University of Dayton Law Review

Volume 3 | Number 2 Article 5

5-1-1978

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Recommended Citation
Ogden, Gregory L. (1978) "Judicial Control of Administrative Delay," *University of Dayton Law Review*: Vol. 3: No. 2, Article 5.
Available at: https://ecommons.udayton.edu/udlr/vol3/iss2/5

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JUDICIAL CONTROL OF ADMINISTRATIVE DELAY

*Gregory L. Ogden**

Delay in administrative decisionmaking[1] is a long standing problem[2] that remains unresolved today. In a recent major study of the federal regulatory agencies,[3] the Senate Committee on Governmental Affairs noted that "[m]ost federal regulatory proceedings are characterized by seemingly interminable delays."[4] Regulatory agency delay[5] is perceived by practitioners before regulatory agencies and administrative law judges within the regulatory agencies as one of the most serious problems facing those agencies.[6] Agency delay is extremely costly to regulated industries and to the public, both as taxpayer and as consumer.[7] According to the Senate Committee on Governmental Affairs, undue delay is a serious problem[8] in the agency decisionmaking processes of licensing,[9] adjudication,[10]

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1. The Administrative Procedure Act [hereinafter cited as APA] defines "agency action." It states: " 'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . ." 5 U.S.C. § 551(13) (1976). For purposes of this article, "decisionmaking" will be used in this sense.

2. *See* J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960).

3. STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION, VOLUME FOUR, DELAY IN THE REGULATORY PROCESS, S. Doc. No. 72, 95th Cong., 1st Sess. (1977) [hereinafter cited as RIBICOFF REPORT, VOL. FOUR].

4. RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at (V).

5. The statistical data is available for the federal regulatory agencies. This article's conclusions are applicable to delayed decisionmaking in all administrative agencies whether federal, state, or local.

6. RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 1.

7. RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 8-10.

8. RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 6-7, 26-32.

9. The APA defines licensing as "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." 5 U.S.C. § 551(9) (1976). "License" is defined in 5 U.S.C. § 551(8) (1976). The RIBICOFF REPORT, VOL. FOUR, *supra* note 3, surveyed licensing at the Civil Aeronautics Board [CAB] and at the Interstate Commerce Commission [ICC]. The survey was based on information obtained by the Administrative Conference of the United States for formal agency proceedings for fiscal year 1975. The study concluded that licensing proceedings averaged 19 months. RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 6-7.

10. The APA defines "adjudication" to be "agency process for the formulation of an order." 5 U.S.C. § 551(7) (1976). "Order" is defined in 5 U.S.C. § 551(6) (1976). The average number of days elapsed for adjudicatory proceedings in which there was a decision by an administrative law judge followed by agency review ranged from 475 days for the CAB to 1,057 for the Federal Communiccations Commission [FCC] in fiscal years 1973 and 1974. RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 27.

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ratemaking,[11] and enforcement.[12] Similarly, *notice and comment* rulemaking[13] is sometimes slower than agency adjudication.[14]

This article examines judicial efforts to control administrative delay.[15] It will discuss jurisdictional grounds, substantive standards (primarily the Administrative Procedure Act,[16] and due process of law), and judicial remedies for administrative delay. Federal and state cases will be examined in the sections on substantive standards and remedies. Only federal cases will be discussed in the jurisdiction section. In all these cases courts have reviewed delayed decisionmaking by both regulatory and non-regulatory agencies.

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11. RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 6-7. The ratemaking process was studied for the CAB, the Federal Maritime Commission [FMC], the Federal Power Commission [FPC], and the ICC. Ratemaking proceedings averaged 21 months. *Id.*

12. *Id.* The enforcement process was studied at the Federal Trade Commission [FTC] and the Securities Exchange Commission [SEC]. Enforcement proceedings averaged over three years. *Id.*

13. The APA defines "rulemaking" to be "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (1966). "Rule" is defined in 5 U.S.C. § 551(4) (1976). "Notice and Comment" rulemaking is defined in 5 U.S.C. § 553 (1976).

14. *See* RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 26-32. It concludes that the rulemaking process is quicker than adjudication *for policy decisions. Id.* at 26. For example, rulemaking proceedings averaged 224 days for the CAB in fiscal year 1974 as contrasted with 475 days for CAB adjudication proceedings. *Id.* at 27. Similarly, FCC rulemaking proceedings averaged 383 days in fiscal year 1974 as opposed to 1,057 days for FCC adjudication proceedings. *Id.* However, in a report by the Subcommittee on Oversight and Investigations, House Committee on Interstate and Foreign Commerce, rulemaking and adjudicatory proceedings were studied at the Consumer Product Safety Commission [CPSC], the FCC, the FTC, the ICC, and the SEC. The survey results showed that for the CPSC the average disposal time for rulemaking proceedings was greater than for adjudicative proceedings: average disposal time was 16.1 months for rulemaking and 3.3 months for adjudicative proceedings in fiscal year 1975. Similarly, at the FCC rulemaking proceedings averaged 6.4 months in fiscal year 1975 (down from 14.1 months in fiscal year 1971) while application hearings averaged 4.5 months (down from 10.1 months in fiscal year 1971). STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., FEDERAL REGULATION AND REGULATORY REFORM 581-85 (Comm. Print, 1976).

15. On the subject of administrative delay, *see*: K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 8.08 (1976); Cramton, *Causes and Cures of Administrative Delay,* 58 A.B.A.J. 937 (1972); Long, *Administrative Proceedings: Their Time and Cost Can Be Cut Down,* 49 A.B.A.J. 833 (1963); Gellhorn, *Administrative Procedure Reform: Hardy Perennial,* 48 A.B.A.J. 243 (1962); Prettyman, *Reducing the Delay in Administrative Hearings,* 39 A.B.A.J. 966 (1953); Kaufman, *Have Administrative Agencies Kept Pace With Modern Court-Developed Techniques Against Delay?—A Judge's View,* 12 AD. L. BULL. 103 (1959-60); Goldman, *Administrative Delay and Judicial Relief,* 66 MICH. L. REV. 1423 (1968); Rothman, *Four Ways to Reduce Administrative Delay,* 28 TENN. L. REV. 332 (1961); Freedman, *The Uses and Limits of Remand in Administrative Law: Staleness of the Record,* 115 U. PA. L. REV. 145 (1966); Comment, *Judicial Control of Administrative Inaction: Environmental Defense Fund, Inc. v. Ruckelhaus,* 57 VA. L. REV. 676 (1971); Note, *Judicial Acceleration of the Administrative Process: The Right to Relief From Unduly Protracted Proceedings,* 72 YALE L. J. 574 (1963).

16. 5 U.S.C. §§ 551-706 (1976).

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I. Judicial Control: An Introduction

Courts have been asked to provide relief to parties harmed by delayed administrative decisions for over fifty years. As far back as 1926, in *Smith v. Illinois Bell Telephone Co.*,[17] the United States Supreme Court affirmed the granting of equitable relief by a United States district court to Bell Telephone Company to remedy a three year delay by the Illinois Public Utilities Commission in deciding whether requested rate increases were to be granted. More recent cases have challenged delayed decisionmaking by federal regulatory agencies. For example, in *Federal Power Commission v. Hunt*,[18] the United States Supreme Court acknowledged delayed decisionmaking by the Federal Power Commission in discussing the claims of the natural gas producers:

> [t]hat the condition of the Commission's docket transposes for all practical matters temporary certificates into permanent ones. This claim arises due to the delays incident to the issuance of a permanent certificate. We spoke of the "nigh interminable" delay in § 5 proceedings in *Atlantic Refining Co. v. Public Service Comm., supra*, [360 U.S.] at 389. There delay operated against the consumer. Here it operates against the producer. The Commission has been making efforts in this regard, through the establishment of guidelines for determining initial prices and other administrative devices. However, we again call to its attention the dangers inherent in the accumulation of a large backlog of cases with its accompanying irreparable injury to the parties. Moreover, consumers may become directly affected thereby through the reluctance of producers to enter the interstate markets because of the long delay incident to permanent certification. Procedures must be worked out, not only to clear up this docket congestion, but also, to maintain a reasonably clear current docket so that hearings may be had without inordinate delay.[19]

More recently, courts have criticized the Federal Communications Commission for delayed decisionmaking in license renewal proceedings[20] and application proceedings.[21]

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17. 270 U.S. 587 (1926).

18. 376 U.S. 515 (1964). In *Hunt*, the United States Supreme Court upheld an FPC grant of natural gas sale temporary certificates conditioned on the disallowance of gas sale price increases while the decision on granting permanent certificates was pending. In so doing, the Court reversed a decision of the court of appeals invalidating that condition. 376 U.S. at 516-17.

19. 376 U.S. at 526-27 (citation omitted).

20. Fidelity Television, Inc. v. FCC, 502 F.2d 443 (D.C. Cir. 1974). In *Fidelity* the court noted with displeasure that "[t]he history of the administrative proceeding out of which this case arises is one of inordinate delay which has considerably tried this court's patience." 502 F.2d at 444. The FCC delayed eight years in deciding whether Fidelity Television, Inc. should

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Although the courts must have the assistance of the legislative and the executive branches of government to control delayed administrative decisionmaking,[22] they do have an important role in controlling delay and in remedying abuses caused by delayed decisionmaking.[23] The discussion of the judicial role will be divided into sections on jurisdiction and barriers to judicial review, substantive standards, and remedies courts have articulated to control delayed decisionmaking.

II. JURISDICTION

A court must have subject matter jurisdiction to review a claim that administrative decisionmaking has been unduly delayed. Federal court jurisdiction to review claims of undue administrative delay must be based on some other ground than the Administrative Procedure Act.[24] As a result of the *Califano v. Sanders* decision,[25] a discussion of other grounds for federal subject matter jurisdiction of delay claims is required. This section will examine federal question jurisdiction,[26] mandamus,[27] review of agency inaction under a specific statute, and appellate review jurisdiction based on an agency order.

The Administrative Procedure Act does not provide an independent ground for subject matter jurisdiction.[28] In *Sanders*, an applicant for social security disability benefits challenged a Social

be granted a television station license or whether a competing station's license for the same channel should be renewed. 502 F.2d at 444.

21. Lebanon Valley Radio, Inc. v. FCC, 503 F.2d 196 (D.C. Cir. 1974). In this case, the court indicated its irritation with the slow pace of an FCC proceeding on Lebanon Valley Radio, Inc.'s application "for a construction permit for a new broadcast station." 503 F.2d at 197. The proceeding started in March, 1965. In reversing and remanding the case to the FCC, the court stated "[w]e presume the Commission will proceed expeditiously so that this proceeding may reach a final conclusion before it enters its second decade." 503 F.2d at 201.

22. In NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965), Chief Judge Lumbard called for legislative and executive action to reduce delays in National Labor Relations Board [NLRB] back pay cases. He noted that delays in *Mastro Plastics Corp.* were caused by personnel shortages. More generally, he stated that the nature of back pay awards results in a lengthy decisionmaking process. 354 F.2d at 180-81.

23. In Chicago & E. Ill. R.R. v. United States, 375 U.S. 150 (1963), Mr. Justice Black (in a dissenting opinion) charged that the ICC "has used procedural delaying devices to deny barge lines their inherent advantage over railroads" in carriage rates. 375 U.S. at 151. He also noted that courts "have had to protect inland barge lines from Commission action" that denied such advantages. *Id.* at 151.

24. 5 U.S.C. §§ 701-06 (1976); Califano v. Sanders, 430 U.S. 99 (1977).

25. 430 U.S. 99 (1977).

26. 28 U.S.C. § 1331 (1970), *as amended by* Act of Oct. 27, 1976, Pub. L. No. 94-544, 90 Stat. 2721.

27. 28 U.S.C. § 1361 (1970).

28. 430 U.S. 99 (1977).

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Security Administration decision not to reopen his previously denied claim for benefits. He based jurisdiction for his challenge on section 205(g) of the Social Security Act.[29] The United States district court held that it did not have section 205(g) jurisdiction to review that decision.[30] The Court of Appeals for the Seventh Circuit, reversing the district court, found "an independent grant of subject matter jurisdiction without regard to the amount in controversy . . ." in section 10 of the Administrative Procedure Act.[31] In reversing the Court of Appeals for the Seventh Circuit, the United States Supreme Court concluded that the Administrative Procedure Act, section ten,[32] is not an independent ground of federal subject matter jurisdiction.[33] The *Sanders* decision is important in this context because the Administrative Procedure Act provides both substantive standards prohibiting unreasonable delay by administrative agencies[34] and judicial power to remedy unreasonably delayed agency action.[35] Due to the *Sanders* decision, however, subject matter jurisdiction to review unreasonable delay claims must be found on other grounds.[36]

The *Sanders* Court stated that federal question jurisdiction is available, except when prohibited by a specific statute, to review agency action in lieu of the Administrative Procedure Act.[37] As part of the rationale for its holding, the Court interpreted amendments to the federal question jurisdiction statute, section 1331(a),[38] and stated: "The obvious effect of this modification, subject only to

29. 42 U.S.C. § 405(g) (1973).

30. 430 U.S. at 103-04.

31. *Id. quoting from* the opinion of the Court of Appeals for the Seventh Circuit, 522 F.2d 1167, 1169 (7th Cir. 1975).

32. 5 U.S.C. §§ 701-06 (1976).

33. 430 U.S. at 103-04.

34. 5 U.S.C. § 555(b) (1976) states: "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 558(c) (1976) states: "When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings . . . and shall make its decision."

35. 5 U.S.C. § 706 (1976) states: "[T]he reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed. . . ."

36. The *Sanders* Court cited, as a case *contrary* to its holding, Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961). 430 U.S. at 104 n.4. In *Deering Milliken, Inc.* the court reviewed NLRB action, claimed to be unreasonably delayed in violation of the APA standards, and held that the APA provides courts with jurisdiction to review claims of unreasonably delayed agency action.

37. 430 U.S. at 105.

38. Pub. L. No. 94-544, 90 Stat. 2721 (1976). These amendments eliminated the "amount-in-controversy" requirement for suits against the United States government and against agencies, officers, and employees of the United States government. 430 U.S. at 105.

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preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action regardless of whether the APA of its own force may serve as a jurisdictional predicate."[39] Thus courts can review claims that agency action has been unduly delayed under section 1331 jurisdiction unless a specific statute precludes review of the particular type of agency action.[40] Even with a "preclusion-of-review statute," however, a court probably has jurisdiction to determine a constitutional claim that due process of law is violated[41] by unreasonably delayed agency action.[42]

Federal mandamus[43] provides another ground of subject matter jurisdiction for judicial review of unreasonably delayed agency action.[44] In *White v. Mathews,* applicants for social security disability benefits brought a class action to obtain judicial relief from the failure of the Social Security Administration to promptly hear and decide their appeals of the Secretary's decision to deny their applications for benefits.[45] The Court of Appeals for the Second Circuit affirmed the district court's finding that federal mandamus provided jurisdiction for judicial review[46] of the plaintiff's claim that their social security disability hearings were unreasonably delayed.[47] The court of appeals reasoned that mandamus is appropriate be-

39. 430 U.S. at 105.

40. The *Sanders* Court went on to conclude that § 205(g) of the Social Security Act did not provide jurisdiction to review this decision because there was "no final decision of the Secretary made after a hearing." 430 U.S. at 108.

41. See discussion of unduly delayed agency action as a due process violation in text accompanying notes 133-36 *infra.*

42. The *Sanders* Court distinguished, concerning § 205(g) jurisdiction, the cases of Weinberger v. Salfi, 422 U.S. 749 (1975), and Mathews v. Eldridge, 424 U.S. 319 (1976). In both those cases review under § 205(g) was allowed even though there was no decision by the Secretary following a hearing because both cases contained constitutional challenges to the decision of the Social Security Administration which would have been foreclosed by the preclusion of § 1331 jurisdiction contained in § 205(h) (42 U.S.C. § 405(h) (1973)) of the Social Security Act. The *Sanders* Court distinguished those cases and stated that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." 430 U.S. at 109. *Salfi* and *Mathews* "merely adhered to the well established principle that when constitutional questions are in issue, the availability of judicial review is presumed." *Id.*

43. 28 U.S.C. § 1361 (1970).

44. White v. Mathews, 559 F.2d 852 (2d Cir. 1977). *Accord,* Caswell v. Califano, 435 F.Supp. 127 (N.D. Me. 1977); Blakenship v. Mathews, No. C 75-0185 L(A) (W.D. Ky. May 6, 1976); Sturgill v. Mathews, No. 75-288 (E.D. Ky. September 17, 1975); Barnett v. Weinberger, No. 74-270 (D. Vt. May 6, 1975).

45. 559 F.2d at 855.

46. *See* Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 HARV. L. REV. 308 (1967).

47. 559 F.2d at 856.

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cause the Secretary is required by the Social Security Act to conduct hearings within a reasonable time and because the Secretary does not have "discretion to deny a reasonable opportunity for a hearing."[48] Since it affirmed the district court finding that mandamus was appropriate, the court of appeals in *White* declined to decide whether either federal question jurisdiction under section 1361[49] or section 205(g) of the Social Security Act[50] provide jurisdictional grounds for judicial review of claims of unreasonably delayed hearings.[51]

Jurisdiction to review undue delay claims can also be based on statutes establishing an agency's mandate. In *Environmental De-*

48. *Id.* The district court in White v. Mathews, 434 F. Supp. 1252 (D. Conn. 1976), analyzed the mandamus issue as to unreasonably delayed hearings. It stated the three basic requirements of mandamus: " '(1) a clear right in the plaintiff to the relief sought; (2) a plainly denied and preemptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available.' *Lovallo v. Froehlke,* 468 F.2d 340, 343 (2d Cir. 1972), *cert. denied,* 411 U.S.. 918 (1973)." 434 F. Supp. at 1258. Applying that test, the district court found plaintiff had "a clear right to the hearing he seeks. . . ." *Id.* at 1259, *citing* 42 U.S.C. § 405(b) (1973) and 20 C.F.R. § 404.917 (1976). The district court also found the Secretary had a mandatory duty "to perform within a reasonable time and not permit unreasonable delay of administrative action." *Id.* at 1259, *citing* the APA, 5 U.S.C. § 555(b) (1976) and Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 860-61 (4th Cir. 1961). Finally, the court concluded that no other adequate remedy was available because plaintiff had *not* received a prompt hearing, a fact uncontested by the Secretary. *Id.* at 1259. As to the final point, the court in Caswell v. Califano, 435 F. Supp. 127 (N.D. Me. 1977), held, citing the district court opinion in *White,* that the alternative of protesting to the Secretary regarding the lack of promptness in hearing and deciding cases is "unrealistic" because the Secretary "is already acutely aware of the existing backlog and delays prior to hearing." 435 F. Supp. at 132. *Caswell* was also a challenge to delayed Social Security disability hearings on very similar grounds to *White.*

49. 28 U.S.C. § 1361 (1970).

50. 42 U.S.C. § 405(g) (1973). In Caswell v. Califano, 435 F. Supp. 127 (N.D. Me. 1977), the court went on to find, in addition to federal mandamus, that section 405(g) of the Social Security Act provides jurisdiction for a claim that administrative hearings have been unreasonably delayed in violation of plaintiff's statutory and constitutional rights to a hearing. The court used the United States Supreme Court's analysis in Mathews v. Eldridge, 424 U.S. 319 (1976), to conclude that once an application is filed with the Secretary and there has been an initial decision, administrative action is sufficiently final for judicial review and plaintiffs are not required to exhaust administrative remedies to have judicial review of the constitutional claim under section 405(g) jurisdiction. 435 F. Supp. at 132-33.

51. 559 F.2d at 856. In Citizens Ass'n of Georgetown, Inc. v. Washington, 291 A.2d 699 (D.C. Ct. App. 1972), the District of Columbia Court of Appeals held that mandamus is not an appropriate ground of jurisdiction to compel the District of Columbia Zoning Commission to perform quasi-legislative acts claimed to be unduly delayed by a citizen's group interested in rehabilitation of the Georgetown Waterfront area. *Id.* at 705. The court stated that the District of Columbia Administrative Procedure Act required that the action to be reviewed must be a *contested case,* defined as adjudicative action, for the court to have jurisdiction to review the case. *Id.* at 703-05. *Accord,* Environmental Defense Fund, Inc. v. Mayor-Comm'r of D.C. 317 A.2d 515 (D.C. Ct. App. 1974) (*contested case* requirement of D.C. APA precludes review of petitioner's claim that the local government has failed to act to correct an alleged serious "air pollution emergency").

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fense Fund, Inc. v. Hardin,[52] petitioners sued to compel the Secretary of Agriculture to suspend the registration of DDT as a "misbranded economic poison" under the Federal Insecticide, Fungicide, and Rodenticide Act.[53] Prior to filing suit, petitioners had requested, *inter alia,* that the Secretary issue suspension notices, but he did not act on the suspension petition filed by petitioners.[54] The court of appeals framed the issue in the following manner by stating: "This case requires the court to consider under what circumstances there may be a judicial remedy for the failure of an administrative agency to act promptly, and what form that remedy may take."[55] The court of appeals denied the government's motion to dismiss on jurisdictional grounds and "remanded [the case] to the Secretary to provide this court with the record necessary for meaningful appellate review."[56] In deciding that it had jurisdiction to review this claim, the court noted that the availability of mandamus jurisdiction does not preclude "statutory appellate review of the failure to act, when exigent circumstances render it equivalent to a final denial of petitioners' request."[57] The court treated the Secretary's delayed suspension decision as a denial of the requested suspension sufficient to trigger appellate review of that action under the governing statute, the Federal Insecticide, Fungicide, and Rodenticide Act.[58]

Similarly, the Hill-Burton Act[59] provided jurisdiction for a suit against the Secretary of the Department of Health, Education, and Welfare (hereinafter cited as HEW) as well as local and state offi-

52. 428 F.2d 1093 (D.C. Cir. 1970).

53. 7 U.S.C. § 136 (1976).

54. 428 F.2d at 1095-96.

55. *Id.* at 1095.

56. *Id.* at 1096.

57. *Id.* at 1098. The court at 1099 n.29 cites and discusses § 706, APA in support of reviewability of administrative inaction. To the extent that reviewability is premised in § 706 as a jurisdictional ground, *Hardin* is overruled by Califano v. Sanders, 430 U.S. 99 (1977).

58. 428 F.2d at 1099. Judicial review of the validity of orders is provided in 7 U.S.C. § 1356(d) (1964). Similarly, in Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), the petitioners sued to compel issuance of both notices of suspension and notices of cancellation as to certan uses of DDT pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act [FIFRA] which they claimed the Secretary of the Environmental Protection Agency had unreasonably delayed in issuing. *Id.* at 588. The court concluded that it had jurisdiction as to the cancellation issue "to entertain a request for relief in the form of an order directing the Secretary to act in accordance with FIFRA." *Id.* at 593. The court reasoned that it had this mandamus-like power under 7 U.S.C. § 1356(d)(1964) in order to protect its appellate jurisdiction from never being perfected because of indefinite delay by the Secretary in issuing a reviewable order. *Id.* On the issue or reviewability of failures to suspend under FIFRA, *see also* Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528 (D.C. Cir. 1972).

59. 42 U.S.C. § 291 (1970, Supp. V 1975).

cials to compel the opening of a hospital, in *Poirrier v. St. James Parish Police Jury.*[60] Plaintiffs in *Poirrier* sought to compel the Secretary to seek repayment to HEW of Hill-Burton moneys used by state and local officials to construct the hospital.[61] Denying a government motion to dismiss the action, the court concluded that plaintiffs had stated "a claim for judicial review of administrative action—in this case administrative inaction—on the ground that the Secretary has abused the discretion given him by the Hill-Burton Act."[62] In so holding, the court stated that "administrative discretion is not a license for lethargy. . . ."[63] The court went on to conclude that the Secretary must "at some point . . . seek a refund of the Hill-Burton grant unless he makes the affirmative determination under the Act that such action is not appropriate. 42 U.S.C. § 291(i)."[64] Thus the Hill-Burton Act can be used as the basis of a court's jurisdiction to review delayed action by the HEW Secretary.

A court's appellate jurisdiction to review agency orders provides another jurisdictional ground for review of claims that agency action has been unreasonably delayed. However, this is an effective ground only when litigants can afford to wait until the agency issues some order reviewable in the normal appellate process or until the administrative process has run its course completely.[65] When litigants cannot afford to wait until an agency order is issued, they must establish that agency proceedings are sufficiently final for the case to be ripe for judicial review. They must also establish standing to assert an unreasonable delay claim before a reviewing court. Finally, they must either exhaust adequate administrative remedies or prove that those remedies are unavailable or inadequate.

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60. 372 F. Supp. 1021 (E.D. La. 1974), *aff'd*, 531 F.2d 316 (5th Cir. 1976). The hospital remained "vacant and unused" for eighteen months after it was built. 372 F. Supp. at 1022.

61. *Id.*

62. *Id.* at 1023. However, the *Poirrier* court cites and discusses § 706 as supportive of judicial reviewability of administrative inaction at 372 F. Supp. at 1024 n.3. To the extent reviewability is premised in § 706 as a jurisdictional ground, *Poirrier* is overruled by Califano v. Sanders, 430 U.S. 99 (1977).

63. *Id.*

64. *Id.* The *Poirrier* court also denied the government's motion for summary judgment that the Secretary abused his discretion under the Act by neither suing to recover the granted funds nor suing the fund grantees for breach of a contract condition that, if the funds were granted, then the hospital would be constructed and opened. The court finally noted that insufficient personnel, raised as a defense, is not a legally sufficient justification for the Secretary's failure to pursue either course of action. 372 F. Supp. at 1025-26.

65. Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975) (claim of unreasonably delayed agency action on a related issue raised when court of appeals reviewed FCC decision approving AT&T rate increase); Irish v. SEC, 367 F.2d 637 (9th Cir. 1966), *cert. denied*, 386 U.S. 911 (1967) (claim of unduly delayed agency action raised when court of appeals reviewed SEC order revoking petitioner's broker and dealer registration).

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In *Environmental Defense Fund, Inc. v. Hardin,*[66] the court held, in denying a government motion to dismiss, that the Environmental Defense Fund had standing to litigate the claim that the Secretary of Agriculture had unreasonably delayed the action of issuing DDT suspension notices.[67] Similarly, the court rejected the government's claim that because the Secretary had neither granted nor denied the request to issue suspension notices, there was no final order ripe for judicial review.[68] The court found a final order ripe for review by holding that "administrative inaction is the equivalent of an order denying relief."[69] Although the court warned that "relief delayed is not always equivalent to relief denied,"[70] it concluded that "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief."[71] Thus delayed action is ripe for judicial review if the delay both causes irreparable harm as alleged by petitioners in *Hardin* and has the effect of a denial of the requested action.

The requirement of exhaustion of administrative remedies for court review of agency action does not bar judicial review of a claim

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66. 428 F.2d 1093 (D.C. Cir. 1970).

67. *Id.* at 1096-97. *Accord,* Poirrier v. St. James Parish Police Jury, 372 F. Supp. 1021, 1024 (E.D. La. 1974), *aff'd,* 531 F.2d 316 (5th Cir. 1976) (standing of a group of local residents to raise the issue of unduly delayed action by the HEW Secretary).

68. 428 F.2d at 1098.

69. *Id.* at 1099. The court concluded that the case was ripe and therefore action delayed is action denied because: 1) the Secretary's denial of a suspension petition would be sufficiently ripe for review; 2) "[n]o subsequent action can sharpen the controversy arising from a decision by the Secretary that the evidence submitted by petitioners does not compel suspension or cancellation of the registration of DDT"; and 3) "[i]n light of the urgent character of petitioner's claim, and the allegation that delay itself inflicts irreparable injury, the controversy is as ripe for judicial consideration as it can never be." *Id.* at 1098. Regarding the third reason, the court went on to state:

> [T]he suspension power is designed to protect the public from an "imminent hazard", if petitioners are right in their claim that DDT presents a hazard sufficient to warrant suspension, then even a temporary refusal to suspend results in irreparable injury on a massive scale. The controversy over interim relief is ripe for judicial resolution, because the Secretary's inaction results in a final disposition of such rights as the petitioners and the public may have to interim relief.

428 F.2d at 1099.

70. *Id.* at 1099.

71. *Id.* In Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), the Court of Appeals for the District of Columbia Circuit found that the Secretary's inaction in neither granting nor denying petitioner's request to issue notices of cancellation for some uses of DDT was a final order ripe for review because: 1) denying the requested issuance would be reviewable as a final order; 2) indefinitely delaying the decision to issue or not issue notices would prevent judicial review by the court; and 3) "the Secretary's own findings with respect to DDT compel him to issue cancellation notices." 439 F.2d at 592-93.

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that agency action has been unduly delayed. In *Latvian State Cargo & Passenger Steamship Line v. United States,*[72] the court held that a shipowner, whose ship was "requisitioned" by the United States Maritime Commission (on June 1, 1942), eight years prior to suit, could sue in the Court of Claims for just compensation even though the owner failed to exhaust administrative remedies with the Commission. Since the Commission delayed for eight years without explaining why it had not determined or paid compensation for the ship, the court allowed the shipowner to sue directly in the Court of Claims so that its statutory right to compensation would not be denied by Commission delay.[73] In addition, in *Southeastern Oil, Inc. v. United States*[74] plaintiff's suit to recover moneys withheld by the United States government was not barred by failure to exhaust an administrative remedy that was inadequate because of administrative delay.[75]

Although inadequate administrative remedies do not have to be exhausted, an unreasonable delay claim must at least be raised with the administrative agency to preserve that claim for judicial review. In *Gearhart & Otis, Inc. v. SEC,*[76] the Court of Appeals for the District of Columbia Circuit denied the petitioner's claim that an SEC action revoking its broker's registration was unreasonably de-

72. 88 F. Supp. 290 (Ct. Cl. 1950).

73. *Id.* at 292. For an insightful analysis of unreasonably delayed agency action as a defense to an exhaustion of administrative remedies requirement for review of a demonstration permit statute as a prior restraint on first amendment rights *see* Graham, *Action and Exhaustion: The Problem of Denial of Constitutional Defense Because of Failure to Exhaust Remedies,* 44 WASH. L. REV. 547, at 565-76 (1969).

74. 115 F. Supp. 198 (Ct. Cl. 1953).

75. *Id.* at 201. The plaintiffs' suit was not barred according to the court because:

> [t]he plaintiff having appealed to the head of the department and the head of the department having failed for more than two years to indicate whether he would or would not take jurisdiction of the appeal, the plaintiff was justified in regarding the administrative appeal procedure as inadequate and in filing its suit in this court. Having filed its suit, it was not required to abandon that suit and resume the administrative procedure.

Id. Accord, citing principal case, Sunshine Publishing Co. v. Summerfield, 184 F. Supp. 767, *cert. denied,* 349 U.S. 921 (1955). (15 month delay by Post Office in processing second-class permit application by nudist magazine). *Accord,* Caswell v. Califano, 435 F. Supp. 127 (N.D. Me. 1977) as to the inadequacy of administrative remedies when the claim is unduly delayed agency action. The court in *Caswell* reasoned in holding that the exhaustion requirement does not preclude court review of plaintiff's claim under section 405(g) that:

> the very essence of plaintiffs' claim in this case is that finality within the administrative system cannot be achieved because of the violation of their statutory and constitutional right to be heard. It would indeed be ironic if the very delay now under attack, which prevents exhaustion of administrative remedies through no fault of plaintiffs, constitutes a barrier to this Court's jurisdiction under Section 405(g).

Id. at 133.

76. 348 F.2d 798 (D.C. Cir. 1965).

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layed because petitioners failed to raise the claim before the SEC first as required by section 25(a) of the Securities Exchange Act.[77] Similarly, judicial relief to expedite resolution of an agency proceeding that is unreasonably delayed should be requested promptly.[78]

Class actions can be used to obtain judicial review of unreasonable delay claims even though the agency attempts to moot the class representative's case by acting promptly on his or her own claim. In *White v. Mathews,*[79] the Court of Appeals for the Second Circuit rejected the HEW Secretary's claim that the case was moot because the representative plaintiff obtained the hearing he wanted before the class was certified.[80] The court affirmed the district court's certification of the class under rule 23(a)(2)[81] and allowed relation back of the certification to the time when the representative plaintiff's claim of an unreasonably delayed hearing was still live.[82]

In conclusion, judicial review of claims that administrative action is unreasonably delayed can be based on federal question jurisdiction, federal mandamus, specific statutes such as the Federal Insecticide, Fungicide, and Rodenticide Act or the Hill-Burton Act, and on appellate jurisdiction. Finally, ripeness, standing, and exhaustion do not necessarily prevent judicial review when delayed decisionmaking is equivalent to denied action. Mootness can be avoided by using class litigation to ensure review of the delayed action even though the agency promptly acts on the class representative's claim.[83]

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77. *Id.* at 800-01. 15 U.S.C. § 784(a) (1971).

78. Irish v. SEC, 367 F.2d 637 (9th Cir. 1966), *cert. denied,* 386 U.S. 911 (1967). In *Irish,* petitioner challenged SEC revocation of his broker-dealer registration because the revocation proceedings were unreasonably delayed. The court denied his delay claim, in part, because he failed to object to a two year hiatus in the revocation proceedings until the SEC sought to reactivate the proceedings. According to the court, he should have petitioned for judicial relief to compel a prompt determination in the revocation action before the SEC sought to restart the proceedings. 367 F.2d at 638-39.

79. 559 F.2d 852 (2d Cir. 1977).

80. *Id.* at 857. The court rejected the mootness claim, in part, to prevent the agency from avoiding judicial review by providing the requested relief to the named plaintiff when the claim that hearings are unreasonably delayed is still at issue for class members. *Id.; but see* Callier v. Hill, 326 F. Supp. 669 (W.D. Mo. 1970) (the court dismissed as moot the unreasonable delay claim of a named plaintiff representative of an alleged but certified class whose ADC fair hearing was eventually held even though not within the required sixty days from the date of the request).

81. FED. R. CIV. PRO. 23(a)(2) (1972). Certification under rule 23(a)(2) is proper according to the court of appeals because the legal and factual issues are sufficiently similar when "plaintiffs all seek social security disability benfits through the identical administrative process, all have requested hearings after initial adverse rulings, and all have endured long delays before hearing." 559 F.2d at 858.

82. *Id.* at 857.

83. For a discussion of the justiciability of claims that agency action has been delayed

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III. Substantive Standards

A. *Introduction*

Once jurisdiction is established, a court must find a substantive standard both to define "unreasonable delay" and to proscribe agency action that is so delayed. Courts have used the Administrative Procedure Act,[84] specific statutes that mandate the agency's duties, and the constitutional requirements of the due process clause to define and proscribe unreasonably delayed agency action.

Regardless of the standard used, courts have had to define what is a delayed or abnormal time period for a particular administrative agency action. Courts have also had to define when a delay is unreasonable. Courts have then had to ascertain whether the party objecting has been prejudiced by the delayed action. Finally, courts have had to determine what justifications by agencies for delayed action are legally sufficient excuses precluding judicial relief for the party whose claim is delayed.

B. *The Administrative Procedure Act*

Federal administrative agencies are required by the Administrative Procedure Act to complete actions before those agencies "within a reasonable time . . . ."[85] Courts are empowered by the same Act to "compel agency action unlawfully withheld or unreasonably delayed."[86] Litigants must prove that the time period during which the agency has delayed its action is an abnormal or unreasonable one. In *FTC v. J. Weingarten, Inc.*,[87] the Court of Appeals for the Fifth Circuit reversed a district court injunctive order granted to prohibit the Federal Trade Commission from remanding a section five action[88] under the Federal Trade Commission Act against Weingarten to a FTC hearing examiner three years after the proceeding began.[89] Weingarten claimed the remand violated the Administrative Procedure Act's requirement of reasonably timely agency action. The court of appeals rejected that claim and held that unreasonable delay cannot be established by the mere passage of time, even for more than three years. In so holding, the court

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for a variety of reasons, *see* Goldman, *Administrative Delay and Judicial Relief*, 66 Mich. L. Rev. 1423 (1968).

84. 5 U.S.C. §§ 551-706 (1976).
85. 5 U.S.C. §§ 555(b), 558(c) (1976).
86. 5 U.S.C. § 706(1) (1976).
87. 336 F.2d 687 (5th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965).
88. 15 U.S.C. § 45(a)(1) (Supp. V 1975).
89. 336 F.2d at 689-91.

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noted that "[a]bsent proof of the normal time necessary to dispose of a similar proceeding" an unreasonable delay claim cannot be established.[90]

A statutory time limit on agency action can be used to prove the required normal time period.[91] Without such a statutory time limit,[92] statements of agency representatives[93] or measurements of the usual time for a challenged proceeding[94] can also be used to prove the requisite time period.[95] In the absence of any proof of a

90. *Id.* at 691. The *Weingarten* court went on to state "[s]o far as this record shows, this case . . . proceeded at a rate comparable to that normally experienced in cases of this kind . . . ." *Accord,* citing principal case, Kent v. Hardin, 425 F.2d 1346 (5th Cir. 1970) (14-month delay by USDA hearing examiner in issuing decision suspending for 90 days petitioner's license to trade in the commodities futures markets does not violate APA "reasonable dispatch" standard without proof of the normal time for such decisions to be issued).

91. Caswell v. Califano, 435 F. Supp. 127 (N.D. Me. 1977). In Caswell, the court defined a reasonable time for the holding of social security disability hearings to be 90 days from the date the hearing is requested. This definition was based, in part, on 90-day time periods stated in the Social Security Act § 1631(c)(2), 42 U.S.C. § 1383(c)(2) (Supp. V 1975) to decide supplemental security income cases when the presence of a disability is not questioned, and stated in regulations at 45 C.F.R. § 205.10(a)(16) (1976) to decide claims at the state agency under the former aid to the totally disabled program. 435 F. Supp. at 134-35.

92. THE RIBICOFF REPORT, VOL. FOUR, *supra* note 3, at 145-47, recommends that agencies set, publish, and enforce deadlines for the accomplishment in a timely manner of the agencies' business. The report recommends against congressionally determined time limits preferring to require the agencies to set their own time limits. In contrast, Congress has chosen to handle the analogous problem of delayed criminal adjudication by enacting specific time limits for the processing of federal criminal cases in the Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, (codified in 18 U.S.C. §§ 3161-3174 (Supp. V 1975)). Section 3161(b) requires the filing of an information or indictment within thirty days from the date the person is arrested or served with a summons. *See* Levy v. United States, 477 F.2d 916 (6th Cir. 1973). In *Levy,* the Court of Appeals for the Sixth Circuit vacated a district court order granting injunctive relief. The order prevented the United States from disqualifying a food stamp retailer from participating in the food stamp program because of a two-year delay in beginning disqualification proceedings after the alleged disqualifying acts had occurred. The court vacated the order, in part, because the statute did not set time limits on disqualification investigations.

93. White v. Mathews, 559 F.2d 852 (2d Cir. 1977). In *White,* the Court of Appeals for the Second Circuit quoted testimony before Congress of Social Security Administration Commissioner Cardwell in which he indicated that social security disability hearings could be disposed of within 90 days of the request for hearing. *Id.* at 860 n.10. The court used that testimony to support its conclusion that the district court's order imposing a time schedule for the disposition of social security hearings within 120 to 180 days was not inconsistent with congressional intent expressed in the Social Security Act. *Id.* at 860. *Accord,* Caswell v. Califano, 435 F. Supp. 127 (N.D. Me. 1977), in which the district court supported its finding that 90 days from date of request was a reasonable time period for the scheduling of disability hearings, in part, on the testimony of the Secretary that "90 days is the optimum median elapsed time from request to scheduled hearing." 435 F. Supp. at 135.

94. *See* Clark and Merryman, *Measuring the Duration of Judicial and Administrative Proceedings,* 75 MICH. L. REV. 89 (1976); and Doane, *Measuring the Duration of Judicial and Administrative Proceedings: A Comment,* 75 MICH. L. REV. 100 (1976).

95. *See* Caswell v. Califano, 435 F. Supp. 127, 135 (N.D. Me. 1977), in which the Secretary indicates "the optimum median elapsed time" for scheduling of disability hearings

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normal time period, unreasonable delay can also be found when action is not completed because the agency exhibits lethargy, sloth, inertia, or a dilatory attitude.[96] It can also be found when the elapsed time for agency actions is egregiously long.[97]

When a specific agency statute does not set a time limit for the completion of an action or does not otherwise prohibit unreasonably delayed action, the Administrative Procedure Act prohibitions on unreasonable delay can act as a constraint preventing the agency from acting in an untimely manner or indefinitely failing to act.[98]

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is 90 days. If 90 days is the usual time period, the proof requirement can be satisfied with this information. No cases have been found so holding.

96. FTC v. J. Weingarten, Inc., 336 F.2d 687, 691 (5th Cir. 1964); Kent v. Hardin, 425 F.2d 1346 at 1350 (5th Cir. 1970). Both *Kent* and *Weingarten* hold that it is sufficient to prove facts establishing a "dilatory attitude" on the part of the administrative agency or its employees *as an alternative* to proving the normal time period for the type of action that has been delayed. However, in Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972), the Court of Appeals for the Fifth Circuit construed the APA section 706 standard of "unreasonably delayed" administrative action to require proof that the *delayed action was not only untimely but also unreasonable.* The court defined "unreasonable," in part, to include delayed agency action *caused* by "slothfulness, lethargy, inertia or caprice." *Id.* at 748. *Accord,* EEOC v. Exchange Security Bank, 529 F.2d 1214 (5th Cir. 1976). In *Exchange Security,* a three-year and four-month delay by EEOC in investigating a claim of employment discrimination was held to be insufficient to block an EEOC subpoena of employer's records because, inter alia, there was no statutory time limitation and employer did not prove a " 'dilatory attitude on the part of the Commission or its staff.' " *Id.* at 1216-17 (citing *Chromcraft).* In EEOC v. Moore Group, Inc., 416 F. Supp. 1002 (N.D. Ga. 1976), the court held that an eighteen-month unexplained delay by the EEOC in filing suit on behalf of an employee claiming employment discrimination when there was no backlog or other justification constituted conduct illustrating a "dilatory attitude" on the part of the EEOC.

97. Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975). In *Nader,* customers of American Telephone and Telegraph Co., Inc. obtained judicial review of an FCC decision approving rate increases for A.T.&T. In that proceeding, they attacked inaction by the FCC as to two issues. Those issues related to the question of how Western Electric expenses affected the determination of a fair rate of return for A.T.&T. *Id.* at 196-97. The Western Electric issues were first raised with the FCC in 1965. The court questioned whether the FCC would ever complete the Western Electric issues and stated that "we are concerned as are the petitioners, with the Commission's failure to conduct these proceedings within a reasonable time." *Id.* at 205. After reviewing the procedural history of the FCC proceedings, the court noted that it agreed with the customer's that, " '*Nine years should be enough time for any agency to decide almost any issue.* There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all—and the result is a denial of justice.' " *Id.* at 206 [emphasis added] (quoting reply brief of Petitioner at 8-9).

98. EEOC v. Metropolitan Atlanta Girls' Club, Inc., 416 F. Supp. 1006 (N.D. Ga. 1976) (two and one-half years delay by EEOC in filing complaint on behalf of charging party does not violate EEOC statutory mandate which sets no limit on filing complaints but APA section 706 can be utilized to claim that such delay is unreasonable). Hill v. Federal Power Comm'n, 335 F.2d 355 (5th Cir. 1964). In *Hill,* the Court of Appeals for the Fifth Circuit reversed an FPC denial of a rate increase because the Commission's denial was based upon the applicant's failure to satisfy standards *first mentioned* in the FPC denial decision. In so holding, the court stated it was "too late for an agency to declare the standards to be met by it decision holding that they have not been met." *Id.* at 356. According to the court, the requirement of

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Since the Administrative Procedure Act prohibits only *unreasonable* delays, courts examine the reasons for delayed actions to determine if those reasons justify the delay. Delayed action has been held to be unreasonable when it is caused by lethargy, slothfulness, inertia or a dilatory attitude on the part of the agency.[99] However, when delay is caused by insufficient personnel to handle the workload it is not necessarily unreasonable,[100] unless the time period is so long that unfairness would result to the parties delayed.[101] Finally, when delay is caused by the time necessary to determine whether criminal charges related to the administrative proceeding should be filed, that delay is reasonable.[102]

The Administrative Procedure Act requires that delayed action cause prejudice to the party objecting to the delay before judicial relief will be granted.[103] Although the delay itself can be more costly

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the APA that "persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matter of fact and law asserted" has been violated when the development and communication of those standards did not occur prior to the hearing in this case. *Id.* at 355. (The court cited the quoted section as 5 U.S.C.A. § 1004(a) where it appeared in that codification at the time of the case. The same language is codified at 5 U.S.C. § 554(b)(1976)).

99. Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972); EEOC v. Exchange Security Bank, 529 F.2d 1214 (5th Cir. 1976). *See* textual discussion of these two cases, *supra* note 96.

100. Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972) (19 employees in EEOC regional office were greatly overburdened when there were 810 active cases in their office with 100 new cases a month filed which required investigation). *But see* Caswell v. Califano, 435 F. Supp. 127 (D. Me. 1977) (claim of inadequate resources does not justify violation of time limits mandated by Social Security Act). *Accord,* White v. Mathews, 559 F.2d 852 (2d Cir. 1977); *Accord,* as to inadequate staffing, Poirrier v. St. James Parish Police Jury, 372 F. Supp. 1021 (E.D. La. 1974).

101. Nader v. FCC, 520 F.2d 182, 206 (D.C. Cir. 1975); Equal Employment Opportunity Comm'n v. Bell Helicopter Co., 426 F. Supp. 785 (N.D. Tex. 1976) (five to seven-year delay in filing suit after EEOC determined that discrimination claims were justified cannot be held to be reasonable because of overworked staff; the period of time involved is "too long"); *Accord,* as to unreasonableness of seven-year EEOC delay in processing discrimination charge when only explanation is too many cases, EEOC v. American Nat'l Bank, 420 F. Supp. 181 (E.D. Va. 1976).

102. Levy v. United States, 477 F.2d 916 (6th Cir. 1973).

103. Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972). In *Chromcraft,* the court held that section 706 requires a finding of prejudice as a prerequisite to judicial relief. The court based this conclusion on the following language of section 706: " 'In making the determinations, the court shall review the whole record or those parts of it cited by a party, and *due account shall be taken of the rule of prejudicial error.*' " *Id.* at 747 (emphasis added). Because the employer in *Chromcraft* was unable to prove that it was prejudiced by the Commission's delayed action, the court of appeals reversed the district court order "setting aside the Commission's demand for production of evidence for use in an investigation of Title VII charges filed against the Company." *Id.* at 746-47. *Accord,* Irish v. SEC, 367 F.2d 637 (9th Cir. 1966) (no proof of prejudice from delay in revocation proceedings); EEOC v. Exchange Security Bank, 529 F.2d 1214 (5th Cir. 1976) (employer failed to prove it was prejudiced because of the delay); EEOC v. Metropolitan Atlanta Girls Club, Inc., 416 F. Supp. 1006 (N.D. Ga. 1976) (employer not prejudiced by 272-day delay in filing complaint, because it neither disposed

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to the party objecting,[104] courts have required proof of prejudice above and beyond the mere passage of time.[105] Impairment of the complaining party's ability to present its case because witnesses are no longer available, or available witnesses' memories have failed, or relevant records have been destroyed, are all sufficient to constitute prejudice.[106] Prolonged denial of benefits to which the complaining party is entitled is also sufficient.[107] It should not, however, be difficult to establish prejudice the longer an agency delays or if irreparable harm will be caused by such delay even though the above grounds have not been established.

C. *Specific Statutes*

In addition to the Administrative Procedure Act, specific statutes such as FIFRA,[108] the Hill-Burton Act,[109] and the Social Security Act[110] provide substantive standards for reviewing delayed action. For example, in *White v. Mathews*,[111] the Court of Appeals for the Second Circuit upheld a district court order granting equitable relief to plaintiff's class based on the Social Security Act's require-

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of relevant records nor did it seek to withdraw from voluntary adjustment negotiations with EEOC within four months prior to filing of complaint).

104. *See* Federal Power Comm'n v. Hunt, 376 U.S. 515 (1964) and text at note 19 *supra*.

105. Bryant Chucking Grinder Co. v. NLRB, 389 F.2d 565 (2d Cir. 1967). In *Bryant*, the Court held that a fifteen-month delay by the NLRB general counsel in issuing a complaint did not justify the relief requested by the employer because "mere delay in the issuance of the complaint is insufficient ground for the denial of relief." *Id.* at 568.

106. EEOC v. Moore Group, Inc., 416 F. Supp. 1002 (N.D. Ga. 1976) (five year delay between employee's filing charge and EEOC's filing suit; employer destroyed relevant time cards; witnesses were no longer employed by employer and their whereabouts were unknown; prejudice established according to the court); EEOC v. Bell Helicopter Co., 426 F. Supp. 785, 793 (N.D. Tex. 1976) (nine-year delay in which records were destroyed, witnesses became unavailable, and available witnesses' memories faded; the court held prejudice was established). *Accord*, EEOC v. American Nat'l. Bank, 420 F. Supp. 181, 187 (E.D. Va. 1976).

107. Caswell v. Califano, 435 F. Supp. 127 (D. Me. 1977). In *Caswell*, the court noted that since the reversal rate after a hearing is 45% in the New England region "nearly half of plaintiff class is subjected to prolonged deprivation of benefits to which they are legitimately entitled" because of delay. 435 F. Supp. at 137. This delay violates both section 205(b) of the Social Security Act, 42 U.S.C. § 405(b) (Supp. V 1975), and the Administrative Procedure Act, 5 U.S.C. § 555(b) (1976). *Id.* at 134.

108. Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970). *See* text accompanying notes 52-58 *supra*.

109. Poirrier v. St. James Parish Police Jury, 372 F. Supp. 1021 (E.D. La. 1974) *aff'd* 531 F.2d 316 (5th Cir. 1976). *See* text and accompanying notes 60-64 *supra*. In *Poirrier*, the court found plaintiffs had pleaded a claim that the Secretary may have abused his discretion under the Hill-Burton Act when he could have either sued to recover the granted funds or sued the grantees for breach of contract, but did neither without adequate justification. *Id.* at 1024-26.

110. White v. Mathews, 559 F.2d 852 (2nd Cir. 1977); Caswell v. Califano, 435 F. Supp. 127 (D. Me. 1977).

111. Note 93 *supra*.

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ment that social security disability hearings be held within a reasonable time.[112]

The plaintiff class in *White,* certified by the district court, sued to challenge hearing delays that averaged between 195.2 days nationally to 211.8 days in Connecticut for the entry of final decisions by administrative law judges after the date the hearing was requested.[113] The court of appeals affirmed the district court's finding that the Social Security Act was violated by these hearing delays. In so affirming, the court construed section 205(b)[114] of the Act to require a hearing within a reasonable time. Three factors were considered by the court: (1) the disability insurance benefits program's purpose is "to alleviate the immediate and often severe hardship that results from a wage earner's disability."[115] That purpose is not adequately served by excessive delays in scheduling hearings; (2) because fifty per cent of those claimants whose hearings and decisions are delayed are granted benefits after hearing, so the program's purpose is even further ill served;[116] and (3) because pretermination hearings are not required by *Mathews v. Eldridge,*[117] the hardship to the wage earner acknowledged in *Mathews v. Eldridge* "makes it all the more important to expedite adjudication of claims of erroneous termination."[118]

The court of appeals in *White* rejected as a justification for the delays (making them reasonable according to the HEW Secretary) both the heavy backlog caused by the addition of "Black Lung"[119] and "Supplemental Security Income"[120] cases and the efforts of the Secretary to increase staff and resources to reduce that delay.[121] The court also rejected the Secretary's argument that congressional refusal to set specific time limits for hearing dispositions means the Secretary has sole discretion to schedule hearings.[122] The court con-

112. 559 F.2d at 854.

113. White v. Mathews, 434 F.Supp. 1252, 1254 (D. Conn. 1976).

114. 42 U.S.C. § 405(b) (Supp. V 1975).

115. 559 F.2d at 858.

116. *Id.*

117. 424 U.S. 319, 342 (1976).

118. 559 F.2d at 859.

119. Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 901-960 (1970).

120. Title XVI, Supplemental Security Income for the Aged, Blind, and Disabled, 42 U.S.C. §§ 1381-85 (Supp. V 1975).

121. 559 F.2d at 859. *See* Caswell v. Califano, 435 F. Supp. 127 (D. Me. 1977) for a detailed discussion by the court of the problems discussed herein. For one example, the court in *Caswell* noted that the backlog of cases produced by the addition of "Black Lung" and "S.S.I." cases had reached "crisis proportions" with hearing requests having increased nationwide from 36,780 in 1973 to 113,000 as of April, 1975. *Id.* at 130.

122. 559 F.2d at 859-60. The court specifically concluded that Congress' decision "not

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cluded the challenged hearing delays violated the section 205(b) standard of a reasonable opportunity for a hearing.[123]

When a statute is purposefully drafted with delays built in to achieve some legitimate purpose, review of claims of delayed agency action is very limited. In *International Assocation of Machinists and Aerospace Workers v. National Mediation Board,*[124] a labor union battling National Airlines in a "major labor dispute" sued in the district court to force the National Mediation Board to "proffer arbitration" on the grounds that a section of the Railway Labor Act[125] required proferring of arbitration when the Board's dispute mediation was not successful. The union felt mediation had not been successful and wanted to be released from the Act's ban on strikes while mediation is ongoing.[126] The union claimed the failure to proffer arbitration was an unreasonably delayed agency action. The Court of Appeals for the District of Columbia Circuit reversed the district court's grant of the requested order[127] stating that the purpose of the Railway Labor Act's procedures is "to make exhaustion of the Act's remedies an almost interminable process."[128]

The court of appeals reasoned that although "the Mediation Board began its handling of the matter with a delay that ill suits its need for expedition,"[129] there were sufficient objective facts to justify a conclusion that the Board's continuance of mediation was valid and made in good faith.[130] A party harmed by delayed Board action under the Act, however, is not totally without judicial remedy. The court interpreted the Act to provide a limited judicial scrutiny allowing judicial relief "if the Board continues mediation on a basis that is completely and patently arbitrary and for a period that is completely and patently unreasonable. . . ."[131] Thus the mediation process is not one that can never be terminated when there is a claim of unreasonable delay.[132]

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to impose time limits should not be interpreted as an endorsement of the delays." 559 F.2d at 860. A similar argument was raised and rejected in *Caswell*.

123. 559 F.2d at 860. In so holding the court stated "we need not decide whether the delays also violated the Administrative Procedure Act or the Due Process Clause." *Id.* at 861, n.12.

124. 425 F.2d 527 (D.C. Cir. 1970).

125. 45 U.S.C. § 155 (1972).

126. 425 F.2d at 529.

127. *Id.* at 542-43.

128. *Id.* at 534, *citing and quoting* Detroit & Toledo Shore Line Ry. v. United Transp. Union, 396 U.S. 142 (1969).

129. 425 F.2d at 541.

130. *Id.*

131. *Id.* at 537.

132. *Id.* at 537; Delaware & Hudson Ry. v. United Transp. Union, 450 F.2d 603 (D.C.

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D. Due Process of Law

Another substantive standard is the due process clause. Claiming that unduly delayed agency action violates due process, litigants have sought to establish constitutional violations in tardy agency action. This section will examine the earliest federal cases finding delayed agency actions to be violative of due process. It will then discuss current federal cases raising the same issue and federal cases examining whether due process is violated by statutory procedures when those procedures are challenged on undue delay grounds. Finally, it will discuss state cases in which unduly delayed administrative action is claimed to violate due process.

1. Federal cases

Unreasonably delayed agency action was declared to violate the due process clause[133] in 1926 in *Smith v. Illinois Bell Telephone, Co.*[134] In another case in 1941, an employer unsuccessfully claimed that a nine month delay by the NLRB in issuing a complaint after charges were filed violated due process.[135] The court held due process was not violated even though the delay in filing the complaint was requested by the union without consulting the employer.[136]

More recently, the United States Supreme Court's articulation of when procedural due process requires a hearing before deprivation of a property interest can occur provides the foundation for an analysis of unduly delayed agency action as a due process violation.[137] In *Mathews v. Eldridge*,[138] the United States Supreme Court

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Cir. 1971), *cert. denied*, 403 U.S. 911 (1971). In this case, the Court of Appeals for the District of Columbia Circuit reversed the granting of an injunction by the district court blocking a strike by U.T.U. against selected carriers after the Railway Labor Act dispute resolution processes had been compiled with. *Id.* at 604-05. In reversing, the court noted that judicial review under the Railway Labor Act of a claim of unreasonable delay is very limited, citing the principal case. However, it concluded that while the procedures of the Act are " 'almost interminable,' the process is not completely 'interminable.' It does at some time come to an end. Such a time has been reached in the situation before us." *Id.* at 608.

133. Under the fourteenth amendment to the United States Constitution.

134. 270 U.S. 587 (1926). *See* text accompanying note 17 *supra*.

135. Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB, 121 F.2d 235 (3rd Cir. 1941).

136. 121 F.2d at 237. *See also* Irish v. SEC, 367 F.2d 637 (9th Cir. 1966), *cert. denied*, 386 U.S. 911 (1967) (delay in revocation proceeding unsuccessfully claimed to violate due process).

137. In a number of cases in the last nine years, the United States Supreme Court has determined when a pre-deprivation hearing is required by procedural due process. Some of these cases are: (1) Goldberg v. Kelly, 397 U.S. 254 (1970) (procedural due process requires notice and an opportunity to be heard *before* welfare benefits can be terminated); (2) Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (procedural due process requires notice and opportunity to be heard *before* wages can be garnished; (3) Fuentes v. Shevin, 407 U.S. 67 (1972) (procedural due process requires notice and an opportunity to be heard *before* property can be seized under a replevin statute); (4) Mitchell v. W. T. Grant Co., 416

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held that fifth amendment due process did not require an opportunity for a hearing prior to termination of social security benefits.

The Supreme Court's due process analysis in *Mathews* is a good starting point for discussion. The Court noted that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[139] The Court articulated three factors to be analyzed in determining what process is due. These factors are the private interest at stake, the government interest involved, and, most importantly for this analysis, "the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards . . . ."[140] This last factor, the risk of erroneous deprivation, is also present when benefit entitlement hearings are unduly delayed by administrative agencies.

The *Mathews* Court acknowledged that "the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process."[141] Similarly, the Court stated that "as we recognized last term in *Fusari v. Steinberg* . . . 'the possible length of wrongful deprivation of . . . benefits . . . is an important factor in assessing the impact of official action on the private interests.' "[142] Applying that analysis to the social security disability benefit determination process, the Court found that "[i]n view of the torpidity of this administrative review process . . . and the typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recip-

U.S. 600 (1974) (Louisiana sequestration statute allowing seizure of personal property before hearing does not violate procedural due process *because immediate post seizure hearing* opportunity provided); (5) North Ga. Finishing Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (procedural due process requires notice and opportunity to be heard *before* seizure of bank account under garnishment statute); (6) Goss v. Lopez, 419 U.S. 565 (1975) (procedural due process violated by statute allowing school suspensions without a hearing either *before* or *immediately after* the student is suspended); and (7) Mathews v. Eldridge, 424 U.S. 319 (1976) (procedural due process does not require notice and opportunity to be heard *prior* to termination of Social Security disability benefits). For a discussion of timing of hearings and the creditor and debtor interests involved in private self-help repossession and subsequent hearings, *see* Alexander, *Cutting the Gordian Knot: State Action and Self Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 913-31 (1975).

138. 424 U.S. 319 (1976).

139. *Id.* at 333, *quoting* Armstrong v. Manzo, 380 U.S. 549, 552 (1965).

140. *Id.* at 335. For a discussion of techniques to reduce the likelihood of erroneous determinations by social welfare agencies, see Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

141. 424 U.S. at 341.

142. *Id.*

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ient may be significant."[143] This is particularly true because the time period between the termination of benefits and the post-hearing decision averages one year.[144]

In *Aiello v. Wilmington,*[145] a plaintiff fireman claimed that a 98-day delay between the date of his suspension by the Wilmington fire department and the date of the administrative hearing on his suspension violated due process because he was deprived of his salary for the 98 days and because he was ordered, he claimed, by the fire department not to take another job during that time period.[146] Most of the delay occurred because the department waited for the disposition of criminal charges arising out of the same incident. When these charges were dismissed,[147] another month's delay was arguably caused by a request of plaintiff's lawyer for a continuance.[148] Plaintiff was found by the hearing board to have violated good behavior regulations of the department, and was penalized by having his salary withheld for the 98-day time period.[149]

The *Aiello* court, deciding whether to grant or deny cross-motions for summary judgment, framed the issue to be "whether due process delayed is due process denied."[150] The court went on to ask two questions:

> (1) can a mere delay in providing a hearing rise to the level of a constitutional deprivation if the hearing, when finally provided, otherwise procedurally satisfied the requirements of due process; and (2) if so, on the facts of this case, did the delay of 98 days from the time of Aiello's suspension until the hearing impermissibly deny Aiello his right to due process?[151]

The court discussed the applicability of *Mathews v. Eldridge,*[152] *Goss v. Lopez,*[153] and *Fusari v. Steinberg*[154] to the question of when

143. *Id.* at 342.
144. *Id.*
145. 426 F. Supp. 1272 (D. Del. 1976).
146. *Id.* at 1290.
147. *Id.* at 1275-76.
148. *Id.* at 1279. This reason was suggested by defendant city.
149. *Id.* at 1280.
150. *Id.* at 1290.
151. *Id.*
152. Note 138 *supra.*
153. 419 U.S. 565 (1975). The *Aiello* Court noted the timeliness requirement articulated in Goss v. Lopez, which was the "student was entitled to the necessary notice and rudimentary hearing *'as soon as practicable'* following the actual suspension." [emphasis added] [citation omitted]. 426 F. Supp. at 1290.
154. 419 U.S. 379 (1975). The *Aiello* Court quoted, as indicative of the Supreme Court's view of the relationship of delay to procedural due process, the following language from *Fusari:* "Prompt and adequate administrative review provides an opportunity for considera-

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"temporal delay" is a denial of due process.[155] The court stated that although those cases decided "the constitutionality *per se* of suspension or termination procedures, their language and reasoning support the conclusion that timing nonetheless is an important element of due process."[156]

The *Aiello* court went on to articulate a set of factors to be analyzed when determining if a delayed hearing constitutes a constitutional deprivation. These factors include:

> (1) the actual duration of delay between the suspension and hearing; (2) the degree of potential deprivation resulting from the suspension; (3) the adequacy of administrative review procedures utilized prior to the suspension; (4) the adequacy of the post suspension hearing with concomitant time constraints and restraints; and (5) the extent to which the individual suspended contributed to or otherwise knowingly and willingly acquiesced in the delay.[157]

Because there were numerous unresolved factual questions, the *Aiello* court denied a motion for summary judgment and held that this issue had to be resolved by the trier of fact. However, the court did indicate that "some of these issues are sufficient to demonstrate that serious deprivations of Aiello's due process rights may have been implicated in the chronology of his suspension and trial board hearing."[158]

The likelihood of serious deprivation because of delay does not always entitle a party to judicial relief on due process grounds at least when the assessment and collection of taxes is involved. In *Bob Jones University v. Simon*,[159] petitioner sought injunctive relief to prevent the Internal Revenue Service from "revoking or threatening to revoke petitioner's tax-exempt status . . . . Petitioner alleged

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tion and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process." Id. at 389 (*quoted in* 426 F. Supp. at 1290).

155. 426 F. Supp. at 1290.

156. *Id.* at 1291. The court further discussed timing and due process. It stated:

> Nor should such a conclusion be surprising since the basic right which the courts have been seeking to protect is the right to a hearing "as soon as it is practicable" after a suspension has occurred, when legitimate considerations have excused the failure to provide a hearing prior to the actual suspension. However, this timing component of procedural due process, where a suspension precedes a hearing, must of necessity be flexible.

Id. at 1291.

157. *Id.*

158. *Id.* The court indicated its perception of the harm caused Aiello by delayed action when it stated: "In Aiello's case the degree of deprivation was extremely high; he was for all intent and purposes deprived of what was his present source of income and possibly precluded from pursuing alternate sources of employment." 426 F. Supp. at 1291, n. 41.

159. 416 U.S. 725 (1974).

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irreparable injury in the form of substantial federal income tax liability and the loss of contributions."[160] It claimed the revocation violated, *inter alia*, its due process rights.[161] The United States Supreme Court acknowledged that petitioner would be harmed by such a revocation[162] and that petitioner could lose charitable contributions because of the time required for "postrevocation" judicial review.[163]

Nevertheless the Supreme Court disallowed petitioner's argument that precluding pre-enforcement judicial review of the revocation violates due process because petitioner will be irreparably injured while pursuing alternate review mechanisms.[164] The Court's rejection of pre-enforcement review was based on section 7421(a) of the Anti-Injunction Act[165] as interpreted,[166] which prohibits federal courts from enjoining the assessment or collection of taxes absent a showing that the proposed action "is plainly without a legal basis."[167] The Court reasoned that the absence of pre-enforcement review does not deny petitioners due process because of the availability of post-enforcement review[168] and because of "the powerful governmental interests in protecting the administration of the tax system from premature judicial interference . . . ."[169]

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160. *Id.* at 735-36. Petitioner sought judicial relief to "enjoin the service from revoking a ruling letter declaring that petitioner qualifies for tax-exempt status and from withdrawing advance assurance to donors that contributions to petitioner will constitute charitable deductions under Code § 170(c)(2), 26 U.S.C. § 170(c)(2). . . ." *Id.* at 727.

161. 416 U.S. at 736.

162. The Court stated:

> Because of the importance of inclusion in the Cumulative List, revocation of a § 501(c)(3) ruling letter and consequent removal from the Cumulative List is likely to result in serious damage to a charitable organization. Revocation not only threatens the flow of contributions, it also subjects the affected organization to FICA and FUTA taxes and, assuming that the organization has taxable income and does not qualify as tax exempt under another subsection of § 501, to federal income tax.

Id. at 730.

163. 416 U.S. at 731. The Court stated: "[b]ut these postrevocation avenues of review take substantial time, during which the organization is certain to lose contributions from those donors whose gifts are contingent on entitlement to charitable deductions under § 170(c)(2)." *Id.*

164. *Id.* at 746.

165. 26 U.S.C. § 7421(a) (1970).

166. 416 U.S. at 745, *citing* Enochs v. William Packing & Navigation Co., Inc., 370 U.S. 1, 6-7 (1962).

167. 416 U.S. at 745.

168. *Id.* at 746. The Court noted that "[t]hese review procedures offer petitioner a full, albeit delayed, opportunity to litigate the legality of the Service's revocation of tax exempt status and withdrawal of advance assurance of deductibility." *Id.*

169. 416 U.S. at 747. The court emphasized the dilemma posed for petitioner by delayed review. It stated:

> We do not say that these avenues of review are the best that can be devised. They

Since the Supreme Court in *Bob Jones University* analyzed the due process consequences when judicial review is delayed to the detriment of the party objecting to the delayed review, the Court's holding is not directly applicable to the due process analysis of delayed agency action. However, the Court's holding is applicable by analogy and, in any case, the holding is very important because it is the most recent United States Supreme Court case directly discussing whether due process protects litigants from harm caused by delayed governmental action.

The failure of a local administrative agency both to promptly decide whether to grant or deny a requested park permit and to promptly inform the applicant of its decision was held to violate due process in *Slate v. McFetridge.*[170] In *Slate,* the Court of Appeals for the Seventh Circuit decided that a sixteen-day delay by a local park district agency in responding to an applicant's request for a permit to use a park for a political rally in Chicago during the 1968 Democratic Party nominating convention violated the due process clause.[171] "[T]heir prompt resolution of Slate's permit request was a dictate of due process in the protection of First Amendment rights."[172] The conclusion of the court of appeals was based on the

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> present serious problems of delay, during which the flow of donations to an organization will be impaired and in some cases perhaps even terminated. . . . And although the congressional restriction to post-enforcement review may place an organization claiming tax-exempt status in a precarious financial position, the problems presented do not rise to the level of constitutional infirmities. . . .

Id. The court went on to acknowledge the difficult position petitioner is placed in, absent pre-enforcement judicial review. It stated: "In holding that § 7421(a) blocks the present suit, we are not unaware that Congress has imposed an especially harsh regime on § 501(c)(3) organizations threatened with loss of tax-exempt status and with withdrawal of advance assurance of deductibility of contributions." 416 U.S. at 749.

170. 484 F.2d 1169 (7th Cir. 1973).

171. *Id.* at 1177.

172. *Id.* at 1176. In so holding, the Court was very critical of the local agency's inaction. It stated:

> Over two weeks later—sixteen days to be exact—Barry called Slate to arrange a meeting. We can only guess at what caused this delay. Whatever the reasons were, however, they cannot justify the tardy response on any view of the facts. Barry testified that the estimate of "100,000 people" caused him immediately to view the communication as a request for Soldier Field, the only facility in his opinion, capable of filling this need. Assuming this to be true and justifiable, it was a foregone conclusion on July 13 or shortly thereafter that plaintiffs *would not be getting* a permit. Barry's *failure immediately to notify plaintiffs of this fact* as the hours remaining before Convention time ticked away was a bald abuse of authority and an outright violation of the mandate in *Freedman* of prompt administrative action. If, moreover, Barry did not in fact view the July 13 letter to be a single-facility request—an inference easily drawn in light of plaintiffs' expressed willingness in the July 13 letter to compromise on a rally site—Barry's delay is equally if not more reprehensible. A licensing authority is granted a reasonable period to rule on a permit application largely because time is

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United States Supreme Court's requirement of a prompt administrative determination in the film censorship prior restraint cases of *Freedman v. Maryland,*[173] *Teitel Film Corp. v. Cusack,*[174] and *Interstate Circuit, Inc. v. Dallas.*[175]

The application of due process principles to claims that agency action has been unconstitutionally delayed is much more complicated when other interests are present. For example, due process of law does not compel the speeding up of agency action when to do so would violate other constitutionally protected interests such as the right to counsel[176] or the right of an agency to proceed effectively to resolve issues of general applicability by rulemaking.[177] Analogously, due process does not prohibit the judicial disallowance of proof of claims in a bankruptcy proceeding when proof of those claims would unreasonably delay those proceedings.[178]

> needed for negotiations and the making of arrangements for and with the applicant. Surely this purpose is not served by allowing the official well over two weeks to sit on his hands. [emphasis added.]

Id. at 1177.

173. 380 U.S. 51 (1965).

174. 390 U.S. 139 (1968).

175. 390 U.S. 676 (1968); all three cases are cited at 484 F.2d at 1174-75.

176. *See* Great Lakes Screw Corp. v. NLRB, 409 F.2d 375 (7th Cir. 1969). In this case, the Court of Appeals for the Seventh Circuit set aside an NLRB order excluding from the hearing the attorney for Great Lakes Screw Corporation for conduct alleged by the NLRB to be contemptuous, but not found to be so by the court. The court held that the exclusion of the attorney violated both the APA, section 555(b), and administrative due process. *Id.* at 377-382. In so holding and remanding the case to the NLRB for a new hearing, the court of appeals stated:

> [t]he delay, expense and inconvenience inherent in setting aside the order of the Board and remanding the case to it for a new hearing is regrettable; however, "the avoidance of delay cannot justify a tolerance of violations of rights fundamental in the administration of justice." Inland Steel v. National Labor Relations Board, 7 Cir., 109 F.2d 9, 21 (1940) citing Montgomery Ward & Co. v. National Labor Relations Board, 8 Cir., 103 F.2d 147, 156 (1939).

Id. at 381.

177. Buckeye Cablevision, Inc. v. United States, 438 F.2d 948 (6th Cir. 1971). In *Buckeye Cablevision, Inc.*, the Court of Appeals for the Sixth Circuit upheld a decision of the FCC to stop "all major market CATV hearings in progress . . ." until the FCC completed rulemaking proceedings in which it would develop "new industry-wide CATV rules." *Id.* at 950. Buckeye Cablevision, Inc. claimed that the FCC's delay in acting on its request to expand Cable Service in Toledo, Ohio, which request was stopped because of the rulemaking proceedings, violated due process of law. The court of appeals rejected that claim. The court stated that although the two and one-half year time period "since the petition was originally filed is, of course, an unfortunate delay. . . ." *Id.* at 948, the freeze order which produced the delay did not violate due process because the order "was necessary and reasonable in light of the initiation of the rulemaking proceedings to provide an effective procedure consistent with due process for the making of the new rules. . . ." *Id.* at 954.

178. *In re* Cartridge Television, Inc., 535 F.2d 1388 (2d Cir. 1976). In this case, a bankruptcy judge did not allow stockholders of a bankrupt corporation to prove contingent and unliquidated stock fraud claims against that corporation because proof of those claims

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When a specific statutory time period is provided for administrative action, a due process deprivation can be found when the agency fails to act within the statutory time period.[179] However, when agency procedures are mandated by statute, but no time limits are set for the completion of those procedures, it is much more difficult to find a due process violation.[180] Similarly, when compliance with statutory procedures by an applicant for welfare benefits causes delayed receipt of benefits by that applicant because of court congestion, due process is not violated.[181]

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would have unduly delayed completion of bankruptcy proceedings. The bankruptcy judge's action was premised on section 57(d) of the Bankruptcy Act, 11 U.S.C. § 93(d) (1970). On appeal, the Court of Appeals for the Second Circuit rejected the stockholders' claim that Fifth Amendment due process is violated if they are not allowed to prove their claims in bankruptcy because then "the defrauded shareholders would be left completely unpaid. . . ." 535 F.2d at 1391.

179. Johnson v. Greer, 477 F. 2d 101 (5th Cir. 1973). In *Johnson*, the Court of Appeals for the Fifth Circuit affirmed a trial court judgment finding that detention of plaintiff by defendant psychiatric facility administrator under a Texas "emergency protective custody" statute was unlawful because plaintiff was detained for five days under a 24-hour warrant. The court upheld the trial jury's conclusion that the administrative delay in obtaining a second warrant authorizing detention of plaintiff for a further time period "became unreasonable at a time 24 hours after his initial authorization to retain Johnson had expired (*i.e.*, after Johnson had been detained for a total of 48 hours)." *Id.* at 104. The court noted that under Texas law defendant was required to either release plaintiff or seek a warrant for an additional time period. The defendant is, however, allowed a "reasonable period of time to obtain the necessary court order. . . ." *Id.* The court of appeals concluded that the unlawful detention of plaintiff constituted a deprivation of plaintiff's liberty interest under due process of law sufficient for a Section 1983 civil rights action. *Id.*

180. *See* Independent Voters of Illinois v. Kusper, 490 F.2d 1126 (7th Cir. 1974). In *Kusper*, plaintiffs challenged, *inter alia* on due process grounds, the refusal of defendant local agency to provide access to candidate petitions and voter records so that plaintiffs could determine if sufficient signatures of validly registered voters had been placed on a local election nominating petition. *Id.* at 1127-28. The Court of Appeals for the Seventh Circuit held that the local agency's delay of two days in supplying copies of petitions requested by plaintiffs was not "unreasonable administrative delay" sufficient to violate Fourteenth Amendment due process even though a court order issued shortly thereafter required disclosure of the petitions to plaintiff. *Id.* at 1131, n.8. *See* United States v. One (1) 1972 Wood, 19 foot Custom Boat, FL 8443AY, 501 F.2d 1327 (5th Cir. 1974). In this case, the owner of a rented boat (seized pursuant to 19 U.S.C. §§ 1602-1604 (1970) because the boat was used by a renter to "transport marijuana") challenged on due process grounds a ten-month delay between seizure of the boat and institution by the United States Attorney of forfeiture proceedings. The owner's claim was denied because, as required by statute, "The customs investigation and administrative processing was not completed . . ." until eight months after the seizure. 501 F.2d at 1329. The additional two month delay was caused both by the owner's bargaining with the government over the amount of the charges for storage and by the time required for the United States Attorney to bring the forfeiture proceedings. Because the statutory procedures were followed by the customs officers and the United States Attorney, no due process violation was established by the delay. *Id.*

181. Rasmussen v. Toia, 420 F. Supp. 757 (S.D.N.Y. 1976) (statutory procedures requiring court adjudication as a precondition to receipt of welfare benefits do not violate due process because rationally related to legitimate legislative objective even though court congestion results in five-months to one-year delay in obtaining required order of adjudication).

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2. State cases

State courts have also found due process violations when litigants are harmed by delayed administrative agency action. In *In Re Arndt*[182] a driver whose license was suspended for six months for a refusal to take a breathalyzer test when he was arrested for driving while intoxicated challenged the suspension on due process grounds because the administrative agency involved delayed its suspension decision for two years and eight months after the driver was arrested.[183] The New Jersey Supreme Court vacated the suspension because the proceedings were unduly delayed without any explanation; in violation of a statutory requirement that required suspension proceedings to be completed within a reasonable time, and in violation of fundamental fairness required by procedural due process.[184] Other New Jersey cases have required proof of prejudice to the party claiming delay for delayed agency action to constitute a due process violation.[185] These cases also require the party claiming delay to demand prompt action[186] and not to acquiesce in the delayed action.[187]

Similarly, in *Commonwealth v. Rinck*[188] the Pennsylvania Commonwealth Court reversed a six month suspension of a real estate broker's license and ordered reinstatement of the license by the state real estate agency. The suspension occurred when the real estate commission reopened a misrepresentation complaint against the broker two and one-half years after the original complaint was dismissed following a hearing on the charges. The broker's license

182. 67 N.J. 432, 341 A.2d 596 (1975).

183. 67 N.J. at 434-35, 341 A.2d at 597. The court noted that approximately 21 months passed between the arrest and the suspension hearing and another eleven months passed between the hearing and the issuance of the suspension decision. *Id.*

184. 67 N.J. at 434-37, 341 A.2d at 597-98, citing *inter alia,* Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926).

185. Ararat Inc. v. State Dep't of Environmental Protection, 132 N.J. Super. 305, 333 A.2d 548 (1975) (no due process violation from four-year and five-month delay by local agency in notifying plaintiff of approval of right of third party to exercise eminent domain rights on plaintiff's land because no prejudice to plaintiff established as a result of delayed notice); *In Re* Garber, 141 N.J. Super. 87, 357 A.2d 297 (1976) (no due process violation established by 12-month delay in issuing license suspension decision after hearing because driver, who retained his license pending the decision, did not prove that prejudice resulted from the delay).

186. Ararat Inc. v. State Dep't of Environmental Protection, 132 N.J. Super. 305, 333 A.2d 548 (1975); *In Re* Garber, 141 N.J. Super. 87, 357 A.2d 297 (1976).

187. Appeal of Darcy, 114 N.J. Super. 454, 277 A.2d 226 (1971) (two-year delay in holding Civil Service Commission hearing in which discharged employee challenged employment termination was reasonable because no prejudice proved as a result of delay *and* because delayed action was due to a desire on the employee's part to wait until criminal charges against him were resolved).

188. 355 A.2d 858 (1976).

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was suspended after a second hearing on the same charges.[189] In reversing, the court noted that it is unfair and a due process violation to reopen a closed administrative action at a later point in time. The court reasoned that this is because "our citizens are entitled to know that at some definite time administrative proceedings involving their rights and responsibilities have been concluded."[190] Additionally, the longer action is delayed the more witnesses' memories fade. Therefore, the court concluded that the commission could not reopen the case originally decided in the broker's favor.[191]

Pennsylvania courts require proof of prejudice to the party claiming delay before the courts will find that delayed agency action constitutes a due process violation.[192] Either impairment of the party's ability to present its case[193] or of the party's livelihood[194] can constitute such prejudice.

The New York Court of Appeals recognized that delayed administrative agency action can constitute a due process violation in *O'Keefe v. Murphy.*[195] In *O'Keefe,* two police officers, charged with criminal conduct were dismissed from the New York City Police Department after they refused to waive immunity and testify before a grand jury.[196] Both officers were reinstated in 1969 following a

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189. *Id.* at 858-90.

190. *Id.* at 890.

191. *Id.*

192. State Dental Council & Examining Bd. v. Pollock, 457 Pa. 264, 318 A.2d 910 (1974). In *Pollock,* appellant dentist challenged a 30-day suspension of his license because, among other grounds, due process was violated when the suspension hearing was held three years after the occurrence of the events which triggered the suspension action. The court noted that most of the delay was caused because the complaining witness, another dentist, waited until he dissolved a business partnership with appellant before complaining to the state board. The court rejected appellant's claim holding that a due process violation was not established because appellant failed to prove that he was prejudiced by the delay. The court indicated one type of prejudice to be "e.g., dead or missing witnesses or stale recollections by witnesses. . . ." 318 A.2d at 916. The court went on to note: "While we do not condone a delay of this magnitude, we cannot say that appellant was denied due process because he has alleged no harm that resulted therefrom." *Id.*

193. State Dental Council & Examining Bd. v. Pollack, 457 Pa. at 274, 318 A.2d 916. *See* note 192, *supra.*

194. State Bd. of Funeral Directors v. Cieslak, 355 A.2d 590 (1976). In this case, appellant funeral director contested a six-month suspension of his professional license claiming that due process was violated by a two and one-half year delay by the board in issuing its suspension decision after the hearing was held. *Id.* at 591-92. The court rejected his claim, holding that he must prove that the delay prejudiced him before the court would find a due process deprivation. The court noted that he was not able to prove such prejudice because the suspension was stayed pending appeal allowing him to continue to practice his profession. *Id.* at 593.

195. 38 N.Y.2d 563, 345 N.E.2d 292, 381 N.Y.S.2d 821 (1976).

196. One officer was dismissed in July, 1965; the other in November, 1966. 345 N.E.2d at 293; 38 N.Y.2d at 567; 381 N.Y.S.2d at 823.

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United States Supreme Court decision[197] holding that public employees could not be fired for not waiving immunity. Both officers were disciplined after subsequent hearings in 1970.[198]

The officers claimed that the delay in adjudicating their case violated due process. The New York Court of Appeals noted that:

> [N]evertheless, the due process aspect of delay in the administrative context presents an important issue. The controlling standard is one of "fairness and justice" . . . . Thus, whenever a delay in an administrative adjudication significantly or deliberately interferes with a party's capacity to prepare or to present his case, the right to due process has been violated.[199]

However, the court rejected the officers' claim concluding that the delay in their case was not unreasonable and stating four reasons for its conclusion. These were: (1) "The major part of the delay was attributable to the operation of pre-*Gardner* law and the post-*Gardner* delay was not so extensive as to obstruct appellants' defenses";[200] (2) the police officers had not proved that the delay impaired their ability to present their case; (3) the Police Commissioner did not wilfully delay their proceedings; and (4) the officers waited to protest the delayed action until July, 1970. Therefore, because the delay was not unreasonable, and because the court would not set specific time limits for agency action, "the delays did not deprive the appellants of fairness and justice mandated by due process."[201]

197. Gardner v. Broderick, 392 U.S. 273 (1968).

198. 345 N.E.2d at 293; 38 N.Y.2d at 567; 381 N.Y.S.2d at 821.

199. 345 N.E.2d at 294; 38 N.Y.2d at 568; 381 N.Y.S.2d at 823.

200. *Id.*

201. *Id. Accord,* as to proof of prejudice being required to establish a due process violation when agency action is unreasonably delayed, Minnick v. Melton, 53 App. Div. 2d 1016, 386 N.Y.S.2d 488 (1976). In *Minnick,* petitioner driver claimed that a seventeen-month delay between his arrest for driving while intoxicated and the scheduling of a Department of Motor Vehicles hearing to determine if his driver's license should be revoked for refusing to take a breathalyzer test violated his speedy trial rights. The driver sought to enjoin the Department of Motor Vehicles Commissioner from holding the hearing. The Appellate Division of the Supreme Court reversed the trial court's determination that speedy trial rights were violated because the revocation proceeding is non-criminal. The court went on to note that the delayed action violated neither the statute, which sets no time limits for the holding of hearings, nor due process because the driver has neither had his license suspended nor established that his defense was impaired because a witness was unavailable. 53 App. Div. 2d at 1017, 386 N.Y.S.2d at 489. *See also In re* Scornavacca v. Leary, 38 N.Y.2d 583, 345 N.E. 2d 304, 381 N.Y.S.2d 833 (1976). In this case, the New York Court of Appeals reversed a trial court order granting a hearing to determine if delays in adjudicating charges against police officers for violating department rules entitled the officers to back pay when the officers' pay was suspended while the charges were pending. The court held that since the officers could not receive back pay (because they were convicted of the department charges) it would reverse the order directing a hearing and order the dismissal of the complaint. 381 N.Y.S.2d at 834-35, 38 N.Y.2d at 585, 345 N.E.2d at 305.

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State courts in Massachusetts,[202] California,[203] and Wisconsin[204] have also discussed the applicability of procedural due process to claims of unreasonably delayed agency action.

2. Justiciability

The complexity of the due process analysis herein is illustrated by analogy in *Ad Hoc Committee on Judicial Administration v. Commonwealth of Massachusetts.*[205] This case was a section 1983[206] civil rights class action brought to remedy an alleged failure by the State of Massachusetts "to provide 'court facilities, judges, clerical personnel and other facilities,'"[207] which failure plaintiffs claimed violated their rights to speedy disposition of civil cases under fourteenth amendment due process and to speedy disposition of criminal cases under the sixth amendment. The plaintiffs sought federal court relief to compel Massachusetts to alleviate court congestion and related delayed disposition of criminal and civil cases by adding more judicial personnel and facilities.[208]

The Court of Appeals for the First Circuit affirmed the trial court's dismissal of plaintiffs' section 1983 claim on grounds that the claim was not justiciable. In so affirming, the court of appeals noted that it would be difficult and maybe even impossible for a federal court to formulate "timetables of general application" for all cases so as to have a yardstick to measure "the maximum permissible delay."[209] The difficulty is because of the numerous variables involved, because different cases may require different time periods, and because different geographical areas may also require different

202. Boston Gas Co. v. Dep't of Pub. Utilities, 329 N.E.2d 712 (Mass. 1975) (procedural due process violated when a ratemaking agency unduly delayed administrative action on proposed interim rate increases while suspending the effect of those interim rates for the maximum statutory time period, without holding a hearing or at least explaining the suspension to the Company under circumstances that the interim rate increases were clearly justified).

203. Peradotto v. State Personnel Bd., 25 Cal. App. 3d 30, 101 Cal. Rptr. 595 (1972) (three-day delay in commencement of employment termination hearing did not violate due process rights of terminated employee; because, although material witness was unavailable on first of three days in which delay occurred, discharged employee knew in advance that witness would be unavailable and failed to depose witness before he left).

204. Will v. Dep't of Health & Social Services of Wisconsin, 171 N.W.2d 378 (Wis. 1970) (due process of law does not compel holding of AFDC hearings within 60 days of request; because no proof of how long the delays were in holding hearings, and because no proof of prejudice to plaintiffs from delayed hearings, court cannot find an unreasonable delay.

205. 488 F.2d 1241 (1st Cir. 1973), *cert. denied,* 416 U.S. 986 (1974).

206. 42 U.S.C. § 1983 (1974).

207. 488 F.2d at 1243.

208. *Id.* at 1242-43.

209. *Id.* at 1244. *See* Posner, *An Economic Approach to Legal Procedure and Judicial Administration,* 2 J. LEGAL STUDIES 399, 445-46 (1973).

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time periods.[210] The court also noted that it is difficult to prove when delay is caused by court congestion and not by, for example, "discovery, negotiation, investigation, strategy, and, of course counsel's engagements on other matters, or even procrastination."[211] Finally, the court of appeals observed that there may not be a judicial remedy for a variety of reasons: (1) adding more judges and resources will not necessarily reduce delays in bringing cases to trial; (2) a court would have to also consider all of the relevant scheduling, management, and procedural devices to fashion an appropriate remedy; and (3) it is undesirable for a federal court to intrude into state judicial administration.[212]

Those state and federal courts that have analyzed whether delayed agency action violates due process have done so from the perspective of a single case. The problems raised in *Ad Hoc Committee on Judicial Administration* are directly applicable when a court is asked to fashion relief to stop system-wide delayed administrative agency action.[213] For example, judicially imposed timetables create similar problems whether the imposition is on an administrative agency or on a court.

In conclusion, courts have used substantive standards to both define and proscribe unreasonably delayed agency actions. These standards include the Administrative Procedure Act, specific statutory mandates and due process of law.

IV. Remedies

Once a court has determined that it has jurisdiction to decide a claim of unreasonably delayed agency action, and once a court has found a substantive standard to define and proscribe it, the court must determine what remedy it will fashion to alleviate the harm caused by the delay. Courts have chosen a variety of remedies, including imposing timetables on agency action with sanctions for non-compliance, remanding to the agency with instructions to decide the claim promptly, vacating the decision of the agency because of delay in reaching the decision, and dismissing the agency's action on the merits because of agency delay in prosecuting that action. This section will examine the judicial remedies created to solve the problems caused by unduly delayed agency action.

Courts will impose strict timetables on administrative agencies

210. 488 F.2d at 1244.

211. *Id.* at 1245.

212. *Id.* at 1245-46.

213. *See* discussion of judicial remedies for systemwide delay in the Social Security Administration in notes and text accompanying notes 214-223 *infra*.

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to remedy system-wide delays in adjudicating claims for entitlement to social welfare benefits. In an unprecedented and far-reaching decision the Court of Appeals for the Second Circuit in *White v. Mathews*[214] affirmed an order of the district court imposing timetables on the Social Security Administration requiring the completion of disability hearings within a specific number of days. The court of appeals *also* affirmed the district court's order requiring as a sanction for non-compliance, the payment of benefits to applicants whose disability hearings were not completed within the mandated time periods.[215]

White was a class action brought by applicants for social security disability benefits who requested hearings to contest the denial or termination of their benefits. The plaintiff class claimed that the Social Security Administration had unreasonably delayed both the scheduling of their hearings and the issuing of decisions after hearings. The district court in Connecticut found "that the average time between request for a hearing before an administrative law judge and entry of his final decision for the period of January, 1973 through March, 1975 was 211.8 days for residents of Connecticut and 195.2 days nationally."[216]

The district court in *White* found that these time periods violated the Social Security Act as well as the Administrative Procedure Act and due process of law. That court ordered a timetable within which hearing decisions must be completed after a hearing is requested and was set up as follows: (1) 180 days, effective July 1, 1977; (2) 150 days, effective December 31, 1977; and (3) 120 days, effective July 1, 1978. The district court also ordered the Social Security Administration to pay benefits to those people whose decisions are delayed beyond the deadline of the timetable "from the expiration of the allotted time period until a decision is rendered."[217]

In affirming the imposition of such a timetable, the court of appeals concluded that the delays in scheduling hearings and issuing hearing decisions violated the Social Security Act.[218] Also, in

214. 559 F.2d 852 (2d Cir. 1977).

215. *Id.* at 854. The drastic and unprecedented nature of this decision is illustrated by congressional action in raising Social Security taxes to ensure that the Social Security Insurance Fund does not go bankrupt.

216. 434 F. Supp. 1252 (D. Conn. 1976); quoting from the court of appeals opinion, 559 F.2d at 855.

217. 434 F. Supp. at 1252 *aff'd*, 559 F.2d 852 (2d Cir. 1977), quoting from the court of appeals decision, 559 F.2d at 855. Payment of benefits would stop for those applicants receiving unfavorable decisions as of the date of decision.

218. 559 F.2d at 860. The court declined to determine whether those delays constituted violations of due process of law or the Administrative Procedure Act. *Id.* at 860 n. 10.

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affirming the district court order requiring payment of benefits, the court of appeals stated that neither section 405(i)[219] nor section 405(q)[220] of the Social Security Act precludes such payments under "a federal court's exercise of its remedial power when it finds that the Secretary has violated the statute," even though Congress has not specifically allowed payment of benefits in this situation.[221]

The court of appeals also reasoned that this order serves the congressional purpose for the disability insurance benefits program that persons who are entitled to disability insurance benefits not be forced, as class representative White was, to seek welfare benefits. The order was a reasonable exercise of the court's equitable power in light of the following considerations: (1) the timetable which triggers payment of benefits to unduly delayed claimants allowed a one year grace period before the 180 day deadline was mandatory; (2) the payment order was prospective only and precluded payment when a delayed decision was the result of action by the claimant or the need for further medical evidence; and (3) payment terminated with a right of recoupment if the claimant lost the appeal. The court concluded that "we find no error in this equitable solution to the difficult problem of balancing administrative difficulties and wage earners' needs."[222]

Other courts have also imposed timetables, but not monetary sanctions, to speed up delayed administrative action by the Social Security Administration,[223] the Federal Communications Commission,[224] and state agencies determining unemployment compensa-

219. 42 U.S.C. § 405(i) (1973).

220. 42 U.S.C. § 405(g) (1973).

221. 559 F.2d at 860-61.

222. *Id.* at 860.

223. Caswell v. Califano, 435 F. Supp. 127 (N.D. Me. 1977). In *Caswell,* the court imposed timetables on the Social Security Administration to solve the same type of hearing delay problem challenged in White v. Mathews. The *Caswell* timetables were to reduce *scheduling delays* to no more than 120 days from the date of the request by December 31, 1977, and to no more than 90 days by July 1, 1978, with mandatory compliance reports every three months until the time limits have been achieved. The court imposed no time limits on the issuing of decisions so that the Secretary can "give greater attention to the more complex cases." *Id.* at 136. The *Caswell* court rejected imposition of monetary sanctions to ensure administrative resources would be used to clear up hearing delays. *Id.* The court cited unpublished decisions of two other district courts: (1) Blankenship v. Mathews, Civ. No. C 75-0185 L(A) (W.D. Ky. May 6, 1976) in which similar timetables were ordered, but in which monetary sanctions were rejected; and (2) Barnett v. Weinberger, *sub. nom.* Barnett v. Mathews, Civ. No. 74-720 (D. Vt. opinions of May 5, 1975, January 13, 1976, and February 2, 1976) in which both timetables and monetary sanctions were ordered. 435 F. Supp. at 129, 136.

224. Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975). In *Nader,* the Court of Appeals for the District of Columbia Circuit ordered the FCC to "within thirty days . . . submit a schedule for the orderly, expeditious resolution of the lawfulness of the . . ." delayed issues including "the Commission's proposed timetable for disposing . . . ." of those issues delayed

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tion claims.[225] The imposition of timetables is indicative of judicial exasperation with system-wide delay by agencies determining entitlement to social welfare benefits because the consequences of delayed action are drastic for eligible persons who are forced to wait. The imposition of timetables also promises to be more effective in relieving system-wide delay than the more traditional remedy of remanding to the agency which is utilized to protect an individual litigant from the harmful consequences of a delayed determination in his or her case.

Courts have also awarded damages to remedy the harm caused parties because of delayed administrative action. Damages have been awarded under the legal theories of false imprisonment,[226] unlawful detention,[227] and deprivation of constitutionally protected rights.[228] However, the Federal Tort Claims Act cannot be used to award damages because of unreasonably delayed agency action.[229]

Courts have also dismissed on the merits lawsuits brought by administrative agencies to enforce the agencies' statutory mandate when those lawsuits were unreasonably delayed to the prejudice of

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ten years. *Id.* at 207. Both the schedule and any changes to it will require court approval. The FCC will be required to stick to the schedule and will have to justify "material failures to comply." *Id.* The court "shall retain jurisdiction solely to ensure compliance." *Id.*

225. Phillips v. Dawson, 393 F. Supp. 360 (W.D. Ky. 1975) (timetables imposed by court for determination of eligibility and for payment of unemployment compensation benefits by Kentucky state agency responsible for unemployment compensation determination); Wilkinson v. Abrams, 4 Pa. Legis. Serv. Rev. ¶ 6087 (1976) (court approved timetable required Pennsylvania state agency to decide appeals of unemployment compensation denial determinations at the "Board of Appeals" level within specified number of days); Howar v. Smith, 4 Pa. Legis. Serv. Rev. ¶ 6087 (1976) (court approved similar timetable for decisions by referees of initial appeals of denial of unemployment compensation benefits within specified number of days).

226. Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968) (wrongful detention by sheriff of prisoner for nine months after criminal charges were dismissed constituted a claim for relief under state false imprisonment law and a section 1983 civil rights claim because the sheriff had a statutory duty "to ascertain the authority upon which a prisoner is confined." This he failed to perform. *Id.* at 796).

227. Johnson v. Greer, 477 F.2d 101 (5th Cir. 1973) (psychiatric facility administrator wrongfully delayed, in violation of a statutory duty, obtaining an additional warrant authorizing his continued detention of plaintiff).

228. Slate v. McFetridge, 484 F.2d 1169 (7th Cir. 1973) (court of appeals remanded for determination of damages, after holding that trial court should have directed a verdict for plaintiffs, finding constitutional deprivation of plaintiffs' rights when local agency failed to promptly decide, and failed to promptly notify plaintiffs of its decision on plaintiffs' request for a park permit).

229. J.H. Rutter Rex Mfg. Co. v. United States, 515 F.2d 97 (5th Cir. 1975) *cert. denied*, 424 U.S. 954 (1976) (discretionary function exception to Federal Tort Claims Act, 28 U.S.C. § 2671 (1976), bars plaintiff's suit under that Act. Plaintiff claimed damages were caused by the NLRB's unreasonably delayed action in ensuring that plaintiff comply with an order reinstating employees wrongfully discharged for labor union activity and in computing the back pay owed to those discharged employees).

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the party sued by the agencies. This remedy has been applied by courts to litigation brought by the Equal Employment Opportunity Commission[230] and the Subversive Activities Control Board.[231] State courts have similarly remedied delayed administrative adjudication by reversing orders of administrative agencies suspending a real estate broker's professional license,[232] and the driver's license of a vehicle operator.[233] Federal courts, however, have been reluctant to remedy delayed administrative adjudication by dismissing the agency proceeding either because the court felt that the appropriate remedy was remanding the proceeding to the agency for further action[234] or because the party claiming delay had foreclosed a dismissal with prejudice by negotiating another favorable disposition with the agency.[235]

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230. EEOC v. Moore Group, Inc., 416 F. Supp. 1002 (N.D. Ga. 1976) (employer's motion to dismiss EEOC complaint granted because delays in bringing lawsuit charging employment discrimination by employer prejudiced employer and therefore violated the Administrative Procedure Act); *Accord,* EEOC v. American Nat'l. Bank, 420 F. Supp. 181 (E.D. Va. 1976) (employer's motion for summary judgment dismissing EEOC complaint granted on grounds of laches and violation of Administrative Procedure Act, § 706); EEOC v. Bell Helicoptor-Co., 426 F. Supp. 785 (N.D. Tex. 1976) (employer's motion to dismiss EEOC complaint granted, in part, because EEOC delays violated Administrative Procedure Act).

231. Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Bd., 380 U.S. 513 (1965). In this case, the United States Supreme Court vacated a judgment affirming an order compelling registration by petitioner as a communist front organization because of the staleness of the record. The Court noted that the last hearings on the matter were held in 1954 and the registration claim was based on occurrences happening predominantly before 1940.

232. Commonwealth v. Rinck, 24 Pa. Commw. Ct. 386, 355 A.2d 858 (1976). The court in *Rinck* reversed the suspension ordered by the agency and required the agency to reinstate the broker's license. *Id.*

233. *In re* Arndt, 67 N.J. 432, 341 A.2d 596 (1975). The New Jersey Supreme Court vacated the suspension order in this case.

234. FTC v. Texaco, Inc., 381 U.S. 739 (1965), vacating an order of the Court of Appeals for the District of Columbia Circuit in Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964). The court of appeals had ordered a remand to the FTC to dismiss an antitrust complaint against Texaco, Inc. when administrative proceedings brought by the FTC lasted 12 years without the FTC being able to develop a case against Texaco. *Id.* at 763. The United States Supreme Court, after vacating the court of appeals order, remanded the case to the FTC for further proceedings.

235. Brandenfels v. Day, 316 F.2d 375 (D.C. Cir. 1963). In this case, the Court of Appeals for the District of Columbia Circuit noted that the unreasonable delay prohibitions of the Administrative Procedure Act could, under proper circumstances, provide jurisdiction for a court to compel an agency (here, the Post Office) to dismiss a case with prejudice. In this case, however, petitioner bargained with the Post Office to dismiss without prejudice a fraud claim against him as the only alternative to a dismissal with prejudice, either of which was to his benefit. Although the Post Office had to terminate the initial fraud proceedings because of procedural irregularities, it could have reinstated the case against petitioner. Because of the bargain struck between the parties, the court would not compel the Post Office to dismiss the fraud case with prejudice. *Id.* at 379-80.

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Courts have also remedied unreasonably delayed agency action by ordering the agency to enter the delayed decision. Courts have based this type of relief on either mandamus[236] or the Administrative Procedure Act.[237] More commonly, however, courts have remedied delayed agency action by remanding the case to the agency with instructions to decide the case promptly but without necessarily dictating what the agency's decision should be on the merits. Courts have provided this kind of relief to remedy delayed action by the Federal Communications Commission,[238] the National Labor Relations Board,[239] the Environmental Protection Agency,[240] the

236. ICC v. Humboldt S.S. Co., 224 U.S. 474 (1912) (mandamus lies to compel an agency to take jurisdiction to regulate ship and railroad carriage rates in Alaska, to investigate, and to decide those cases because it has a "ministerial duty" to act under its governing statute. In *Humboldt*, the delayed decision the court ordered the agency to implement was the initial question of whether the ICC had jurisdiction to regulate ship and railroad carriage rates in the territory of Alaska for transportation of persons and property in interstate commerce). *But see* Mesa Microwave, Inc. v. FCC, 262 F.2d 723 (D.C. Cir. 1958) (six-month delay by FCC in processing CATV license applications while a "general inquiry" into the entire subject of licensing was pending is not such a delay as to justify the requested writ of mandamus).

237. Arrow Transp. Co. v. United States, 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd sub nom.*, Kansas Corp. Comm'n v. Arrow Transp. Co., 361 U.S. 353 (1960) (APA compels court order requiring ICC to set lawful barge traffic rates to relieve barge company from harm caused by presently effective discriminatory rates). *See also* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (court compelled EPA Secretary to issue cancellation notices as to some uses of DDT pursuant to statutory authority of FIFRA; petitioners claimed failure to issue notices violated § 706 of the Administrative Procedure Act and they requested an order analogous to mandamus requiring the issuance of those notices).

238. American Broadcasting Co. v. FCC, 191 F.2d 492 (D.C. Cir. 1951) (ten-year delay by FCC in determining allocation of radio frequencies challenged by American Broadcasting Co. because of interference with its "clear channel" license caused by the assigning of a temporary frequency during the ten-year time period to another applicant for a radio station license; court finds this constitutes agency inaction which it will remedy by remanding case to FCC and ordering it to promptly decide what frequency to assign to that applicant, radio station KOB); *see* Associated Press v. FCC, 448 F.2d 1095 (D.C. Cir. 1971) (remand with a court order to the agency to decide the case promptly is the proper remedy when prejudicial delay is established (which it was not here in an FCC proceeding over AT&T requests for increases in telpak rates) rather than the court deciding the merits of the claim itself).

239. Templeton v. Dixie Color Printing Co., 444 F.2d 1064 (5th Cir. 1971), *cert. denied*, 400 U.S. 868 (1970) (court of appeals vacated district court order requiring National Labor Relations Board to hold a decertification election petitioned by certain employees which election the Board had unlawfully delayed for three years; court of appeals remanded case to NLRB ordering it to determine promptly whether grounds for a decertification election exist) *see also* Clark's Gamble Corp. v. NLRB, 407 F.2d 199 (6th Cir. 1969) (National Labor Relations Board ordered by court to determine, because of the passage of time since the original collective bargaining representative petition was filed, to what extent the same employees who originally petitioned are still working there. The determination to be made before requiring the employer to bargain with the originally selected collective bargaining representative of its employees.

240. Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528 (D.C. Cir. 1972) (Environmental Defense Fund challenged refusal by Environmental Protection Agency to suspend uses of aldrin and dieldrin pursuant to FIFRA; court of appeals remanded case to the agency

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United States Department of Agriculture,[241] the Federal Power Commission,[242] and the Interstate Commerce Commission.[243]

Courts have used their traditional equitable powers to compel an agency, by way of a mandatory injunction, to hold a hearing.[244] Courts have also indicated that they will enjoin agency action when a party proves that it will suffer irreparable harm as a result of delay.[245] Courts will also enjoin the holding of further hearings by a

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to review its decision anew based on information provided by its "scientific advisory committee"); *accord,* in part, Environmental Defense Fund, Inc. v. Ruckleshaus, 439 F.2d 584 (D.C. Cir. 1971) (Environmental Defense Fund challenge to refusal of Environmental Protection Agency to issue notices of suspension for some uses of DDT under FIFRA; court remands case to agency for a new decision on whether to suspend DDT registration because agency did not sufficiently state a basis for the initial refusal to suspend).

241. Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (Environmental Defense Fund challenge to refusal of Secretary of Agriculture to suspend DDT registration under FIFRA; court remands case, in part, to Secretary to present to the court a record of his administrative action, "*either for a fresh determination on the question of suspension, or for a statement of reasons for his silent* but effective refusal to suspend the registration of DDT," *Id.* at 1100, so that court may properly review the basis of the Secretary's decision).

242. Minneapolis Gas Co. v. FPC, 294 F.2d 212 (D.C. Cir. 1961) (court of appeals ordered Federal Power Commission to enter a decision in a rate determination case in which it had held a hearing, heard evidence, made an initial determination, but then ended the rate proceeding without issuing a formal decision; *court indicated Commission could reopen the case but was not required to do so*).

243. North Am. Van Lines, Inc. v. United States, 412 F. Supp. 782 (N.D. Ind. 1976) (court remands to Interstate Commerce Commission ordering it to promptly decide whether to grant or deny applications for certificates of convenience and necessity filed by a national moving company, which decisions the Commission had unlawfully delayed because of a "flagging procedure" it used).

244. Atlantic & Gulf Stevedores, Inc. v. Donovan, 274 F.2d 794 (5th Cir. 1960) (court of appeals reversed the district court order and remanded holding that the APA empowers a court to order the Deputy Commissioner under the Longshoreman's Compensation Act to hold a statutorily required (by the Act itself) hearing to determine (which the Commissioner refused to do) whether an employer's liability under that Act to an injured employee was satisfied by the employer's voluntary payment of benefits to the injured worker).

245. M.G. Davis & Co., Inc. v. Cohen, 369 F.2d 360 (2d Cir. 1963). In this case, the Court of Appeals for the Second Circuit affirmed the district court's granting of a motion for summary judgment filed by the Securities Exchange Commission in a case in which a broker-dealer sought to withdraw its SEC registration and sought injunctive relief preventing the Commission from investigating it. *Id.* at 361. The court of appeals noted that injunctive relief was not available because the broker-dealer had failed to prove that it would be irreparably harmed by delays in the administrative process if the injunction was not granted. *Id.* at 363. The court rejected the broker-dealers assertions that the cost of fighting the investigations was sufficient to constitute irreparable harm. *Id.* at 364. *Accord,* Gulf Oil Corp. v. FPC, 128 F. Supp. 446 (D.D.C. 1955), *aff'd,* 230 F.2d 40 (D.C. Cir.), *cert. denied,* 351 U.S. 973 (1956) (injunctive relief could be granted to remedy irreparable harm caused by delayed administrative action; however, no proof of irreparable harm established by plaintiff oil company seeking to enjoin operation of temporary rates for sales of natural gas arguably not within the jurisdiction of Commission to set even though there were heavy penalties for noncompliance with temporary rates; therefore injunctive relief denied); International Waste Controls, Inc. v. SEC, 362 F. Supp. 117 (S.D.N.Y. 1973) (claimed economic loss caused by delays in adminis-

trial examiner pursuant to agency remand in a proceeding previously litigated when the effect of the remand is to unduly delay those proceedings at great cost in money and time to the objecting party and when the remanded proceeding would cover issues fully developed at prior hearings.[246] Similarly, courts will modify the orders of administrative agencies when parties who are the subject of the orders are prejudiced by the order because of delay by the agency in conducting the proceedings which lead to the order.[247]

Prejudicial delay by an administrative agency does not always entitle the party harmed to relief from that prejudice when the grant of relief would cause harm to others whose interests are equally entitled to protection. In *National Labor Relations Board v. J. H. Rutter-Rex Manufacturing Co., Inc.*[248] the United States Supreme Court reversed the modification by the Court of Appeals for the

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trative proceedings to investigate securities law violations by petitioner was insufficient to satisfy irreparable harm requirement for granting of injunctive relief halting investigation); *accord*, Petroleum Explorations, Inc. v. Public Serv. Comm'n, 304 U.S. 209 (1938) (cost of producing evidence at a hearing on natural gas rates which petitioner was ordered to do by state public utilities commission is insufficient to satisfy irreparable injury requirement for the granting of injunctive relief prohibiting commission's holding of hearing).

246. Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961) (Court of Appeals for the Fourth Circuit upheld, in part, granting by district court of injunction prohibiting National Labor Relations Board regional director from conducting hearings pursuant to Board remand as to issues previously litigated concerning an unfair labor practice charge; remand violates Administrative Procedure Act requirement that agencies conduct their business with reasonable dispatch, will further delay ultimate decision, and will result in additional costs of time and money to the objecting party, Deering Milliken, Inc.); a casenote extensively discussing this case is Note, *Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings*, 72 YALE L. J. 574 (1963).

247. NLRB v. Superior Fireproof Door & Sash Co., Inc., 289 F.2d 713 (2d Cir. 1961) (court modified NLRB order which found employer had failed to bargain in good faith with the collective bargaining representative of its employees; modification allowed because NLRB took "1,015 days" to complete these proceedings when the average time to complete such proceedings was "475 days"; modification consisted of ordering NLRB to hold a new certification election to determine if the previously selected union representative is still desired by the employees. *Id.* at 723-24); *see* C.E. Niehoff & Co. v. FTC, 241 F.2d 37 (7th Cir. 1957) (court of appeals modified effective date of an FTC cease and desist order entered against petitioner to stop antitrust law violations; modification changed effective date of the order from immediately to when ordered by the court on its own or at the request of the FTC; basis of modification is prejudice to petitioners because its competitors, not yet affected by similar cease and desist orders but under FTC investigation, will favorably compete with petitioner on prices and drive it out of business before the FTC can issue cease and desist orders against those competitors. *Id.* at 42-43); *see* Kennedy v. San Francisco-Oakland Newspaper Guild, 430 F.2d 317 (9th Cir. 1970) (court of appeals modified a district court injunctive order which prevented picketing of striking employees at a newspaper related in corporate status to the newspaper against whom the strike was called; the modification allowed was terminating the injunction as to that newspaper, but not as to two unrelated newspapers, because the NLRB delayed in determining an unfair labor practice claim arising out of the strike, and the duration of the injunction was tied to the determination of that claim).

248. 396 U.S. 258 (1969).

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Fifth Circuit[249] of a Board back pay award against an employer reducing the amounts due to employees of the company because the Board unduly delayed in the "specification process" for determining who was entitled to what amount of back pay.[250] In reversing and thus reinstating the full amount of back pay awarded to the employees by the Board, the court noted that "wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrongdoing employer."[251] Similar protection is provided holders of FCC licenses whose renewal application decisions are unduly delayed by the Commission.[252]

The traditional equitable defense of laches and state statutes of limitations do not bind the United States government in its pub-

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249. J.H. Rutter-Rex Mfg. Co. v. NLRB, 399 F.2d 356 (5th Cir. 1968).

250. 396 U.S. at 261-62. The *Rutter-Rex Mfg. Co.* case is one of the longest this writer has seen. The labor dispute which triggered the litigation commenced with the selection of a bargaining representative by employees of Rutter-Rex Mfg. Co. in January, 1954. A strike followed in April, 1954 and lasted for one year. In 1956, the NLRB found that the employer had unlawfully refused to bargain with the representative and ordered reinstatement of terminated employees and back pay for those employees. 496 U.S. at 259-60. The Court of Appeals for the Fifth Circuit upheld the NLRB and enforced the reinstatement and back pay order in NLRB v. J.H. Rutter-Rex Mfg. Co., 245 F.2d 594 (5th Cir. 1957) cited and discussed in 396 U.S. at 260. Two subsequent court of appeals opinions discussed the employer's delay claim in NLRB v. J.H. Rutter-Rex Mfg. Co., 305 F.2d 242 (5th Cir. 1962) and in J.H. Rutter-Rex Mfg. Co. v. NLRB, 399 F.2d 356 (5th Cir. 1968), cited and discussed in 396 U.S. at 261-62. The latter opinion was reversed by the U.S. Supreme Court in the instant case. What may be the final challenge of this company to the back pay award is contained in J. H. Rutter Rex Mfg. Co. v. United States, 515 F.2d 97 (5th Cir. 1975) discussed in note 229 *supra.*

251. 396 U.S. at 264. The court went on to note that "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Id.* at 369, *citing* NLRB v. Electric Cleaner Co., 315 U.S. 685, 689 (1942) and NLRB v. Katz, 369 U.S. 736, 748 n. 16 (1962); *see* NLRB v. Pool Mfg. Co., 339 U.S. 577, 582 (1950) (NLRB delay in seeking enforcement of a cease and desist order does not require a court to preclude enforcement of that order); NLRB v. Staub Cleaners, Inc., 418 F.2d 1086 (2d Cir. 1969), *cert. denied,* 397 U.S. 1038 (1970) (NLRB delay in both issuing and seeking enforcement of, *inter alia,* a refusal to bargain order is not sufficient grounds for a court to deny enforcement of the order); *But see* International Union, United Automobile, Aerospace, & Agricultural Implement Workers v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971) (NLRB request for interim relief requiring employer to collectively bargain with recognized representative pending completion of the litigation denied by court of appeals, because NLRB delayed six years in adjudicating case, and because union representatives decided to make dispute a test case as to "make whole relief").

252. Committee for Open Media v. FCC, 543 F.2d 861 (D.C. Cir. 1976). In this case, Committee for Open Media challenged the extension of a television station's broadcasting license (under section 307(d) of the Federal Communications Act, 47 U.S.C. § 307(d) (1962)) beyond three years from the date of its renewal application, filed in 1970, without the filing of a new renewal application. In rejecting this challenge because section 307(d) of the Act automatically extends broadcasting licenses until the Commission makes its renewal decision, the Court of Appeals for the District of Columbia Circuit stated that the purpose of the extension provision is "to protect licensees from harm associated with delays in agency action on requests for license renewals." 543 F.2d at 866-67.

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lic capacity.[253] Thus, parties harmed by federal administrative agencies that have unreasonably delayed action in the agency's public capacity cannot use either laches or state statutes of limitations.[254] As previously discussed, the federal Administrative Procedure Act provides an adequate statutory substitute for the protection afforded in the defenses of laches or state statutes of limitations.[255] However, a state administrative agency in Washington was held to be subject to the defense of equitable estoppel when it delayed ten years in determining the tax assessment of a foreign corporation.[256]

In conclusion, courts have remedied the harm caused by delayed agency action in a variety of ways. Courts have imposed timetables on agencies with monetary sanctions for non-compliance, have awarded damages, have dismissed agency lawsuits and administrative orders, have ordered the entry of a decision, have remanded with instructions to promptly decide the case, and have ordered equitable relief except when other parties would be prejudiced or when equitable doctrines do not apply. Judicial imposition of these remedies shows that parties faced with delayed administrative agency action have a variety of devices to either compel agency action or to be relieved from the prejudice caused them by the delay.

V. Conclusion

This article has examined jurisdiction, substantive standards, and remedies for delayed administrative action. A final observation is that administrative delay cannot be solved by the courts alone. Both the agencies themselves, and the legislature, whether Congress

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253. United States v. Summerlin, 310 U.S. 414, 416 (1940). The United States Supreme Court in this case stated that "it is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." *Id.*, *citing* United States v. Thompson, 98 U.S. 486 (1879); *see* cases cited therein.

254. As to laches, *see* Chromcraft Corp. v. EEOC, 465 F.2d 745, 746 n.2 (5th Cir. 1972), *citing* United States v. Summerlin, 310 U.S. 414 (1940) (laches not raisable as a defense to challenge unreasonably delayed action by EEOC but § 706 of Administrative Procedure Act can be used for same challenge); as to state statute of limitations, *see* EEOC v. Griffin Wheel Co., 511 F.2d 456 (5th Cir. 1975) (state statute of limitations does not apply to EEOC when seeking injunctive relief in public capacity but does apply to EEOC precluding suit when EEOC is seeking back pay, an essentially private action).

255. *See* Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972) and explanatory parenthetical in note 254 *supra*.

256. Conversions & Surveys, Inc., v. Wash. Dept. of Revenue, 11 Wash. App. 127, 521 P.2d 1203 (1974) (appellate court reversed and remanded for a new trial on the issue of equitable estoppel concluding that if taxpayer could prove on retrial that because of ten-year delay, which agency conceded was unreasonable, its ability to establish that it was not liable for taxes assessed was impaired in that "key personnel" no longer worked for taxpayer, then state would be estopped from collecting assessed tax).

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or a state legislative body, through statutory standards and adequate appropriations, must assist in the resolution of the problem of administrative delay to insure that justice is timely served.

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