents).

<sup>218</sup> Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 919 n.23 (2009).

<sup>219</sup> The OMB does not review the actions of independent regulatory agencies.

<sup>220</sup> Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1988), revoked by Exec. Order No. 12,866, 3 C.F.R. 638, 649 (1993), reprinted in 5 U.S.C. § 601 (2006). For a

eve of his second term, President Reagan issued Executive Order 12,498, requiring agencies to submit annual regulatory plans to OIRA with their proposed actions for the coming year.<sup>221</sup> Although President Clinton formally repealed both orders in 1993 with Executive Order 12,866, he maintained OIRA's centralized oversight of regulatory action and many of the substantive principles of review.<sup>222</sup> Likewise, President Obama has maintained strong White House oversight of agency action, although he has modified some of its features.<sup>223</sup> Thus, through the OIRA review process, the President has a powerful tool for identifying and addressing unreasonable delays in agency actions.

However, as Professors Nicholas Bagley and Dean Richard Revesz have explained, many of the features of OIRA review create an institutional bias against regulation due to the Reagan-era concerns with overregulation.<sup>224</sup> The review is almost wholly reactive and systematically fails to examine agency inaction.<sup>225</sup> With just twenty-two employees reviewing six hundred economically significant regulations per year, OIRA has more on its plate than it can handle.<sup>226</sup> Although OIRA has issued fourteen so-called prompt letters since 2001,<sup>227</sup> only five of those arguably urged an agency to act more quickly on a matter as opposed to suggesting ways to improve the quality of decisionmaking.<sup>228</sup> This is but a drop in the bucket when compared to the numerous agency delays during the period.

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discussion of these Executive Orders and their contribution to Executive control of the administrative state, see Bagley & Revesz, *supra* note 205, at 1263–64, and Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995).

221 Exec. Order No. 12,498, 3 C.F.R. 323 (1985), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638, 649 (1993), *reprinted in* 5 U.S.C. § 601 (2006); *see also* Bagley & Revesz, *supra* note 205, at 1264; Pildes & Sunstein, *supra* note 220, at 3.

222 Exec. Order No. 12,866, 3 C.F.R. 638, 646–48 (1993), *reprinted in* 5 U.S.C. § 601 (2006); *see also* Bagley & Revesz, *supra* note 205, at 1266–67; Pildes & Sunstein, *supra* note 220, at 6.

223 *See supra* notes 17–18 and accompanying text.

224 Bagley & Revesz, *supra* note 205, at 1280–82.

225 *Id.* at 1274–78.

226 *Id.* at 1277–78.

227 Prompt letters are sent to agencies on the OMB's initiative and suggest (1) issues that the "OMB believes [are] worthy of agency priority" or (2) "how the agency could improve its regulations." *OIRA Prompt Letters*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov/public/jsp/EO/promptLetters.jsp> (last visited May 27, 2011).

228 *See* Letter from John D. Graham, Adm'r, OIRA, to Armando Falcon, Jr., Dir., Office of Fed. Hous. Enter. Oversight (May 29, 2002), *available at* [http://www.reginfo.gov/public/prompt/prompt\\_ofheo052902.html](http://www.reginfo.gov/public/prompt/prompt_ofheo052902.html); Letter from John D. Graham, Adm'r, OIRA, and James L. Connaughton, Chairman, Council on Env'tl. Quality, to Benjamin Grumbles, Acting Assistant Adm'r, Office of Water, EPA (Apr. 16, 2004), *available at* [http://www.reginfo.gov/public/prompt/epa\\_beach-act-2000.pdf](http://www.reginfo.gov/public/prompt/epa_beach-act-2000.pdf); Letter from John D. Graham, Adm'r, OIRA, to the Honorable John

Finally, OIRA's review process itself causes delay.<sup>229</sup> Indeed, OIRA was originally designed as a bureaucratic cover for slowing down the pace of the administrative state.<sup>230</sup> President Obama has sought recommendations on reforming the process to prevent undue delays caused by OIRA but has yet to implement any significant reforms in this regard.<sup>231</sup>

As a centralized mechanism for reviewing agency priorities and the progress of agency action, OIRA has the potential to be a powerful tool for curing delays, as discussed below in Part IV.B. But the promise has yet to be realized, and, to date, Presidents have not shown any enthusiasm for using OIRA in this way.

### 3. *Presidential Priorities*

Although the President benefits from centralized review of regulatory initiatives, the President can also communicate administration priorities directly to the agencies through the agency heads and does not need OIRA as a middleman.<sup>232</sup> Consider how President Obama quickly and publicly directed the Secretary of Health and Human Services to craft rules prohibiting the denial of insurance to children with preexisting conditions when insurance companies suggested that the new healthcare law did not in fact include such a prohibition until 2014.<sup>233</sup>

Moreover, the White House does not want OIRA prompting action in areas where the President opposes regulation or that will divert

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Henshaw, Assistant Sec'y of Labor, OSHA (Sept. 18, 2001), available at [http://www.reginfo.gov/public/prompt/osha\\_prompt\\_letter.html](http://www.reginfo.gov/public/prompt/osha_prompt_letter.html); Letter from John D. Graham, Adm'r, OIRA, to the Honorable Michael P. Jaccobson, Deputy Sec'y, Dep't of Transp. (Dec. 7, 2001), available at [http://www.reginfo.gov/public/prompt/nhsta\\_prompt120701.html](http://www.reginfo.gov/public/prompt/nhsta_prompt120701.html); Letter from John D. Graham, Adm'r, OIRA, to the Honorable Tommy Thompson, Sec'y of Health & Human Servs. (Sept. 18, 2001), available at [http://www.reginfo.gov/public/prompt/hhs\\_prompt\\_letter.html](http://www.reginfo.gov/public/prompt/hhs_prompt_letter.html).

<sup>229</sup> In 2007, OIRA review delayed the publication of Notices of Proposed Rulemaking ("NPRMs") 70.6 days on average, ranging from 6 days to 292 days. See Letter from Jacob Gersen & Anne Joseph O'Connell to Jessica Hertz, Office of Mgmt. & Budget (Feb. 27, 2009), available at [http://www.reginfo.gov/public/jsp/EO/fedRegReview/Anne\\_Joseph\\_OConnell.pdf](http://www.reginfo.gov/public/jsp/EO/fedRegReview/Anne_Joseph_OConnell.pdf).

<sup>230</sup> Bagley & Revesz, *supra* note 205, at 1267–68.

<sup>231</sup> See *supra* notes 17–18.

<sup>232</sup> The EPA, for example, began moving forward with new efforts under the CAA almost immediately following President Obama's inauguration. See, e.g., Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009); California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Regulations; Reconsideration of Previous Denial of a Waiver of Preemption, 74 Fed. Reg. 7,040–02 (Feb. 12, 2009).

<sup>233</sup> Robert Pear, *Coverage Now for Sick Children? Check Fine Print*, N.Y. TIMES, Mar. 29, 2010, at A13.

resources and attention from the President's priorities. The President has constituencies to please just like any politician and has little interest in prompting agency action across the board. Consequently, the President is often part of the problem when it comes to agency delays. The President may be able to focus agencies on his administration's priorities, but at best this will do nothing to accelerate action on low priorities and at worst it will exacerbate delays in other areas.<sup>234</sup> Thus, whether by intention or inattention, the President contributes to agency delays, notwithstanding the President's ability to prompt agency action on administration priorities.

Some scholars and commentators, including the newest Justice on the Supreme Court, have applauded the expansion of executive control over the administrative state, arguing that because the President answers to a national constituency, presidential control provides democratic accountability for agency discretion.<sup>235</sup> But the President's election hardly makes unreasonable delay caused by the President's opposition to legislative goals more constitutionally legitimate than delay caused by agency staff, a regulated industry, public interest groups, or individual members of Congress. The President is at most one member of the enacting coalition that charges the administrative state with its responsibilities, and if the enacting coalition has overridden a presidential veto, not even that. Whatever one thinks of presidential control over agency policy discretion,<sup>236</sup> the President should not have the power by means of delay to block legislation signed by prior Presidents, passed over a formal veto, or even enacted with the President's own signature.

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<sup>234</sup> See, e.g., *Pub. Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 157 (3d Cir. 2002) (describing how the Clinton Administration's focus on a particular set of regulations led OSHA to delay rulemaking in other areas).

<sup>235</sup> See, e.g., Kagan, *supra* note 60, at 2252 (arguing that presidential influence on administrative regulation "renders the bureaucratic sphere more transparent and responsive to the public").

<sup>236</sup> This Article does not stake out a position in the debate regarding the scope of presidential control over the substantive policymaking discretion granted to agencies by Congress. To be sure, when Congress does not provide a specific deadline for agency action, the APA or the enabling statute grants the agency some discretion over timing. But regardless of who exercises that discretion—the agency or the White House—courts must judge when the discretion has been abused.

C. *Comparative Institutional Capacities, Competencies, and Remedies of the Three Branches in Curing Agency Delays*

Even if one accepts that the political branches cannot be relied upon to cure agency delays, this does not necessarily mean that the judiciary can do any better. This Section compares the factfinding competencies of the three branches, their capacities to take corrective action, and the remedies available to each.

1. *Identifying Causes of Delay and Assessing Their Reasonableness*

Due to the timing of legal challenges to agency delays, courts do not confront the same difficulties as enacting coalitions in determining *ex ante* an appropriate deadline for decisionmaking. Unlike the enacting coalition, the court will have a factual record developed through civil discovery from which to understand the demands and challenges that the agency faces, so the court need not speculate about the considerations involved in determining an appropriate timeline.

In addition, courts are at least as competent as Congress to determine the cause of agency delays *ex post*, if not more competent. The Federal Rules of Civil Procedure provide litigants with powerful factfinding tools to root out the sources of delay.<sup>237</sup> Although congressional committees can call agency personnel to testify under oath and subpoena documents, much of what goes on in hearings is political posturing rather than serious factual examination. Moreover, the party challenging delay will typically have a stronger motivation to develop a record to support its claim than the congressional committee overseeing the agency, which merely has to look tough for constituents. Indeed, judicial review can assist congressional monitoring of the administrative state by uncovering delays caused by a competing principal attempting to thwart the enacting coalition's legislative goals.

The White House, by virtue of the President's informal and formal controls over the administrative state,<sup>238</sup> should have superior access to information and expertise relevant to agency delays than either Congress or the courts. But agencies can shape the flow of information to the White House, and unless and until the delays affect admin-

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<sup>237</sup> See generally FED. R. CIV. P. 26–37 (providing a variety of discovery methods, and procedures to enforce those methods).

<sup>238</sup> See *supra* Part III.B.



istration priorities, the White House is unlikely to push hard to determine the causes of delay.

Nevertheless, judicial factfinding is narrow in the sense that it focuses on discrete problems rather than developing a complete picture of an agency's agenda.<sup>239</sup> Agencies frequently complain that they do not have enough resources to act any faster.<sup>240</sup> It is generally the agency's choice of priorities, rather than resource constraints per se, that cause delays, inasmuch as agencies allocate finite resources according to their priorities, unless Congress has tied funding to specific activities. But it is difficult for a court to know (1) whether the agency actually has too many matters on its plate or (2) whether the agency is making rational decisions about its priorities. Plaintiffs challenging one delayed matter have no incentive to develop a record concerning other responsibilities of the agency. The parties who benefit from other agency activities will likely not be in court, and a more holistic judicial review would quickly become unworkable.<sup>241</sup>

Consequently, courts are extremely receptive to arguments that compelling agency action in one matter will interfere with other agency priorities.<sup>242</sup> Congress generally grants agencies wide discretion in allocating their resources and agency allocations of funds from lump sum appropriations are not subject to judicial review.<sup>243</sup> Courts are loath to indirectly force the reallocation of resources by shuffling the agency's priorities, fearing that accelerating decisionmaking in one area will merely force the agency to pull resources from another.<sup>244</sup>

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<sup>239</sup> See Cross, *supra* note 177, at 1029–30.

<sup>240</sup> See, e.g., Pub. Citizens Health Research Grp. v. Chao, 314 F.3d 143, 157 (3d Cir. 2002) (noting that OSHA attempted to justify its delay by pointing out that it was pressured to use its limited resources on other regulations).

<sup>241</sup> See Seidenfeld, *supra* note 51, at 259–60 (“[I]t is impossible to identify, much less completely understand, every possible policy choice open to an agency.”).

<sup>242</sup> See, e.g., Telecomms. Research & Action Ctr. v. FCC (*TRAC*), 750 F.2d 70, 80 (D.C. Cir. 1984). *But see* Forest Guardians v. Babbitt, 174 F.3d 1178, 1192 (10th Cir. 1999) (finding that the lack of congressional funding does not relieve an agency of nondiscretionary duty, but may constitute an impossibility defense in a contempt proceeding if the agency fails to meet a court-imposed deadline).

<sup>243</sup> See *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (“The allocation of funds from a lump-sum is . . . traditionally regarded as committed to agency discretion.”). On the other hand, appropriations statutes are construed narrowly because legislative deliberation is unlikely and interest group power is strong. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 169 (1993).

<sup>244</sup> See, e.g., Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1100–01 (D.C. Cir. 2003) (denying injunctive relief against an agency that would have the effect of allowing the plaintiffs to cut ahead of others who had been waiting just as long); *In re Barr Labs.*, 930 F.2d 72, 76 (D.C. Cir. 1991) (“In short, we have no basis for reordering agency priorities.”); *TRAC*, 750 F.2d at 80 (“[T]he court should consider the effect of expediting delayed action on

Both courts and scholars are concerned that compelling action thereby allows private litigants, rather than the agency or the political branches, to set the agency's agenda.<sup>245</sup>

Some of the concerns with compelling action are overstated or not unique to judicial review of agency delay. First, judicial review of agency *action* can also significantly impact an agency's agenda. A court order invalidating a final rule forces the reallocation of resources by placing a matter back on the agency's agenda. Compelling agencies to complete decisionmaking expeditiously rather than continuing to gather and process information can help agencies conserve resources, so long as it does not lead to a decision that fails judicial review. Moreover, prolonged decisionmaking is inefficient. Over time, agency employees depart, new personnel must be trained and briefed on old matters, and previous findings must be revisited.

Second, there is nothing antidemocratic about private parties harmed by delays forcing agencies to pursue legislative goals; the private litigant is simply compelling the agency to fulfill a statutory duty via the judiciary. Because resource constraints are ubiquitous, if they were an adequate justification for delay agencies would have no trouble thwarting the goals of the enacting coalition based on divergent policy preferences. Moreover, Congress frequently relies on judicial review, initiated by private litigants, to prevent and check agency drift.<sup>246</sup> Finally, it is somewhat disingenuous as a purely formal matter to pronounce delays in one area "reasonable" merely because the agency is working on other priorities.

Nevertheless, from a principal-agent perspective, courts should hesitate to interfere with competing legislative goals of either the same or another enacting coalition. Although courts cannot dictate the substance of the decisions they compel, compelling action still risks substituting the court's priorities for that of the political branches.<sup>247</sup>

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agency activities of a higher or competing priority."); *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 40 (D.D.C. 2000) ("If, for example, compelling agency action will serve only to delay other important [agency] matters, the delay in question may be considered reasonable.").

<sup>245</sup> See Cross, *supra* note 177, at 1028–29; Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1199 (1982); cf. Biber, *Resource Allocation*, *supra* note 20, at 18 (discussing the importance of maintaining agency independence in agenda-setting vis-à-vis Congress and the judiciary).

<sup>246</sup> McCubbins, et al., *Administrative Procedures*, *supra* note 32, at 271–73.

<sup>247</sup> See Pierce, *supra* note 32, at 1261 ("[A] decision to defer implementation of one policy is invariably a decision to implement immediately a competing policy.").

Thus, although courts are well equipped to determine the causes of specific delays and evaluate their legitimacy under their respective enabling statute, courts are less well equipped to understand a matter's relative importance within the full panoply of an agency's agenda. Because Congress and the President are responsible for supervising the entirety of an agency's agenda, at least in theory they should be in a better position to judge the relative importance of various responsibilities within an agency's broad statutory mandate or under different statutes.

## 2. *Capacity to Take Corrective Action*

The judiciary is not known for its expeditious decisionmaking and, like the administrative state, is frequently the subject of complaints about delay.<sup>248</sup> Thus, a decision to go to court to compel agency action is unlikely to be a fast track to a remedy, particularly when compared to the President's ability to compel agency action related to administration priorities.

Still, if the agency's inaction is reviewable,<sup>249</sup> the judiciary does not face the same political or structural constraints on curing agency delays *ex post* as the political branches. The fact that a delay affects only a discrete and insular minority or a set of diffuse and poorly organized beneficiaries will not impede judicial review. Indeed, it is generally recognized that courts have an important role to play in protecting such groups from the prejudice or indifference of majoritarian politics.<sup>250</sup>

Nor do courts face the same status quo impediments to corrective action as does Congress when confronting agency drift.<sup>251</sup> Indeed, courts are generally more comfortable ordering incremental rather than wholesale changes in agency activities.

Finally, judicial review of agency delays does not entail the same lost opportunity costs as monitoring by the political branches, which

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<sup>248</sup> In 2008, 5469 civil cases in the Second Circuit had been pending for over three years, constituting 14.7% of all the 37,180 cases pending in 2008. STATISTICAL DIV. OF THE ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL REPORTS 17 tbl.14 (2008), available at <http://www.ca2.uscourts.gov/Reports/08/Statistics.pdf>.

<sup>249</sup> See *supra* Part II.

<sup>250</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (O'Connor, J.) (plurality opinion) (recognizing the judiciary's role under the Equal Protection Clause to protect "discrete and insular minorities" from majoritarian prejudice or indifference" (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153, n.4 (1938))); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978) (same).

<sup>251</sup> See *supra* notes 202–13 and accompanying text.

diverts attention from prospective legislation. A core responsibility of the judiciary is to ensure that agencies act according to their statutory responsibilities and compelling action protects judicial review of agencies' substantive decisions.

Thus, although the President in many cases can obtain expeditious relief, those without White House access must look to Congress or the courts. As between the two, unless delays affect a politically powerful group or a large number of individuals in similar ways, the courts are often in a better position than Congress to act.

### 3. *Fashioning Remedies*

Courts have fewer remedies available than Congress to address delays, which is a serious disadvantage of relying upon judicial review. Congress can provide agencies with additional resources for staff, infrastructure, technology, or other improvements that can alleviate sources of delay. Similarly, Congress can alter administrative or regulatory processes to remove a procedural bottleneck or lessen the harm caused by delays.<sup>252</sup> The judiciary cannot offer the agency any of these remedies. Courts can only remove statutorily inappropriate causes of delay and perhaps motivate agencies to operate more expeditiously with the threat of contempt.

Still, judicial responses to agency delays are more flexible than their legislative counterparts. Court orders can be amended in a changing environment, whereas it is difficult and time consuming to amend enacted legislation.<sup>253</sup> The court can tailor its order to specific regulatory matters, particular offices, geographic regions, or discrete time periods in a way that is difficult for Congress to do.<sup>254</sup>

In addition, the sanctions available to courts may in some cases be more credible than congressional action. To be sure, Congress is capable of much more severe sanctions, such as eliminating or reorganizing the agency, increasing the agency's workload, decreasing its funding, or passing other punitive measures. But for the reasons discussed above in Part III.A, it is exceedingly unlikely in most cases that Congress will impose such sanctions. Moreover, the agency will be forewarned if Congress is considering such action and can lobby against it. Whereas credible congressional sanctions require the atten-

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<sup>252</sup> See, e.g., *supra* note 213.

<sup>253</sup> See *supra* Part III.A.4.

<sup>254</sup> See *Heckler v. Day*, 467 U.S. 104, 120 (1984) (Marshall, J. dissenting) (praising the district court for ordering a "meaningful, carefully-tailored statewide remedy" rather than "intruding clumsily into a pervasively regulated area").

tion of both houses of Congress (and in most cases, the President), a single judge and a few law clerks can address an agency delay, and the minds of judges are notoriously difficult to read. Although a judicial order of contempt may not seem particularly threatening, in fact Professors Gersen and O'Connell have found that judicially imposed deadlines on average are somewhat more effective than statutory deadlines at compelling agency action.<sup>255</sup>

Finally, court sanctions can serve an important signaling function to Congress that agency delays have become unreasonable. Intended beneficiaries and their congressional allies can leverage the court's determination in pushing for legislative action.

In sum, the President is probably in the best position to cure agency delays related to the administration's priorities or favored constituencies. But the President has little incentive to address delays in other areas and often contributes to them. Congress has the most powerful tools to cure agency delays, but faces serious political and structural impediments to corrective action. Thus, the judiciary is sometimes the only branch in a position to take corrective action. Courts are competent to identify the causes of delays, assess their legitimacy, remove statutorily inappropriate sources of delay, and fashion flexible responses to changing conditions. But courts are less competent to evaluate the relative importance of a matter to an agency's overall agenda and may not have the powerful remedies necessary to cure some delays.

#### IV. REFORMING POLITICAL AND JUDICIAL REVIEW OF AGENCY DELAYS

As the discussion in Part III.C demonstrates, no single branch of government has all the institutional competencies, capacities, or remedies to cure agency delays on its own. A coordinated effort is required. This Part proposes several reforms to assist the political branches and the judiciary to work together to identify and correct delays that threaten legislative mandates. Part IV.A begins with Congress, which is the source of many of the challenges in curing agency delays. Part IV.B turns to the executive branch and OIRA. Finally, Part IV.C proposes a new framework for judicial review of agency delays that addresses them as a principal-agent problem.

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<sup>255</sup> Gersen & O'Connell, *supra* note 24, at 949 & n.84.

### A. *Congressional Guidance*

As discussed in Part I.A, it is Congress's lack of specificity in delegating that creates opportunities for delay and makes it difficult for courts to judge the delay's reasonableness. There are good reasons why Congress cannot and in many cases, should not, set hard-and-fast deadlines,<sup>256</sup> but enacting coalitions can provide more guidance to agencies and courts concerning their sense of the appropriate timeline for agency action. For example, in the context of immigration benefits, Congress expressed its view that naturalization applications should be adjudicated within six months.<sup>257</sup> Although this is not a hard-and-fast deadline to be sure, it might serve as a presumptive timeline for agency adjudication. If large numbers of applications are being adjudicated outside this timeframe, the courts should ask the agency to justify the costs of the procedures causing the delays.

Such direction should be easier for enacting coalitions to pass than statutory deadlines. In addition, general guidelines are less problematic if the timeline turns out to be unrealistic. Unlike statutory deadlines, courts can easily excuse the presumption if warranted by circumstances.

In addition, enacting coalitions should provide agencies with more guidance on how to set their priorities to accomplish the enabling statute's legislative goals. Agency delays in the regulatory context are, in part, creatures of broad delegations of authority that fail to explain how agencies should prioritize the many responsibilities with which they are tasked. Although there is no reason to think that Congress will stop delegating decisions to agencies anytime soon, it can at least express the second-order values that agencies should consider in setting their agendas.

### B. *Utilizing the OIRA Review Process to Address Agency Delays*

The OIRA review process has promise as a tool for both courts and Congress to address agency delays.<sup>258</sup> Each year, agencies submit their regulatory agendas to OIRA and indicate the stage in the rulemaking process—e.g., Prerule, Proposed Rule, Final Rule, or

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<sup>256</sup> See *supra* Part III.A.

<sup>257</sup> 8 U.S.C. § 1571(b) (2006).

<sup>258</sup> See, e.g., REVESZ AND LIVERMORE, *supra* note 29, at 171–83 (urging a change in OIRA focus from checking agencies toward agenda-setting and calibration of regulatory stringency, interagency coordination, and distributional analysis).

Long-Term Action—of each regulatory matter.<sup>259</sup> The agencies also include timetables for action.<sup>260</sup> OIRA submissions thus provide a useful snapshot of an agency's agenda and its priorities.

Two reforms, each of which could be implemented through an Executive order, would strengthen the OIRA review process as a tool for both the courts and the political branches to evaluate and address agency delays. First, agencies should indicate with respect to each matter in their OIRA submissions whether they are in the process of (1) determining if a matter is a priority, or (2) crafting a substantive regulatory response. Second, agencies should indicate those matters that they are not actively pursuing, or pursuing more expeditiously, because they deem them to be low priorities in light of resource constraints.<sup>261</sup>

These reforms would have several benefits. When plaintiffs challenge a delayed action, the agency often points to several other matters on its agenda and claims these competing priorities are absorbing its time and attention.<sup>262</sup> It is difficult for Congress or the courts to know whether to credit the agency's claims or whether they are merely a litigation position.<sup>263</sup> An agency's OIRA submissions are more credible than the papers its lawyers file in litigation. Courts would no longer have to second-guess the agency's purported priorities, as they currently must do under the *TRAC* analysis.<sup>264</sup>

Moreover, unless a significant number of regulatory matters are similarly stalled, Congress is unlikely to overcome political and structural impediments to addressing delays through legislative action for

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<sup>259</sup> Exec. Order No. 12,866 § 4(c), 3 C.F.R. 638, 642 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006).

<sup>260</sup> *Id.*

<sup>261</sup> Granting agencies greater deference for matters that are not on their active agenda would encourage agencies to make these distinctions. *Cf.* Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2172–74 (2009) (suggesting that greater judicial deference for agency preemption statements promulgated through notice and comment procedures encourages agencies to use those procedures).

<sup>262</sup> *See, e.g.*, Pub. Citizen Health Research Grp. v. Chao, 314 F.3d 143, 157 (3d Cir. 2002).

<sup>263</sup> Indeed, it is often difficult to know whether the agency has even begun working on a matter. "The first public notice of a proposed rule in the Federal Register might be preceded by weeks, months, or even years of work." Kerwin, *supra* note 2, at 107. In some cases, the agency classifies matters at the Prerule Stage although it has initiated review under the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 609(b)(2)–(3), (d) (requiring the EPA and OSHA to convene panels to consult with small entities on regulations expected to have a significant impact on them before the regulations are published for public comment), or included a timetable for issuing a Notice of Proposed Rulemaking, suggesting that the agency has already begun developing a regulatory response.

<sup>264</sup> *See supra* Part II.C.

the reasons discussed above in Part III.A. If agencies indicated matters that were low priorities or delayed due to resource constraints and Congress was dissatisfied with the number of items stalled, Congress could provide the agency with more resources, less responsibilities, or better guidelines for prioritization.

For example, if OSHA had ten active rulemaking proceedings and twenty other regulatory initiatives in the wings, it would be easy to conclude that the agency did not have enough resources to get the job done. Because a large group of activities would be similarly affected, it would be easier for Congress to overcome collective action impediments to address the problem. Beneficiaries awaiting different regulatory actions similarly stalled would be able to band together and point to the agency's admission that important matters are falling by the wayside.

Agencies would be motivated to categorize their agendas in this way if courts granted greater deference to the agency's timeline for matters either at the priority-setting stage or deemed low priorities in their OIRA submissions, placing the burden on plaintiffs to show that the costs of delay are high and outweigh any potential benefits.<sup>265</sup> By crediting the agencies' OIRA submissions, the courts would encourage greater transparency as well as more rational prioritization. Moreover, the OIRA submissions would provide an important signaling mechanism for Congress to consider whether legislative action is warranted.

There is some danger that this would discourage agencies from beginning substantive rulemaking or would create an incentive to categorize matters as low priorities. But it would be nearly impossible for an agency to categorize a matter at the priority-setting stage if its OIRA submissions indicate that it is crafting a substantive response. Moreover, an affirmative declaration by an agency that a matter is a low priority will be politically difficult to defend if the matter is in fact important. And unless it is clear that a matter is important, it is not such a bad thing if the agency defers focusing on it until other higher-priority matters are completed.

### *C. A New Framework for Judicial Review of Agency Delays*

Courts have an important role to play in curing agency delays. But how should they go about it? This Section proposes that courts utilize a form of cost-benefit analysis ("CBA") to ensure that agencies

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<sup>265</sup> See *infra* Part IV.C.



do not thwart their legislative mandates and to encourage more rational priority setting.

1. *The Reasons for Delay Must Be Grounded in the Statute*

First, consistent with the Supreme Court's decision in *Massachusetts v. EPA*, courts must ensure that agencies ground their reasons for delay in the enabling statute.<sup>266</sup> Thus, at a minimum, an agency must justify its delay with respect to the enabling statute that requires the discrete agency action. Neither bribes nor what may be sound policy considerations, if statutorily irrelevant, are acceptable reasons for delay.<sup>267</sup> In *Massachusetts v. EPA*, for example, where the agency had to decide "whether [GhG] emissions contribute to climate change," delay could only be justified by the need for additional time to make the endangerment finding.<sup>268</sup>

The range of statutorily relevant issues will depend on the breadth of the enabling statute and the decision that the agency must make. Where Congress has articulated specific criteria for the agency to consider, such as when screening applicants for public entitlements, the universe of statutory reasons for deferring decisionmaking will be quite narrow.<sup>269</sup> The agency must justify its indecision by the need to gather or review information necessary to determine the eligibility of the applicant. By contrast, where Congress has charged the agency with making less clearly defined judgments, not only about whether to regulate but how, such as with broadly worded health, safety, and environmental legislation, there will likely be a wider range of statutory reasons for prolonging decisionmaking. If, for example, the agency must regulate water pollutants, the agency's delay might be justified by investigating the risks associated with different concentrations of pollutants based on the characteristics of the waterway or the affected

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<sup>266</sup> *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007); cf. Sunstein, *supra* note 20, at 677–78 (noting that many of the pre-*Chaney* inaction cases involved allegations that a statutorily irrelevant factor influenced the decision not to act). In most cases, the agency will cite the reason for the delay in its defense, particularly if the agency believes that it is a legitimate justification for deferring or prolonging the initiation or completion of decisionmaking. But if the agency does not want to reveal or does not know the true cause of its delay, plaintiffs must uncover the cause through discovery and present their evidence to the court. The plethora of executive privileges typically claimed by government defendants can, unfortunately, create formidable obstacles for plaintiffs seeking to identify improper influences of competing principals within the executive branch. Courts should scrutinize such claims to ensure they are not used to hide illegitimate causes of delay.

<sup>267</sup> *Massachusetts v. EPA*, 549 U.S. at 533–34.

<sup>268</sup> *Id.*

<sup>269</sup> See *supra* note 35.

populations. If the statute tempers its goal of clean water by requiring only the best available or practicable technology, then such considerations could also justify the agency's timeline.<sup>270</sup>

In either case, at a minimum, the agency must ground its reasons for deferring or prolonging its decisionmaking in the consideration of issues relevant to the decision that it is charged with making under the statute. Courts regularly judge whether the factors agencies consider in regulating are permissible or required under the enabling statute, so they are also well prepared to judge whether the agency's reasons for prolonging decisionmaking are grounded in the statute.

## 2. *Delays Must Further Statutory Goals*

Second, even if an agency is conscientiously gathering complex data on the impact of GhGs on the environment or the health effects of carcinogenic agents in the workplace, this cannot justify prolonging its decisionmaking process forever. Although the quality of a decision will often improve with more time (assuming the agency is working diligently), the benefits of the improved decision may not be worth the costs of the delay.<sup>271</sup>

Imagine a legislative act that seeks to deliver a public good valued at  $x$  on an annual basis, say a safety standard for workers intended to prevent  $x$  number of injuries per year. If the agency with rulemaking authority implements the statute immediately, based on the available information, it will promulgate a rule that prevents  $x - 5$  injuries (Decision *A*). In other words, in its haste, the agency underestimates the safety standard required to achieve the intended benefit. Alternatively, if the agency spends another year gathering additional information, consulting different experts, and applying more personnel to the matter, the agency's delayed decision will prevent  $x - 2$  injuries (Decision *B*). Decision *B* is closer to the annual benefit that the statute intended to provide. But from a principal-agent perspective, that does not mean that Decision *B* does a better job implementing the enacting coalition's goals than Decision *A*. If  $x = 100$ , then the cost in unprevented injuries of the one-year delay is 95. It will take thirty years under Decision *B* for the intended beneficiaries to recoup the benefits

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<sup>270</sup> There would inevitably be cases in which it is not entirely clear whether the agencies' reasons for delay are permitted by the statute, *see generally*, e.g., Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, but such questions, although important, are beyond the scope of this Article.

<sup>271</sup> *See* Freeman & Vermeule, *supra* note 56, at 81 (“[H]olding other factors constant, agencies should postpone their decision just until the costs of further delay exceed the expected gain in new information.”).

lost from the failure to implement Decision *A* in Year 1.<sup>272</sup> Until that time, Decision *A* does a better job achieving the enacting coalition's legislative goals than Decision *B*. In the meantime, the agency may amend the rule to account for new developments or the rule may become obsolete, meaning that the benefits of Decision *B* are never realized.

Of course, the prompt but poorer-quality decision might not merely deliver fewer intended benefits but also impose unintended costs that a more thoughtful decision would avoid. If the agency regulates a chemical found in the workplace that upon further analysis proves less harmful than initially believed, or the standard is stricter than necessary to achieve the optimal level of risk, the quicker decision may burden the industry with costly and unnecessary regulation. This does not change the fact, however, that delays producing better quality decisions are not desirable if the cost of delay outweighs the benefits. But the mitigation of the risk and consequences of over- or under-regulating may be an important benefit of deferring or prolonging decisionmaking.<sup>273</sup>

There are several practical challenges in the real world to such an analysis. First, it is often difficult to determine the precise benefit that the enacting coalition sought to deliver in broadly worded statutes delegating specific policy decisions to the agency.<sup>274</sup> Nevertheless, determining legislative goals for purposes of weighing the costs and benefits of delay is no more difficult, and probably less so, than the statutory interpretation in which courts routinely engage when reviewing agency action.

Consider the OSH Act, in which Congress declared its policy "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."<sup>275</sup> The principal goal of the enacting coalition was clearly to provide workers with the benefit of greater safety. Although Congress presumably did not want to hobble industries in the process, this concern merely limits the scope of the primary goal of worker safety. Thus, the potential costs of delay in regulating a risk under the OSH Act can be measured by the danger

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<sup>272</sup> This ignores discounting for future value if the injuries are monetized.

<sup>273</sup> See Freeman & Vermeule, *supra* note 56, at 81 ("When stakes are high (as when a nondecision might lead to significant irreversible negative consequences), the cost of delaying a decision could be substantial.").

<sup>274</sup> For helpful discussions of the promises and pitfalls of various approaches to statutory interpretation, see FARBER & FRICKEY, *supra* note 39, at 88–115, and SUNSTEIN, *supra* note 243, at 111–226.

<sup>275</sup> 29 U.S.C. § 651(b) (2006).

posed to worker safety in the form of injuries, illnesses, and deaths. If these are significant, then the cost of delay is quite high, unless no regulation can satisfy the enacting coalition's desire that industry not be overly burdened or the only feasible regulations will not significantly mitigate the risk. These are the same types of issues that the court must consider when reviewing whether agency action is consistent with the enabling statute.

Of course, the enacting coalition may have passed the legislation for purely symbolic reasons, and a majority may not actually want the agency to engage in much regulation.<sup>276</sup> But unless the enacting coalition has expressly revealed this desire in the statute, courts should not facilitate such political pathologies, with all of the difficulties they pose for agencies, by second-guessing the face of the statute.<sup>277</sup>

The legislative goals are even easier to ascertain with public benefits. Put simply, such statutes have as their goal the delivery of specified benefits to intended beneficiaries. Thus, the cost of delay by agencies such as the Social Security Administration or United States Citizenship and Immigration Services ("USCIS") in adjudicating applications for disability benefits or naturalization is measured by the benefits lost while eligible beneficiaries wait for adjudication of their applications. There is no secondary limiting principle, although obviously the procedures used should ensure that benefits are provided only to eligible applicants.

Second, it is impossible to know with certainty in advance whether the benefits of additional time are worth the costs. If the agency does not yet know the magnitude of a risk posed by a chemical in the workplace or the costs of imposing additional regulations on the industry, the agency will have difficulty making this calculation. Similarly, although agencies that screen large numbers of applications for benefits, licenses, and the like can easily track the duration of each stage of the process, they cannot know in advance whether additional time spent on any single application will ultimately prove outcome determinative.

Yet these are precisely the types of questions that agencies should ask in setting their agendas and evaluating their decisionmaking processes. Even in the face of uncertainty, agencies can estimate the costs and benefits of deferring their decisions within ranges.<sup>278</sup> If the

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<sup>276</sup> See Dwyer, *supra* note 67, at 234.

<sup>277</sup> *Id.* at 285, 314–15.

<sup>278</sup> See *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (noting that agencies make predictions in the face of uncertainties).

agency has no information regarding the cost of delay, we would not expect the agency to prioritize the matter. But if the agency knows that the costs of delay are likely to be significant, even if it does not know precisely how significant, then the agency should proceed expeditiously with determining an appropriate regulatory response. Similarly, if an administrative procedure significantly prolongs an adjudicatory process, the agency should assess whether the procedure produces sufficient actionable, outcome-determinative information, such that the benefits of the procedure are worth the costs of the delays.

Third, as discussed in Part III.C.1, agencies will often delay addressing one matter so that they can work on another. The reviewability of petitions for rulemaking means that citizens can put more regulatory matters on an agency's agenda than it has resources to address in a timely manner.<sup>279</sup> It is right for citizens to know the full scope of their administrative state's responsibilities, but agencies with finite resources still must prioritize their agendas.

Courts are not well equipped to understand a matter's relative importance within the full panoply of an agency's agenda.<sup>280</sup> Decisions about whether to prioritize a matter requires multiple informal judgments about whether (1) the matter can be addressed by regulatory action, (2) the regulatory tools available to the agency are likely to be effective, (3) the information needed for decisionmaking is on hand or obtainable, (4) the agency has the resources to get the job done, and (5) such action is the best use of the agency's resources relative to its other responsibilities.<sup>281</sup> These types of informal, and often incremental, judgments share many characteristics with agency enforcement decisions as described by the Court in *Chaney*.<sup>282</sup> They are within the peculiar expertise of the agency and difficult for courts to review without manageable statutory guidelines or clear cases for action.

Nevertheless, there is always a danger that competing principals, such as the President, influential members of Congress, or a regulated

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<sup>279</sup> *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007). Courts generally are comfortable making these decisions because they simply require applying the substantive provisions of the relevant statute to the facts presented in the petition for rulemaking. It does not involve addressing the difficult question of how long it should take the agency to begin or complete a rulemaking proceeding.

<sup>280</sup> *See supra* Part III.C.1.

<sup>281</sup> *Cf. Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (discussing factors relevant to resource-allocation decisions).

<sup>282</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

industry, will seek to manipulate an agency's agenda to thwart a legislative mandate. Put differently, the agency's low prioritization of a matter may simply be a cover for an extra-legislative veto. Thus, there must be a limit even to an agency's discretion over its priorities.

Accordingly, judicial review of agency delays must account for both the inherent uncertainties in CBA and the need for agencies to retain sufficient discretion over their agenda, while ensuring that agencies do not thwart legislative mandates.

### 3. *Balancing Agency Discretion with Meaningful Judicial Review*

One way to balance these competing concerns would be for courts to utilize shifting or sliding burdens of proof for agency delays caused by prioritization versus substantive decisionmaking. The OIRA reforms proposed above in Part IV.B would help courts classify the type of delay at issue. When a party challenges an agency's decision to postpone or defer decisionmaking on a regulatory matter due to its low priority, the burden would be on the challenging party to show that the costs of delay are significant and clearly outweigh any likely benefits of deferring decisionmaking.<sup>283</sup> If there is no evidence to believe that delay is costly, the agency would retain control over its agenda. But if the costs of deferring the matter are significant and well known, the court should ask the agency to present credible countervailing benefits of postponing its decisionmaking. These might include the benefits of working on other regulatory matters, so long as these other priorities are in pursuit of the same statutory goals. For example, if an agency were charged with delay in regulating an air pollutant under the CAA, the court would credit the agency's action on other air pollutants under the Act, but not for activities focused on distinct regulatory mandates. This would ensure that the agency is not merely using its priorities to thwart important legislative goals.

If the agency were unable to produce credible countervailing benefits of delay, the court would order the agency to set a timetable for regulatory action. In addition, the court would retain jurisdiction with the threat of contempt to ensure that the agency proceeds expeditiously with decisionmaking.

Once an agency has begun formulating a regulatory response or otherwise acknowledged that a problem is a regulatory priority, the balance between these competing concerns shifts. To be sure, sub-

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<sup>283</sup> Courts should also require that plaintiffs first file a petition for rulemaking to give the agency an opportunity to consider the claim of unreasonable delay before it is hauled into court.

stantive decisions can also be quite complex and peculiarly within an agency's expertise. Standard setting often involves a complex analysis of interrelated factors with the potential to impact millions of individuals and entire industries. The agency needs sufficient time to make a reasoned judgment in light of the complexity of the decision and the potential risks of getting it wrong. But because the agency has indicated the importance of a matter, protests that competing priorities prevent it from proceeding or that time is not of the essence are less credible.

Moreover, as the agency proceeds with rulemaking and the likely shape of regulation becomes clear, there is increasing danger that competing principals will seek to derail agency action to protect their interests. The agency itself may wish to avoid completing a matter as the political costs of action loom large on the horizon. In addition, prolonged decisionmaking raises efficiency concerns. As rulemaking proceedings drag on institutional memory is lost and redundant work must be performed. Meanwhile, the agency struggles to maintain forward momentum on multiple fronts.

Accordingly, rulemaking proceedings not completed within two years should be presumed unreasonably delayed. Two years is the length of a congressional session. From a principal-agent perspective, the agency's timeline for a delegated decision should not exceed the enacting coalition's own event horizon, unless Congress has expressly contemplated more prolonged decisionmaking in the statute itself. The agency could rebut the presumption by presenting a reasoned explanation of how additional time for decisionmaking would produce a sufficiently better decision, such that the benefits would be worth the costs exacted by the delay on the enacting coalition's legislative goals. For example, even if the costs of delay are well known, the agency may need more time to determine the right level of regulation if there is a high risk that over- or under-regulating will have serious negative consequences.

A two-year presumption would possess much of the action-forcing attributes of a deadline, motivating agencies to focus on completing their priorities. But unlike a deadline, a rebuttable presumption would allow agencies additional time for unusually complex decisions or unforeseen circumstances. When the agency is working diligently and additional time is worth the costs due to the risk and potential consequences of error, it would be able to rebut the presumption. Agencies actively engaged in rulemaking should have sufficient information at their disposal to support their CBA.

Agencies should be able to complete most important rulemaking proceedings within two years.<sup>284</sup> Moreover, if these matters are indeed priorities, we want agencies to complete them in two years.<sup>285</sup> We do not set deadlines simply to provide ourselves with the time we think we need to accomplish our goals; we set them to ensure that we accomplish our goals in a timely manner.

Critics will complain that any presumption is arbitrary for the range of complexity in the various rulemakings with which the administrative state is tasked. There is some merit to the charge. In an ideal world, we would grant agencies precisely as much time as necessary for each decision they must make. But developing a customized presumption for each decision an agency must make would essentially require a totality-of-the-circumstances test, which has none of the action-forcing attributes of a presumption and is not much different from the present ad hoc judicial review of agency delay. Alternatively, we could craft different presumptions for particular agencies or statutes, but these would be just as vulnerable to a charge of arbitrariness because there is still a great deal of variety in the decisions that individual agencies must make, even under a single statute.

Moreover, unlike a per se rule or a hard statutory deadline, a rebuttable presumption could be overcome if the agency demonstrates that the decision is a particularly complex one or entails significant risks of grave errors. Thus, any arbitrariness would be mitigated by the rebuttable nature of the presumption.

There is some danger that agencies would respond to greater judicial deference for prioritization decisions or matters designated low priorities in their OIRA submissions by elevating fewer matters to priority status. But agencies would continue to be responsive to competing principals and regulatory beneficiaries that desire agency action on an array of matters. Indeed, it may even be desirable for judicial review to provide agencies with leverage to resist largely symbolic responses to competing principals, thereby conserving their resources for true legislative priorities. In any event, it would be difficult for agencies to hide important regulatory matters among low priorities given the transparency of their regulatory submissions to the OMB. If

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<sup>284</sup> Professors Gersen and O'Connell found that the average duration of significant rulemaking proceedings between 1995 and 2008 was 503.4 days from the NPRM while the length of routine rulemaking proceedings during the same period was 385.3 days. See Letter from Jacob Gersen & Anne Joseph O'Connell to Jessica Hertz, *supra* note 229.

<sup>285</sup> If the agency changes its mind about a priority, this decision should also be made deliberately and able to withstand scrutiny.



the costs of delay were significant, plaintiffs would still be able to compel agency action.

Finally, the proposed framework would provide agencies with sufficient discretion to focus their resources on administration priorities, while ensuring that a change of administrations does not bring important regulatory matters to a halt because they offend an important presidential constituency or simply are not White House priorities. Of course, there is some danger that an outgoing presidential administration might seek to take advantage of this burden-shifting framework by elevating multiple regulatory matters to priority status in an effort to control the incoming administration's agenda. But courts should be able to see through such ruses and if little substantive work has begun on a matter the incoming administration would have no trouble removing its priority status.

#### 4. *Administrative Screening Programs*

Administrative screening programs, such as the adjudication of social security or immigration and naturalization benefits, are distinct from rulemaking proceedings in important ways. Yet courts reviewing delays in these programs should also consider the costs and benefits of prolonged or deferred decisionmaking when caused by a principal-agent problem.

Congress does not delegate screening programs because it is uncertain as to the best policy to pursue, it is unwilling to make hard policy choices, or it wishes to provide the agency with flexibility to address new problems as they arise.<sup>286</sup> Thus, the agency cannot point to competing priorities for its attention because the enacting coalition's mandate is clear that the administrative program is a nondiscretionary priority.<sup>287</sup>

Furthermore, the scope of the delegated decision in screening programs is usually quite narrow because Congress sets specific eligibility criteria for most benefits.<sup>288</sup> To be sure, the agency must make decisions about each applicant's eligibility. On the simple end of the

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<sup>286</sup> See WILSON, *supra* note 44, at 236, 242–43, 246, 248–52 (explaining why Congress makes the difficult political decisions in this context).

<sup>287</sup> Moreover, individual procedural due process concerns are heightened with respect to agency screening for benefits. Every circuit that has addressed the issue has concluded that applications for public benefits, where Congress has constrained the administrator's discretion with specific eligibility criteria, trigger procedural due process protections. See *Cushman v. Shinseki*, 576 F.3d 1290, 1297–98 (Fed. Cir. 2009) (collecting cases).

<sup>288</sup> See *supra* note 35. Other nonentitlement screening programs, such as FCC licensing, are likely to involve more complex decisionmaking because the agency must consider the impact

spectrum, social security retirement benefits merely require the agency to review an applicant's records to determine how long the individual has worked and how much he or she has earned, calculate the amount of the social security check based on the worker's age, and mail and record the payment.<sup>289</sup> On the more difficult end of the spectrum, social security disability claims require the agency to assess the health and physical abilities of individual applicants.<sup>290</sup> But each decision concerns only a single individual and most of the relevant information will be contained within the applicant's submission, so the agency will not have to gather information, analysis, and opinions from diverse sources. In contrast to most standard setting, administrative screening for benefits does not require the review of a plethora of interrelated factors with the potential to impact diverse and unknown parties. Accordingly, errors are also generally less consequential.

Therefore, in an ideal world the agency would review applications as it receives them, determine the applicant's eligibility, and approve or deny the application. In the case of social security retirement benefits, almost any delay following eligibility for benefits would be intolerable because the decision is so simple. In the case of immigration or social security disability benefits, where the decisions are slightly more complicated, the time for decisionmaking may be a bit longer, but should be measured by weeks or months and not years.<sup>291</sup>

It is unlikely in the context of large screening programs that the agency is attempting to thwart the primary goals of the enabling statute, but the agency's choice of procedures may not be the most effective means of pursuing those goals. For example, the Social Security Act has the obvious aim of providing benefits to eligible beneficiaries, but this includes the subsidiary goals of timely and accurate decisions. The more procedures the agency utilizes to ensure the accuracy of its decisions, the more difficult it will be for it to render a timely decision. The challenge is to strike the right balance.

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of its decision on a wider range of parties. Thus, they are more akin in certain ways to agency standard setting.

<sup>289</sup> See 42 U.S.C. § 415 (2006) (describing computation of primary insurance benefits); 20 C.F.R. § 404.902 (2011) (describing criteria for initial determinations in old age, survivors' and disability insurance programs under Social Security Act); see also WILSON, *supra* note 44, at 99–100.

<sup>290</sup> Heckler v. Day, 467 U.S. 104, 106–07 (1984) (discussing the complexities of the decision); 20 C.F.R. § 404.1594 (describing eligibility and determinations for disability benefits).

<sup>291</sup> For example, in the case of naturalization applications, Congress has mandated that the agency adjudicate applications within 120 days of interviewing the applicant and expressed its sense that “the processing of an immigration benefit application should be completed not later than 180 days after the initial filing.” 8 U.S.C. § 1571(b) (2006).

In addition, the agency may institute procedures not simply to render more accurate decisions in pursuit of its primary goal, but to further a distinct goal or to protect itself from political fallout from its decisions. For example, following the September 11 terrorist attacks, USCIS (the successor to Immigration and Naturalization Services) enacted cumbersome new background checks of applicants for lawful permanent residency and naturalization.<sup>292</sup> It is questionable whether much of the information reviewed by USCIS, which went well beyond traditional criminal background checks, was in fact relevant to the eligibility determinations that the agency was charged with making under the Immigration and Naturalization Act.<sup>293</sup> Many applicants caught up in background checks that dragged on for years were merely witnesses to crimes and posed no known threat to U.S. security.<sup>294</sup> But the procedures represented a new agency priority—protecting America’s border—in the post-9/11 political landscape.

Where delays are caused by procedural bottlenecks, the court should ask the agency to explain how the procedures allow the agency to make better decisions, such that the costs to the program are worth the benefits. For example, if the agency’s review of certain sources yields little actionable information not available from other sources, but slows down the screening program for large numbers of applicants, the benefits are likely not worth the costs. If the court determines that the costs of the procedures to the enacting coalition’s goals are not worth the benefits, then the agency should be compelled to act more quickly. In exchange, the court would have to rule that the procedure causing the bottleneck is not required under the enabling statute. Even if the court does not ultimately compel action, asking agencies to justify their procedures would enhance the transparency of agency decisionmaking and encourage more rational administration of the programs delegated by Congress.

However, delays in large screening programs are not always the result of procedural bottlenecks. They may also be the result of having too many applications to process with too few adjudicators. Thus, delays are the result, in part or in whole, of the failure of Congress to allocate sufficient funding to the agency to get the job done. In these

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<sup>292</sup> Aronov v. Napolitano, 562 F.3d 84, 95–96 (1st Cir. 2009).

<sup>293</sup> See 2007 CITIZENSHIP & IMMIGR. SERVICES OMBUDSMAN ANN. REP. 40-41, available at [http://www.dhs.gov/xlibrary/assets/CISOMB\\_Annual%20Report\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/CISOMB_Annual%20Report_2007.pdf). The Ombudsman agreed with “the assessment of many case workers and supervisors at USCIS field offices and service centers that the FBI name check process has limited value to public safety or national security” and questioned its use. *Id.*

<sup>294</sup> *Id.*

cases the delay is better understood as the result of a dysfunctional principal than a problem in the principal-agent relationship between Congress and the agency. Consequently, there is little that the court can do to compel agency action. You cannot squeeze water from a stone.

Still, even in such cases courts can play an important signaling function by declaring the agency's decisionmaking unreasonably delayed due to resource constraints. Agency beneficiaries would then be able to leverage the court's judgment to lobby Congress for additional funding. At a minimum, the court's judgment would make Congress's use of appropriations to gut administrative programs—which may constitute a stealth repeal—more transparent.

### 5. *The Costs of Cost-Benefit Analysis*

CBA itself can be costly and time-consuming.<sup>295</sup> But weighing the costs and benefits of delay to enacting coalition's goals would be less involved than the detailed CBA in which agencies must engage for proposed regulations. Moreover, because agencies now engage in extensive CBA for proposed regulations, beginning CBA when setting priorities would be a wise investment of time and resources that would pay off down the road. Even if CBA causes an agency not to regulate, it is hard to believe that the cost of CBA would be greater than the cost of unnecessary regulations. In any event, although analyzing the costs and benefits of delay may involve some additional work on the part of the agency, it is the price of rational priority setting.<sup>296</sup>

Although the inherent uncertainty in CBA of delay means that the agency's timeline for decisionmaking would often be contestable, such analysis, for all of its flaws, is preferable to other less transparent or less accountable means of deciding when to act, such as pleasing an influential member of Congress, reacting to external events, or simply "muddling through."<sup>297</sup> From a principal-agent perspective, agencies should set their priorities and timeline for action to best achieve Congress's legislative objectives.

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<sup>295</sup> Cf. SHANE, *supra* note 195, at 168 (calculating the costs of the OMB's regulatory review).

<sup>296</sup> See generally REVESZ & LIVERMORE, *supra* note 29 (arguing that the use of CBA leads to more rational decisionmaking and better policy outcomes).

<sup>297</sup> See Seidenfeld, *supra* note 51, at 261–64.

### CONCLUSION

There is no magic bullet to cure agency delays. Given the ever-increasing number of agency responsibilities and the pressure to slash budget deficits, unless political will emerges to raise tax revenue, we can expect the administrative state to have more responsibilities on its plate for the foreseeable future than it can handle expeditiously. We need a doctrine of judicial review that encourages rational priority setting by agencies consistent with their legislative mandates, identifies causes of delay that undermine accountability, facilitates legislative responses to cure systemic problems, and allows courts to address delays that are difficult for Congress to cure. It is a tall order, but reconceiving agency delays as a principal-agent problem could be a first step to achieving these goals.