

# COMPELLING COMPLIANCE: DISCIPLINING AGENCIES THROUGH STATUTORY DEADLINES

MARISA SYLVESTER\*

## INTRODUCTION

On May 11, 2005, drivers across America received an unpleasant surprise: an impending trip to the Department of Motor Vehicles.<sup>1</sup> As part of a broader package of anti-terrorism legislation, Congress enacted the REAL ID Act, establishing federal requirements for drivers' licenses and other identification cards.<sup>2</sup> The Act prohibited federal agencies from accepting noncompliant documents "for any official purpose,"<sup>3</sup> including "entering nuclear power plants," and, more relevant to the average American, boarding commercial aircrafts.<sup>4</sup> Thus, many Americans resigned themselves to a trip to the DMV before the statutory deadline, "3 years after the date of the enactment of this division," or May 11, 2008, when federal agencies would no longer accept noncompliant IDs.<sup>5</sup>

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1. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (REAL ID Act), Pub. L. No. 109-13 tit. II § 202, 119 Stat. 312 (2005).

2. *Id.*

3. *Id.* § 202(a)(1).

4. *Id.* § 202(3).

5. *Id.* § 202(a)(1).

As the initial deadline's fifteenth anniversary approaches, anyone putting off their REAL ID update need not worry: The newest enforcement deadline for the Act is May 7, 2025.<sup>6</sup> Almost 20 years after the Act's passage and 17 years after its initial compliance deadline, federal agencies will follow its mandate and begin to reject non-compliant IDs. This example may seem extreme or anomalous. But it instead illustrates a troublingly common practice in administrative law: agencies consistently failing to meet Congressional deadlines for administrative action. In fact, data collected between 1995 and 2014 shows that federal agencies failed to meet over 1,400 of these statutory deadlines.<sup>7</sup> This amounts to over half of the congressionally imposed<sup>8</sup> deadlines issued during this period.<sup>9</sup>

These delays matter. Agency delay "saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for [regulated] parties."<sup>10</sup> It also deprives citizens of important public health and safety benefits flowing from regulatory regimes. For instance, the REAL ID Act's stated purpose included "establish[ing] and *rapidly* implement[ing]"<sup>11</sup> federal identification standards after recommendations and findings from the National Commission on Terrorist Attacks' 9/11 report.<sup>12</sup> Noting that almost all of the 9/11 hijackers fraudulently obtained U.S. identification documents, the Commission recommended that the federal government set nationwide standards to minimize the risk of other

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6. *DHS Announces Extension of REAL ID Full Enforcement Deadline*, U.S. DEP'T OF HOMELAND SEC. (Dec. 5, 2022), <https://www.dhs.gov/news/2022/12/05/dhs-announces-extension-real-id-full-enforcement-deadline> [<https://perma.cc/2RW9-HFAC>].

7. Scott Atherley, *Federal Agency Compliance with Congressional Regulatory Deadlines*, R STREET POLICY STUDY NO. 39, 1 (August 2015), <https://www.rstreet.org/wp-content/uploads/2018/04/RSTREET39-1.pdf> [<https://perma.cc/2CXJ-XPVT>].

8. For discussion of regulatory deadlines, or deadlines that agencies impose on themselves, see Mariah Mastrodimos, *Self-Imposed Agency Deadlines*, 75 STAN. L. REV. 675 (2023).

9. Atherley, *supra* note 7, at 1.

10. *Potomac Elec. Power Co. v. Interstate Com. Comm'n*, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

11. REAL ID Act, Pub. L. No. 109-13 tit. II § 202, 119 Stat. 312 (2005) (emphasis added).

12. See generally Thomas Kean et al., *THE 9/11 COMMISSION REPORT* (July 22, 2004).

terrorist groups doing the same.<sup>13</sup> When Congress tasks federal administrative agencies with implementing such important policies for public safety, delays are especially disturbing.<sup>14</sup>

Fortunately, the Administrative Procedure Act supplies a remedy: Reviewing courts may “compel agency action unlawfully withheld or unreasonably delayed.”<sup>15</sup> Enforcement of statutory deadlines, however, does not always provide affected parties with relief. When agencies violate statutory deadlines, federal courts adopt one of two competing approaches. Some courts automatically order the agency to act,<sup>16</sup> but others exercise considerable discretion and apply a multi-factor balancing test in choosing whether to order agency action, in which a missed deadline is just one factor.<sup>17</sup>

This note seeks to situate APA § 706(1) and statutory deadlines<sup>18</sup> within the broader framework of administrative law and urge courts to take such deadlines seriously as a matter of congressional oversight. Strict construction of statutory deadlines should appeal to both sides of the fierce debate about the scope and size of administrative agencies, as this approach helps both to realize the benefits

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13. *Id.* at 390.

14. Other examples abound. *See, e.g., In re A Cmty. Voice*, 878 F.3d 779 (9th Cir. 2017) (regarding an EPA delay of over eight years in updating its regulation of lead paint dust after the American Academy of Pediatrics deemed its standards “obsolete,” as half of all children have blood lead levels above the CDC’s level of concern); *Ammonium Nitrate Safety Program*, U.S. CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/resources-tools/programs/ammonium-nitrate-security-program#:~:text=The%20Ammonium%20Nitrate%20Security%20Program,to%20prevent%20the%20misappropriation%20or> [https://perma.cc/9TAK-ERP3] (describing the CISA’s program for regulating ammonium nitrate to ensure safety from terrorist attacks using it as an explosive, mandated in 2008 and not yet complete).

15. 5 U.S.C. § 706(1).

16. *See, e.g., Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999).

17. *See, e.g., Telecomms. Rsch. and Action Ctr. v. FCC (TRAC)*, 750 F.2d 70 (D.C. Cir. 1984).

18. APA § 706(1) also applies to cases in which an agency has withheld action absent a specific statutory deadline, as courts may nonetheless find such action “unreasonably delayed.” Such cases are beyond the scope of this paper.

of regulatory programs and to strengthen congressional control of agencies.<sup>19</sup>

Section I overviews the pre-APA practice of compelling delayed executive action. It will also provide an account of the legislative history of the APA, exploring § 706(1)'s historical meaning and relevance to statutory deadlines. Section II describes how statutory deadlines interact with § 706(1). This section includes a discussion of the Supreme Court's seminal case expounding the provision, *Norton v. Southern Utah Wilderness Alliance*.<sup>20</sup> Section III describes the two dueling lower court approaches to missed deadlines. Section IV describes possible reasons for agency delay and lays out normative arguments explaining why both skeptics and advocates of a robust administrative state should support the Tenth Circuit's strict constructionist approach to statutory deadlines. Finally, Section V explores an alternative, self-executing type of deadline called "hammer provisions" before concluding that judicial enforcement of standard deadline provisions is preferable.

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19. Savvy readers may, in light of the Court's standing doctrine, identify a problem with my REAL ID example, or APA § 706(1) challenges in general. The Court has consistently prohibited private plaintiffs from bringing suits based on "generalized grievances." See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575 (1992) ("[A]n injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable."). While a plaintiff aggrieved that the REAL ID Act's benefits of increased security have not yet accrued would thus lack standing under this line of cases, it is easy to imagine scenarios in which regulated (or soon-to-be-regulated) parties could challenge an agency's failure to act based on the current or prospective monetary harms imposed by a statute or regulation. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) (recognizing monetary harm as "traditionally recognized as providing a basis for a lawsuit in American courts," thus sufficient to confer standing). In other cases, creative plaintiff choices may satisfy standing's injury-in-fact requirement based on the costs to states of regulatory compliance. See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2365–2366 (2023) (holding that the state of Missouri had standing to sue for an injunction of the Biden administration's student loan forgiveness plan based on the order's cost to its public loan service, MOHELA). While this paper does not purport to find standing for all possible challenges under APA § 706(1), I merely observe that the Court's standing doctrine may limit such challenges, but does not foreclose them entirely.

20. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004).

## I. PRE-APA PRACTICE AND LEGISLATIVE HISTORY

Judicial practice prior to the APA's enactment clearly authorized courts to compel certain types of action withheld by agencies and executive officers. The Supreme Court has long authorized mandamus as one such remedy available to courts in their equitable discretion.<sup>21</sup> The remedy required the right kind of executive inaction, however: It was available to compel performance of "a precise, definite act, purely ministerial, and about which the [officer] had no discretion whatsoever."<sup>22</sup> These cases gave rise to a "familiar" and related principle: courts may compel performance of such legal commands, but may not "control discretion" or mandate the content of its exercise.<sup>23</sup> When agencies failed to act pursuant to discretionary mandates, courts could order the agency "to take jurisdiction, not in what manner to exercise it."<sup>24</sup> These principles displayed concern about separating judicial power from agency discretion and respect for agency expertise when exercising such discretion.

Cases from around the time of the APA's enactment reflect this understanding of compelling agency action. In *Safeway Stores v. Brown*, Safeway Stores complained that the Office of Price Administration did not respond to its petitions about price controls within the statutorily specified response period.<sup>25</sup> Because the Administrator's response required him to exercise policy judgment, the Court "require[d] the Administrator to exercise his discretionary power . . . without any direction as to the manner in which his discretion should be exercised."<sup>26</sup> Violation of a statutory deadline regularly

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21. See, e.g., *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613-17 (1838); *Marbury v. Madison*, 1 Cranch 137, 141 (1803) ("And in the duties enjoined upon him by law . . . if he neglects or refuses to perform them, he may be compelled by mandamus.").

22. *Kendall*, 37 U.S. at 613.

23. *Interstate Com. Comm'n v. United States ex rel. Humboldt S.S. Co.*, 224 U.S. 474, 485 (1912).

24. *Id.* See also *Interstate Com. Comm'n v. New York, N.H., and H.R. Co.*, 287 U.S. 178, 204 (1932).

25. 138 F.2d 278 (Emer. Ct. App. 1943).

26. *Id.* at 280.

warranted judicial compulsion of agency action, although courts respected the agency's substantive discretion.<sup>27</sup> The legislative history of the APA indicates that its drafters intended to codify this approach to compelling agency action.

As early as 1929, concerns mounted about the fairness and efficacy of administrative law and adjudications.<sup>28</sup> As a result, President Franklin Delano Roosevelt commissioned then-Attorney General Robert Jackson, who would later serve on the Supreme Court, to "investigate the need for procedural reform in various administrative tribunals and to suggest improvements therein."<sup>29</sup> After the disruption of World War II and "painstaking" consideration, Congress passed the APA in 1946.<sup>30</sup> Four years later, then-Justice Jackson wrote for the Court that the Act "represent[ed] a long period of study and strife; it settle[d] long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest."<sup>31</sup> This pronouncement is often invoked to urge courts to remain true to the legislative compromises behind the APA and interpret the Act accordingly.<sup>32</sup>

The Final Report from Jackson's Committee devotes little time to compulsion of delayed agency action, mentioning only that judicial review "is adapted chiefly to curbing excess of power, not toward compelling its exercise . . . the courts cannot, as a practical matter, be used for that purpose without being assimilated into the administrative structure."<sup>33</sup> This reflects the concern in historical case law that courts might, in compelling agency action, interfere too much

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27. For similar examples from the time of the APA's enactment, *see also* *Powers v. Bowles*, 144 F.2d 491 (Emer. Ct. App. 1944); *Am. Chain & Cable Co. v. FTC*, 142 F.2d 909 (4th Cir. 1944).

28. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37-41 (1950)

29. DEAN ACHESON ET AL., DEP'T OF JUST., FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE iii (1941) [hereinafter FINAL REPORT].

30. *Wong Yang Sung*, 339 U.S. at 40.

31. *Id.*

32. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 523 (1978); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1211 (2015).

33. FINAL REPORT, *supra* note 29, at 76.

with the agency's prerogative to determine the content thereof.<sup>34</sup> The Act's legislative history further demonstrates that the enacting Congress intended § 706(1)<sup>35</sup> to codify, not revolutionize, existing administrative law practices. The Senate Report on the Act includes an appendix from the Attorney General, stating that this section "declares the existing law concerning the scope of judicial review" and "is not intended to confer any nonjudicial functions or to narrow the principle of continuous administrative control."<sup>36</sup> That principle separated judicial review from making discretionary decisions committed to the agency by Congress.

Finally, the Attorney General's office issued a Manual to the Administrative Procedure Act in 1947.<sup>37</sup> The Manual sought to advise agencies about "the meaning of various provisions of the Act" and describe the government's position at the time.<sup>38</sup> Respecting § 706(1), Attorney General Tom Clark identified the remedies available to reviewing courts when compelling agency action.<sup>39</sup> The Department of Justice viewed the section as "codify[ing] these judicial functions."<sup>40</sup> In keeping with these long-extant practices, "the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties . . . However . . . a court may require an agency to take action upon a matter, without directing how it shall act."<sup>41</sup>

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34. See, e.g., *ex rel. Humboldt S.S. Co.*, 224 U.S. at 485; *New York, N.H., and H.R. Co.*, 287 U.S. at 204.

35. Although many of these original sources refer to APA § 10(e) (as styled in the Act), I use the modern, codified citation to avoid confusion.

36. S. Rep. No. 79-752-79, at 230 (1945).

37. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (Wm. W. Gaunt & Sons, Inc., reprint ed. 1947) [hereinafter ATTORNEY GENERAL'S MANUAL]. See also *Vermont Yankee*, 435 U.S. at 546 (describing the manual as "a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation").

38. ATTORNEY GENERAL'S MANUAL at 6.

39. *Id.* at 108 ("Orders in the nature of a writ of mandamus have been employed to compel an administrative agency to act, or to assume jurisdiction, or to compel an agency or officer to perform a ministerial or non-discretionary act.") (citations omitted).

40. *Id.*

41. *Id.*

APA § 706(1) conferred broad authority on courts to compel legally mandated action, so long as the court did not stray beyond the judicial power to dictate the substance of agency decisions. In doing so, the Act preserved and codified the state of the law in the decades preceding its enactment.

## II. APA § 706(1) AND STATUTORY DEADLINES

APA § 706(1) provides a cause of action for enforcement of statutory deadlines in federal court. In a seminal case expounding the provision, the Supreme Court considered when exactly it provides a remedy for agency failures to act.<sup>42</sup> *Norton v. Southern Utah Wilderness Alliance* involved a challenge to the Bureau of Land Management's land stewardship under a policy of "multiple use management."<sup>43</sup> Multiple use management required the Bureau to accommodate different types of land use, including several types of recreational, conservational, and wildlife concerns.<sup>44</sup> The plaintiffs challenged the Bureau's authorization of off-road vehicle (ORV) usage, claiming that it adversely impacted soil quality and disrupted animals and visitors in wilderness areas.<sup>45</sup> Because of this "classic land use dilemma of sharply inconsistent uses," the plaintiffs alleged that the Bureau was withholding statutorily mandated action to preserve the land for the conservation and wildlife uses specified by statute.<sup>46</sup> As such, the APA authorized the suit by providing a cause of action under § 706 to "compel agency action unlawfully withheld or unreasonably delayed."<sup>47</sup>

Justice Scalia, writing for a unanimous Court, began with the text of the APA. He first established that the Act allows suit by plaintiffs

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42. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61 (2004).

43. *Id.* at 58 (citing 43 U.S.C. § 1702(c)).

44. See 43 U.S.C. § 1702(c) for a complete list of the uses to be accommodated in multiple use management (including range, timber, minerals, watershed, wildlife, and more).

45. *Norton*, 542 U.S. at 60.

46. *Id.*

47. 5 U.S.C. § 706(1).



“aggrieved by agency action,”<sup>48</sup> which the Act defines as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.”<sup>49</sup> Applying the canon of *ejusdem generis* to § 551(13), the Court concluded that “failure to act” under the APA “is properly understood to be limited . . . to a *discrete* action.”<sup>50</sup> This interpretation tracks the long history and precedent of allowing courts to compel ministerial, concrete agency actions, in accordance with the provision’s original meaning.

More importantly, Justice Scalia explained the appropriate scope of § 706(1) and what kinds of agency inaction can be compelled by courts. Because reviewing courts can only compel actions “unlawfully withheld,” “the only agency action that can be compelled under the APA is action legally *required*.”<sup>51</sup> Justice Scalia used, as the paradigmatic example of such a legally required action, “the failure to promulgate a rule or take some decision by a statutory deadline.”<sup>52</sup> This excluded the BLM’s discretionary, policy-laden, and programmatic choice regarding compliance with its statutory mandate.<sup>53</sup> The Court’s conclusion clearly authorizes lawsuits to compel action mandated by a statutory deadline under the APA. Unfortunately, the Supreme Court has not spoken about exactly how and when courts should compel such actions, creating a circuit split between two conflicting approaches.

### III. DUELING APPROACHES TO DEADLINE ENFORCEMENT

*Norton* merely outlines the contours of § 706(1)’s remedy: compelling agencies to perform discrete and legally mandated actions. The lower courts, however, remain divided about how to treat cases of missed statutory deadlines.

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48. 5 U.S.C. § 702.

49. *Norton*, 542 U.S. at 61–62 (citing 5 U.S.C. §§ 702, 551(13)) (emphasis in original).

50. *Id.* at 62–63 (emphasis in original).

51. *Id.* at 63.

52. *Id.*

53. *Id.* at 64–67.

The D.C. Circuit has announced “the hexagonal contours of a standard” to evaluate claims under APA § 706(1).<sup>54</sup> The court begins with the Delphic guidance that agency timelines “must be governed by a ‘rule of reason.’”<sup>55</sup> When Congress provides a deadline or timetable for the agency, this may “supply content for this rule of reason.”<sup>56</sup> Delays in agency actions respecting “human health and welfare” warrant less tolerance than agency actions affecting economic interests.<sup>57</sup> Courts will also consider whether enforcing a deadline may affect higher-priority agency actions and the “nature and extent of the interests prejudiced by delay;” an improper reason for delay need not be identified to rule it unreasonable.<sup>58</sup> This so-called test, known as the “TRAC factors,” affords minimal guidance to courts reviewing delayed agency action beyond their own discretion in weighing each element of the test.

Most circuit courts apply the TRAC factors in cases where plaintiffs bring unspecified claims of delay absent a statutory deadline. Going further, the D.C. Circuit<sup>59</sup> does so even when the agency has violated a statutory deadline, treating such a deadline as merely one persuasive factor in its balancing test.<sup>60</sup> As a matter of statutory interpretation, using the same test in these different situations collapses the two discrete categories identified in § 706(1): action “unlawfully withheld” and “unreasonably delayed.” D.C. Circuit’s approach raises particular concerns given its status in administrative

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54. *Telecomms. Rsch. and Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984).

55. *Id.* (citing *Potomac Elec. Power Co. v. ICC*, 702 F.2d at 1034).

56. *Id.*

57. *Id.*

58. *Id.*

59. Other circuits have followed its lead, including the Eighth Circuit. *See Org. for Competitive Mkts. v. U.S. Dep’t of Agric.*, 912 F.3d 455, 463 (8th Cir. 2018) (applying the TRAC factors in case of deadline violation and noting “war[iness] of becoming the ultimate monitor of Congressionally set deadlines”).

60. *See, e.g., In re Barr Laboratories, Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991) (finding that violation of a deadline “does not, alone, justify judicial intervention”); *In re United Mine Workers of Am. Int’l. Union*, 190 F.3d 545, 551 (D.C. Cir. 1999) (“Our conclusion that the Secretary has violated the deadline set forth in the Mine Act does not end the analysis . . . we must continue our analysis of the remaining TRAC factors.”).

law: Many statutes grant jurisdiction, often exclusively, to the D.C. Circuit for appellate review of agency actions and orders.<sup>61</sup> By weighing other factors alongside an agency's clear violation of a congressional mandate, the *TRAC* test does not appropriately regard the importance of statutory deadlines when violated.

An alternative approach limits reviewing courts' discretion to excuse agencies when they violate statutory deadlines. In *Forest Guardians v. Babbitt*, the Tenth Circuit distinguishes between actions "unlawfully withheld" and actions "unreasonably delayed."<sup>62</sup> Presence and violation of a statutory deadline indicates an "unlawfully withheld" action, in which case "neither the agency nor the court has any discretion" regarding compliance, and the court must order the agency to act.<sup>63</sup> In contrast, the court maintains equitable discretion when reviewing actions "governed only by general timing provisions," and can "decide whether agency delay is unreasonable."<sup>64</sup> Such cases adopt the *TRAC* approach to evaluate whether delay is reasonable. But in the presence of a missed deadline, the court attempts to realize clearly expressed congressional intention by ordering the agency to act. Following *Forest Guardians*, the Fourth and Ninth Circuits have adopted this interpretation.<sup>65</sup>

Textualists might imagine a third alternative to statutory deadline enforcement, construing statutory language that an agency "shall" act by a certain date as a 'use it or lose it' approach to agency power.<sup>66</sup> The argument would proceed as follows: Congress

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61. Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J. L. & PUB. POL'Y 131, 143 (2013).

62. 174 F.3d at 1190 (10th Cir. 1999).

63. *Id.*

64. *Id.*

65. See, e.g., *Biodiversity Legal Found. v. Badgely*, 309 F.3d 1166, 1178 (9th Cir. 2002) ("The exercise of discretion is foreclosed when statutorily imposed deadlines are not met."); *South Carolina v. United States*, 907 F.3d 742, 760 (4th Cir. 2018) (adopting the *Forest Guardians* understanding that failure to meet a statutory deadline makes an action "unlawfully withheld" and holding that "the court must award injunctive relief to secure the agency's compliance").

66. Assuredly non-textualist scholars have also deemed this the "most plausible inference" when an agency acts after a deadline for that action: "[A]fter the date, the

commanded that the agency shall act within a given period, and courts must construe “shall” according to its plain meaning—typically, as a mandate.<sup>67</sup> Therefore, the combination of a deadline and mandatory language bars an inference that the agency can execute that mandate after the deadline passes.<sup>68</sup> However, the Supreme Court has repeatedly declined to enforce deadlines in this manner, calling them “jurisdictional.”<sup>69</sup> Instead, the Court requires a clear statement rule: Absent an express statement to the contrary, “courts should *not* assume that Congress intended the agency to lose its power to act” after passage of a deadline.<sup>70</sup> This requirement reflects the extremity of revoking<sup>71</sup> agency power: Such a remedy would often violate “the ‘great principle of public policy . . . which forbids that the public interests should be prejudiced’ when government neglects its duty.”<sup>72</sup> Because the Court does not strictly construe such jurisdictional deadlines, the two available treatments of missed deadlines remain the competing *TRAC* and *Forest Guardians* approaches. Of the two, *Forest Guardians* provides the more desirable doctrine.<sup>73</sup>

#### IV. NORMATIVE IMPLICATIONS OF DEADLINE ENFORCEMENT

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agency is acting in contravention of the legal authority for its action.” Jacob E. Gersen & Anne J. O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 955 (2008).

67. See, e.g., *City of Edmonds v. United States Dep’t of Labor*, 749 F.2d 1419, 1421 (9th Cir. 1984) (accepting this line of reasoning before the Supreme Court later foreclosed it).

68. *Id.* at 1423.

69. See, e.g., *Brock v. Pierce Cty.*, 476 U.S. 253 (1985); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003); *Dolan v. United States*, 560 U.S. 605 (2010).

70. *Brock*, 476 U.S. at 260 (emphasis added).

71. Of course, a court could not formally revoke agency power, but could set precedent instructing courts to set aside agency actions taken after the deadline or issue other forms of injunctive relief preventing the agency from exercising some power after a statutory deadline elapses.

72. *Brock*, 476 U.S. at 260 (quoting *United States v. Nashville, C. & St. L. R. Co.*, 118 U.S. 120 (1886)).

73. Discussed further *infra* Section IV.

Agencies might miss a statutory deadline for a variety of reasons, often through no fault of their own. For instance, political changes—in Congress or in presidential administration—can account for agency delay. One can imagine a Congress very concerned with environmental issues passing a statute that includes regulatory deadlines to ensure the EPA acts quickly. If a new President is elected before the deadlines pass, his EPA appointees could share a different, deregulatory agenda. With this leadership, the agency might purposely drag its feet to avoid promulgating regulations. The President may even exert authority over the EPA by diverting executive branch attention and resources to other agencies. In extreme cases, this may constitute “an extralegal veto on duly enacted statutes.”<sup>74</sup> Alternatively, one can imagine the same Congress attempting to rapidly secure environmental regulations. However, an EPA-friendly President is elected, and control of Congress flips to a deregulatory or environmentally unfriendly majority. Such a Congress may subsequently appropriate less money to the EPA, stymieing the agency’s ability to act before the deadline passes.

Congress may also unintentionally impose impracticable deadlines on agencies based on a poor understanding of the time needed for the rulemaking process.<sup>75</sup> This puts agencies in the difficult position of choosing between complying with a deadline, issuing a rule of poor quality or susceptible to legal challenges, or ignoring the deadline altogether.<sup>76</sup> And finally, courts may worsen the

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74. Michael D. Sant’Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1396 (2011).

75. This problem has only grown more acute in the wake of judicial “paper hearing” requirements for even informal rulemakings, which induce agencies to take the utmost care to develop a thorough record to avoid problems during hard look review.

76. For a compelling argument that ignoring deadlines in such cases may not, in fact, be unlawful, see Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now:” When Agencies Defer Decisions*, 103 GEO. L. J. 157, 177–78, 194 (“If Congress has asked the agency to do something on a timeline that is unrealistic given the nature of the task and the necessities of the administrative process, there is a good argument that the agency’s decision to fail to meet the deadline is lawful. No less than a party to a

problem by imposing additional deadlines in § 706(1) cases. In one such case, where a plaintiff sought to compel 9 EPA rulemakings, the same District Court had compelled over 30 delayed EPA rulemakings just one year earlier.<sup>77</sup> Because the agency devoted its resources to the court-ordered rulemakings, it could not accomplish the ones the plaintiffs sought to compel. Logic would dictate that enforcing statutory deadlines poses little interpretive difficulty: “If, for example, a statute requires an agency to issue a rule by a specific date, the agency must comply with the requirement, even if it has competing priorities and even if it would much prefer not to.”<sup>78</sup> However, agency noncompliance and inconsistent court enforcement complicate the issue, requiring normative arguments between the competing approaches.

The *Forest Guardians* and *TRAC* approaches to violations of clear statutory deadlines implicate important questions about congressional oversight and the purpose of delegation to administrative agencies. Ultimately, both skeptics and proponents of a robust or empowered administrative state should support the Tenth Circuit’s approach to strict enforcement of statutory deadlines.

On one hand, jurisprudence surrounding administrative agencies “has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job” absent agency assistance.<sup>79</sup> Agencies undoubtedly possess advantages over courts in making complex decisions, especially in areas requiring highly

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contract, an agency has an ‘impossibility defense.’”). Such cases may be good candidates for the APA’s “good cause” exception to notice-and-comment rulemaking procedures, frequently invoked to justify procedural informalities when agencies face a statutory deadline. 5 U.S.C. § 553(b)(3)(B). Various courts have limited this exception to ensure that agencies do not “wait until the eve of a statutory . . . deadline, then raise up the ‘good cause’ banner and promulgate rules without following APA procedures.” *Council of S. Mountains, Inc. v. Donovan*, 653 F.3d 573, 581 (D.C. Cir. 1981). However, if Congress has imposed a genuinely impracticable deadline, delay should not be attributed to the agency and the good cause exception could apply.

77. *Cnty. In-Power and Dev. Ass’n v. Pruitt*, 304 F. Supp. 3d 212, 218 (D.D.C. 2018).

78. Sunstein & Vermeule, *supra* note 76, at 177.

79. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

technical or scientific expertise.<sup>80</sup> For certain “intricate, labor-intensive task[s],” assignment by Congress “to an expert body is especially appropriate.”<sup>81</sup> Beyond these pragmatic concerns, commentators offer a variety of normative justifications to legitimate the administrative state, including reasoned decisionmaking, democratic accountability, the benefits of an energetic executive branch, technocratic decisionmaking, and balancing federal power in the modern era.<sup>82</sup> These values now hold more importance than ever in the absence of an active Congress. Given unprecedented political polarization and legislative gridlock, agencies solve the problem of congressional inaction, especially in response to rapidly changing factual circumstances.<sup>83</sup>

In contrast, opponents of a robust administrative state cite concerns about delegation of legislative power and agencies’ ability to bypass bicameralism and presentment in issuing substantive rules.<sup>84</sup> Proponents of such a strict nondelegation doctrine ground their argument in the Constitution’s three vesting clauses, which make “exclusive” grants of legislative, judicial, and executive power to Congress, the courts, and the President, respectively.<sup>85</sup> By this account, the exclusive delegation of lawmaking power to Congress acts as a “bulwark[] of liberty,” ensures clear democratic accountability, reasoned deliberation, and supermajority consensus

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80. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.* (NFIB v. OSHA), 142 S. Ct. 661, 676 (2022) (Breyer, J., dissenting) (comparing Court’s lack of expertise to an agency’s consideration of risk, cost, and various policies to address “grave danger” of COVID-19).

81. *Mistretta*, 488 U.S. at 379.

82. See generally Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017).

83. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 8 (2014) (noting that “Congress’s capacity to react to changed circumstances by lawmaking has diminished sharply over time” and that “Congress is more ideologically polarized now than at any time in the modern regulatory era”).

84. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting), *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437–39 (2019) (Gorsuch, J., concurring).

85. *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring).

to pass law.<sup>86</sup> In addition to these constitutional concerns, strict constitutional nondelegation evinces skepticism about the administrative state. On this view, the individual and his liberty interests stand diametrically opposed to government, a David to the “goliath” of administrative law.<sup>87</sup> Most recently, these concerns have driven Justice Gorsuch’s crusade to revive the nondelegation doctrine, but administrative law has long reflected concern about “government of a bureaucratic character alien to our system.”<sup>88</sup>

Despite their differences, both sides of the agency empowerment or nondelegation debate should embrace the *Forest Guardians* approach to strict construction of statutory deadlines. On either account, the mainstream view of delegation<sup>89</sup> to administrative agencies situates them firmly within Article I, whether as tools Congress uses to serve the public interest or impermissible delegations of legislative power. Because they depend on congressional instruction, “an agency has literally no power to act . . . unless and until Congress confers power upon it.”<sup>90</sup> An agency’s organic statute thus provides the extent of that agency’s power, including through deadlines.

In contrast, the *TRAC* approach disregards explicit congressional statements that an agency must take action by a given date. The D.C. Circuit’s “use of *TRAC*’s balancing factors in cases where there are actual statutory deadlines is puzzling, [as] [t]he mere presence

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86. *Gundy*, 139 S. Ct. at 2133–34.

87. NEIL M. GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* 83 (2019).

88. *Crowell v. Benson*, 285 U.S. 22, 57 (1932).

89. A less mainstream view of delegation to administrative agencies, wherein Congress exercises its legislative power in creating the agency, which then exercises executive power in carrying out its mandate, still supports a strict construction of statutory deadlines. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV., 1721 (2002) (advancing this position). The authors justify this view on the basis that “the content of the ‘executive’ power simply is the execution of validly enacted law,” from which it follows that “the substantive limitation is that the executive officer must act within the legal bounds that the statute itself sets.” *Id.* at 1730. When a statute provides a deadline for agency action, therefore, the deadline comprises part of the legal bounds of agency power that its officers must respect and act within.

90. *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).



of a deadline seems to satisfy the test.”<sup>91</sup> In one representative case, the D.C. Circuit refused to compel compliance with a missed deadline so that it would not disrupt agency priorities, despite recognizing that “Congress clearly intended a faster track for generic drug applications.”<sup>92</sup> In doing so, the court ignored clear statutory directives to the FDA, encroaching on congressional control over administrative agencies by imposing its own interpretation of agency priorities through a balancing test.

Skeptics of the administrative state should appreciate the *Forest Guardians* approach to statutory deadlines for its commitment to honoring congressional direction of agencies and limiting their discretion. The Court has, at least once, honored a statutory deadline in this manner: “[I]n a statutory scheme in which Congress carefully prescribed a series of deadlines . . . we may not simply interject an additional [time] period . . . we must respect the compromise embodied in the words chosen by Congress.”<sup>93</sup> In areas requiring great substantive expertise or technical knowledge, deadlines represent one of the only feasible ways for a generalist Congress to exert any control over agencies.

Deadlines ensure congressional control by preventing two ways that an agency might disobey Congress. First, an agency might undergo “bureaucratic drift” over time, especially if administrations and political agendas change. Deadlines within the same presidential administration or congressional term might prevent this by allowing the enacting Congress to monitor agency compliance and know which President has appointed the agency heads.<sup>94</sup> In a similar vein, tight deadlines can prevent “legislative drift,” or the possibility that a future Congress will repeal or meaningfully amend the agency’s organic statute.<sup>95</sup> Even in areas beyond meaningful congressional expertise, deadlines thus ensure a level of

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91. Catherine Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1557 (2001).

92. *In re Barr Laboratories*, 930 F.2d 72, 76 (D.C. Cir. 1991).

93. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825–26 (1980).

94. Gersen & O’Connell, *supra* note 66, at 935–36.

95. *Id.*

substantive control over agency action, assuaging skeptics' concerns about an unaccountable bureaucracy.

Proponents of a robust administrative state, while rightly skeptical about encroachments into agency priority-setting, should also advocate for strict construction of statutory deadlines as a means to ensure that public benefits actually accrue from agency action. Statutory deadlines achieve important objectives: accelerating decisionmaking, facilitating congressional oversight, and prompting the agency to make difficult—but necessary—decisions.<sup>96</sup> Agencies do not provide flexibility and technocratic competence absent action: "It is obvious that the benefits of agency expertise and creation of a record will never be realized if the agency never takes action."<sup>97</sup> A realistic view of administrative agencies recognizes their public-regarding goals and the benefits of agency action in the complex American federal government.

In the context of statutory deadlines, these benefits are particularly acute. One empirical survey showed deadlines are most commonly imposed on the EPA; other agencies topping the list for the most deadlines include the Departments of Agriculture, Transportation, and Health and Human Services.<sup>98</sup> These agencies make important rules regarding public health and welfare, thereby benefiting the public. Agency delays interfere with this scheme and "impose unintended costs on intended beneficiaries and unintended benefits on those intended to bear the costs of regulations."<sup>99</sup> For instance, a delay in EPA rulemaking under the Clean Air Act would impose the health and welfare costs of pollution on the public, while enabling regulated polluters to continue harmful emissions without consequences. Enforcing deadlines would help ensure that the public receives the regulatory benefits promised by Congress.

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96. Sidney A. Shapiro & Robert L. Glicksman, *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L. J. 819, 830 (1988).

97. *Telecomms. Rsch. and Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 79 (D.C. Cir. 1984).

98. Gersen & O'Connell, *supra* note 66, at 939.

99. Sant' Ambrogio, *supra* note 74, at 1399.

Of course, statutory deadlines will diminish an agency's discretion as its priorities necessarily change when Congress provides statutory deadlines. The Court's decision in *Heckler v. Chaney* expresses great concern for such discretion, making agency decisions not to bring enforcement actions presumptively unreviewable by courts.<sup>100</sup> Such decisions are unsuitable for review because they involve "balancing a number of factors which are peculiarly within [agency] expertise," including how and when to use limited resources, and the agency's control over its substantive agenda and priorities.<sup>101</sup> The TRAC test acknowledges similar concerns, including as its fourth factor "the effect of expediting delayed action on agency activities of a higher or competing priority."<sup>102</sup> As a result, proponents of a powerful administrative state might find that concerns about impeding upon an agency's discretion to set its own agenda outweigh the benefits of compelling action in violation of a statutory mandate.

The impact of compelling agencies to follow statutory mandates, however, does not exceed the amount that the Court has curbed agency discretion elsewhere. In *Massachusetts v. EPA*, the Court interpreted the Clean Air Act to require the EPA Administrator to regulate greenhouse gases upon a finding that they "endanger public health or welfare."<sup>103</sup> This statutory mandate provided "a direction to exercise discretion within defined statutory limits," and "[t]o the extent that this constrains agency discretion to pursue other priorities . . . this is the congressional design."<sup>104</sup> The decision not to bring an enforcement action, likened to prosecutorial discretion in *Heckler*,<sup>105</sup> preserves a level of agency freedom or discretion *within* its statutory mandate. In contrast, a deadline is rightly viewed as *part* of the statutory mandate, structuring the bounds within which the agency can exercise discretion about other

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100. 470 U.S. 821 (1985).

101. *Id.* at 831–32.

102. TRAC, 750 F.2d at 80.

103. 549 U.S. 497, 506 (2007) (quoting 42 U.S.C. § 7521(a)(1)).

104. *Id.* at 533.

105. 470 U.S. at 832.

matters. The Court has permitted such limits on discretion in *Massachusetts v. EPA*. As such, enforcing a clear mandate in the statute's text does not impermissibly interfere with agencies' autonomy, but merely gives effect to congressional boundaries of agency power.

Finally, the *TRAC* test allows courts to substitute their own judgment for that of the agency and of Congress in balancing highly manipulable factors to determine whether to enforce a statutory deadline. The *Forest Guardians* test actually preserves agency autonomy by providing clear guidelines within which agencies can act. Because its doctrine lacks structure, "courts can use the *TRAC* analysis to support virtually any conclusion they want to reach."<sup>106</sup> In contrast, *Forest Guardian* urges judicial restraint and provides clear guidance to agencies that courts will honor congressional intent, whereas the unpredictable *TRAC* test allows courts to weigh factors differently than both Congress and the agency.

#### V. CONGRESSIONAL REMEDIES

Courts' failures to compel action that violates statutory deadlines suggest that Congress ought to turn elsewhere to exercise control over agency timelines. Throughout the 1980s, statutory deadlines became increasingly popular instruments of congressional control over agencies, given congressional concern about agency failures to act or to act promptly.<sup>107</sup> Amendments made during this period to the Resource Conservation and Recovery Act, Toxic Substances Control Act, the Superfund statute, the Clean Water Act, and other environmental statutes included countless deadlines for discrete agency actions.<sup>108</sup> Food and drug statutes also commonly include statutory deadlines, with the FDA often facing criticism for failing to regulate within them.<sup>109</sup>

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106. Sant' Ambrogio, *supra* note 74, at 1413.

107. Shapiro & Glicksman, *supra* note 96, at 827 (noting specifically congressional dissatisfaction with EPA delays during this period).

108. *Id.* at 829–30.

109. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 *FOOD AND DRUG L. J.* 150, 158–59 (1995).

One possible solution is so-called “hammer provisions,” or self-executing statutory clauses that ‘penalize’ agencies or impose some other substantive rule if the agency fails to act before the deadline.<sup>110</sup> The 1984 Hazardous Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA) present a paradigmatic example: The statute creates various “default” rules that become effective on a given date, unless the EPA Administrator makes rules providing otherwise by that date.<sup>111</sup> By setting a default rule that the agency might deem too harsh or too lenient, Congress can nudge the agency to regulate in a different way.<sup>112</sup> Such hammer provisions also avoid procedural challenges under the APA, as Congress has enacted the substantive rules later enforced against regulated parties.

Other types of hammer provisions do not include such “default” rules, but instead strip the agency of certain powers if the agency does not act before a given deadline. For instance, the Nutrition Labeling and Education Act required the FDA to propose certain rules about health claims, label contents within 12 months of its enactment, and issue final rules 12 months later.<sup>113</sup> The hammer provision then stated that failure to issue final rules within 24 months of the Act’s enactment would codify the proposed rules as final.<sup>114</sup>

Hammer provisions may provide an appropriate remedy in certain administrative contexts, but they increase the risk of agencies issuing poor final rules. The primary advantage of hammer provisions is their self-execution. Enacted by Congress, they “obviate litigation as the primary mechanism to enforce statutory

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110. *Id.* at 154 (1995).

111. *See, e.g.*, 42 U.S.C. §§ 6942(d)(1)-(2); 6924(f)(1)-(3) (requiring the EPA to make findings that land disposal of certain wastes does not harm human health and the environment within 32 months or the practice would be banned, doing the same for underground deep injection into wells if the EPA did not regulate the practice within 45 months of enactment).

112. There might be interesting behavioral economics implications here, as Congress must create a default rule that both is sufficiently ‘undesirable’ that it induces the agency to act, but is not so ‘undesirable’ that Congress would oppose it going into effect if the agency fails to act before the deadline.

113. Pub. L. No. 101-535 §§ 2(b)(1), 3(b)(1), 104 Stat. 2356, 2361.

114. *Id.* §§ 2(b)(2), 3(b)(2), 104 Stat. 2357, 2361-62.

deadlines.”<sup>115</sup> This reduces the cost and delay associated with bringing a challenge to compel agency action. However, hammer provisions also raise concerns about locking in bad policy when the agency cannot meet a deadline, perhaps through no fault of its own.<sup>116</sup> Because Congress often delegates to agencies tasks beyond its technical expertise, the “default rules” like those in the HWSA Amendments may be poorly written or fail to adequately address the problem at hand. Even the hammer provisions in the NLEA scheme could also lead to similarly poor-quality rules, if the agency rushes to make proposed rules that eventually become legally binding. Regulated parties and beneficiaries of an agency’s regulatory program could thus suffer in a world of hammer provisions. Furthermore, drafting hammer provisions would require a congressional consensus on these detailed rules, which may prove impossible to obtain.<sup>117</sup> As a result, hammer provisions likely do not solve the problem of inconsistent court enforcement of statutory deadline violations.

#### CONCLUSION

Agency delay should feature prominently in the modern administrative state and should trouble both its defenders and detractors. For the former, agency delays deprive the public of important, congressionally-promised benefits, often serving important public welfare goals. For the latter, delays present another example of agencies’ uncontrolled power, even when contrary to law. On this issue, both sides of the heated debate about administrative power ought to agree that courts should hold agencies to their deadlines rather than exercising discretion to let them off the hook. An analogy to *Chevron* may help illuminate when Congress should prioritize agency discretion over clear congressional mandates. When Congress has not addressed the issue and provided no deadline for agency action, courts may defer to the agency’s expertise and

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115. Magill, *supra* note 109, at 183.

116. See discussion *supra* Section IV.

117. See Freeman & Spence, *supra* note 83, at 8.

priority-setting discretion when evaluating whether to compel action, perhaps in a framework similar to *TRAC*. As in *Chevron*, however, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>118</sup> Congress can hardly express its intent more clearly than by assigning a specific deadline to an agency, and courts reviewing § 706(1) challenges should give effect to that intent. By honoring statutory deadlines, courts will ensure that the public receives the benefits promised by Congress in creating and delegating administrative agencies, and that those agencies truly respond to their statutory instructions, creating real accountability to Congress.

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118. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984).