

American Hospital Association v. Burwell: Correctly Choosing but Erroneously Applying Judicial Discretion in Mandamus Relief Concerning Agency Noncompliance

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Notes

***AMERICAN HOSPITAL ASSOCIATION v. BURWELL:* CORRECTLY CHOOSING BUT ERRONEOUSLY APPLYING JUDICIAL DISCRETION IN MANDAMUS RELIEF CONCERNING AGENCY NONCOMPLIANCE**

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In *American Hospital Association v. Burwell*,¹ the United States District Court for the District of Columbia considered whether to compel the U.S. Department of Health and Human Services (“HHS”) to conduct Medicare reimbursement hearings that had not occurred within a ninety-day statutory deadline.² Plaintiff hospitals awaiting their hearings for far longer than ninety days sought mandamus relief; a judicial remedy to direct HHS to conduct the hearings in compliance with the statutory deadline.³ Unlike some courts in other federal circuits, courts in the D.C. Circuit do not automatically issue mandamus relief whenever an agency does not comply with a statutory deadline.⁴ Accordingly, the district court employed a discretionary test to evaluate whether mandamus relief was appropriate based on individualized factors of the case.⁵ In applying the test in this case, the district court denied mandamus relief.⁶

This Note will support the D.C. Circuit’s use of a discretionary balancing test but argues that the district court erroneously balanced the

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1. 76 F. Supp. 3d 43, 45 (D.D.C. 2014), *rev’d*, 812 F.3d 183, 194 (D.C. Cir. 2016).

2. *Id.*

3. *Id.* at 48.

4. *Id.* at 50; *see infra* Part II.B.

5. *Burwell*, 76 F. Supp. 3d at 50.

6. *Id.* at 56.

relevant factors.⁷ On one side of the scale, the district court allowed its strict posture of deference toward agency policymaking to bias the scale too heavily against mandamus relief.⁸ On the other side, the court overlooked or minimized critical facts favoring mandamus relief, such as Congress's purpose for the statutory deadline and specific instances in the plaintiffs' pleadings demonstrating the deleterious effect of HHS's noncompliance on human health and welfare.⁹ This Note will explain, moreover, that the district court's decision illustrates the problematic void created when strict deference doctrine prevents courts from exercising reasonable discretion in protecting certain legal rights while the other branches of government lack forthcoming remedies to address the issue.¹⁰

Recently, the United States Court of Appeals for the District of Columbia reversed and remanded the district court's decision.¹¹ The remand order instructed the district court to include and reconsider certain factors in the balancing test, and reminded the district court of its ultimate obligation to enforce the law as intended by Congress.¹² The remand order instructions substantiate points argued in this Note and underscore the conclusion that the district court should have issued mandamus relief in the first instance of deciding the case.¹³

I. THE CASE

Health care providers that furnish services to Medicare patients receive payment from HHS through an administrative process.¹⁴ Providers begin this administrative process by first submitting reimbursement claims to a Medicare Administrative Contractor ("MAC").¹⁵ Providers may appeal a MAC's claim denial by requesting that the MAC conduct a redetermination of the claim within sixty days of filing.¹⁶ If the MAC denies the claim for a second time, providers may then appeal to a Qualified Independent Contractor ("QIC").¹⁷ The QIC reviews the MAC's redetermination within

7. *See infra* Part IV.A–B.

8. *See infra* text accompanying notes 196–201.

9. *See infra* Part IV.B.

10. *See infra* Part IV.C.

11. *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 194 (D.C. Cir. 2016). This Note was selected for publication prior to the decision on Feb. 9, 2016 by the United States Court of Appeals for the District of Columbia reversing the decision of the district court.

12. *Id.*

13. *Id.*; *see infra* Part IV.

14. *Am. Hosp. Ass'n v. Burwell*, 76 F. Supp. 3d 43, 46 (D.D.C. 2014), *rev'd*, 812 F.3d 183, 194 (D.C. Cir. 2016) (referring to the four-step administrative process detailed in 42 U.S.C. § 1395ff (2012)).

15. *Id.* (citing 42 U.S.C. §§ 1395kk–1(a)(1)–(4), 1395ff(a)(2)(A)).

16. *Id.* (citing § 1395ff(a)(3)).

17. *Id.*

sixty days.¹⁸ Providers who are not satisfied with the QIC's decision may request a hearing before an Administrative Law Judge ("ALJ").¹⁹ The ALJ provides the only guarantee in the Medicare appeals process that appellants will receive a formal, on-the-record hearing during which they can present evidence and testimony.²⁰ ALJs are statutorily required to issue a decision within ninety days from the time appellants request a hearing.²¹ A provider may appeal an ALJ's decision to the Departmental Appeals Board ("DAB"), the final level of review within HHS.²² The DAB is required to issue a decision within ninety days.²³ Providers may appeal DAB decisions to federal court.²⁴ Providers may bypass levels of review through a process commonly called "escalation" if either the QIC, ALJ, or DAB is unable to issue a decision by its statutory deadline.²⁵

In recent years, the appeals process has backlogged at the ALJ level due to an unprecedented volume of claims submitted on appeal.²⁶ ALJs are unable to issue decisions within the statutorily required ninety-day timeline.²⁷ The DAB, although to a lesser degree than the ALJs, is also receiving more appeals than it can process and will not likely meet the ninety-day deadline for issuing decisions in most appeals.²⁸

The plaintiffs in this case, hospitals serving Medicare patients, have reimbursement claims backlogged at the ALJ hearing level that were not resolved within the ninety-day statutory timeframe and will likely remain in the appeals process for years.²⁹ Plaintiffs have exhausted the first two levels of the Medicare appeals process and, meanwhile, await the opportunity to present their case for reimbursement before an ALJ.³⁰ Facing financial losses from the nearly 2000 backlogged appeals, worth more than \$10 million, the plaintiffs sued the Secretary of HHS to demand the timely adjudication of their appeals.³¹

18. *Id.* (citing § 1395ff(c)).

19. *Id.* (citing §§ 1395ff(b)(1)(E)(i), (d)(1)(A)).

20. *Id.* at 48 (explaining that the ALJ level is the first, and only, guaranteed opportunity for appellants to provide oral testimony within the administrative appeals process).

21. *Id.* at 46 (citing § 1395ff(d)(1)(a)).

22. *Id.* (citing § 1395ff(d)(2)).

23. *Id.* at 47.

24. *Id.* at 46 (citing §§ 405.980, 405.1130).

25. *Id.* at 47.

26. *Id.* at 46.

27. *Id.* at 47. Since 2013, HHS has suspended assigning new provider-based claims to ALJs. Medicare beneficiaries, who are served by the same appeals process, continue to have their claims assigned to ALJs. *Id.*

28. *Id.*

29. *Id.* at 45.

30. *Id.* at 48.

31. *Id.* at 45.

II. LEGAL BACKGROUND

A court's parameters for compelling agency action when that agency misses a statutory deadline are discernable in the following discussion.³² Part II.A of this Note outlines the authority that permits a court to direct an agency to act.³³ Part II.B analyzes the various ways in which courts have treated the issue of whether to compel agency action when an agency misses a statutory deadline.³⁴

A. *Courts May Compel Agency Action When an Agency Fails to Act*

Courts may compel agencies to act when agencies fail to perform their official duties.³⁵ Part II.A.1 explains the Writ of Mandamus as a mechanism for federal courts to order government agencies to act.³⁶ Part II.A.2 discusses the judicial review provisions within the Administrative Procedures Act ("APA") that allow courts to issue mandamus relief against federal agencies that fail to perform their official duties.³⁷ Part II.A.3 examines how courts approach mandamus relief when agencies do not comply with deadlines contained in their enabling statutes.³⁸

1. *Writ of Mandamus*

A Writ of Mandamus is a judicial vehicle for a federal court to order a government agency to perform a required act.³⁹ Specifically, a mandamus action empowers a court "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."⁴⁰ The United States Supreme Court recognizes that a party seeking mandamus relief must demonstrate that they have been deprived of a clear and indisputable right.⁴¹ The Court has also explained that "mandamus is an extraordinary remedy, to be reserved for extraordinary situations."⁴² Finally, the Supreme Court recognizes that granting mandamus relief is a matter of discretion with the reviewing court.⁴³

32. *See infra* Part II.A–B.

33. *See infra* Part II.A.

34. *See infra* Part II.B.

35. *See infra* Part II.A.

36. *See infra* Part II.A.1.

37. *See infra* Part II.A.2.

38. *See infra* Part II.A.3.

39. 28 U.S.C. § 1361 (2012).

40. *Id.*

41. *See, e.g., Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (outlining the pleading requirements for mandamus relief).

42. *Id.* at 289.

43. *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976).

The United States Court of Appeals for the District of Columbia uses a three-prong standard for plaintiffs pleading mandamus relief.⁴⁴ Plaintiffs in the D.C. Circuit courts must plead that they have “a clear right to relief,” that the agency “has a clear duty to act,” and that there is “no other adequate remedy available to plaintiff.”⁴⁵ Regarding the final prong, the remedy must be either unavailable or inadequate rather than merely reflect a plaintiff’s preference for one form of remedy over another.⁴⁶ Moreover, courts in the D.C. Circuit may decline to issue mandamus relief at their discretion even when a plaintiff meets the pleading standard, especially in matters of complex bargaining between the coordinate branches of government.⁴⁷ For example, in *National Wildlife Federation v. United States*,⁴⁸ the D.C. Circuit declined to issue mandamus relief when it involved “intrud[ing]” into complex federal budget matters that were best left to the legislative and executive branches.⁴⁹

2. Administrative Procedures Act

The judicial review provisions of the APA provide a framework for courts to use mandamus relief when agencies do not perform their official duties.⁵⁰ Section 701(6) states: “The reviewing court shall compel agency action unlawfully withheld or unreasonably delayed”⁵¹ Judicial review is precluded by Section 701(a)(2) to the extent that “agency action is committed to agency discretion by law.”⁵² Finally, Section 702 states: “Nothing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground”⁵³

Two Supreme Court cases clarify, to some degree, the APA’s judicial review provisions concerning mandamus relief. In the first case, *Norton v. Southern Utah Wilderness Alliance (“SUWA”)*,⁵⁴ the Court announced, “the only agency action that can be compelled under the APA is covered in Section 706(1)’s mandate for courts to compel agency action “unlawfully

44. *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002).

45. *Id.*

46. *Id.* at 787.

47. *See, e.g., Public Citizen v. Kantor*, 864 F. Supp. 208, 212 (D.D.C. 1994) (explaining that even when a duty is clear and indisputable, issuance of writ of mandamus is committed to the discretion of the court).

48. 626 F.2d 917 (D.C. Cir. 1980).

49. *Id.* at 924

50. 5 U.S.C. §§ 555(b), 706(1) (2012).

51. *Id.* § 706(1) (internal numbering omitted).

52. *Id.* § 701(a)(2).

53. *Id.* § 702 (internal numbering omitted).

54. 542 U.S. 55, 63 (2004).

withheld.”⁵⁵ Justice Scalia briefly distinguished action “unreasonably delayed” in a footnote; “Of course, [Section] 706(1) also authorizes courts to ‘compel agency action . . . unreasonably delayed’—but a delay cannot be unreasonable with respect to action that is not required.”⁵⁶ Justice Scalia’s footnote bifurcates Section 706(1) and arguably weakens the mandate for a court to compel agency action that is “unreasonably delayed.”⁵⁷ In the second case, *Heckler v. Chaney*,⁵⁸ the Court limited the extent to which Section 701(a)(2) precludes judicial review of agency action that is committed to agency discretion by law.⁵⁹ The Court held that matters of agency discretion covered by Section 701(a)(2) enjoy a presumption against judicial review but are not totally immune from judicial review.⁶⁰ The Court explained, “the presumption [of unreviewability in the APA] may be rebutted where the [enabling] statute has provided guidelines for the agency to follow.”⁶¹

3. Enabling Statute

Specific commands from Congress in the enabling statute may rebut the presumption of unreviewability within Section 701(a)(2) and thereby allow a court to issue mandamus relief even when the action is committed to agency discretion.⁶² The *Heckler* Court stressed the importance of the specific language in the enabling statute by explaining, “Congress may limit an agency’s exercise of . . . power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”⁶³ The *Heckler* Court added, “Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.”⁶⁴ Justice Marshall, in concurrence, addressed the role courts have in balancing deference to agencies and issuing mandamus relief, stating:

[R]ecognizing that courts must approach the substantive task of reviewing such failures [to meet statutory requirements] with appropriate deference to an agency’s legitimate need to set policy through the allocation of scarce budgetary and enforcement resources. . . . [T]he Court’s approach, if taken literally, would

55. *Id.*

56. *Id.* at 63 n.1.

57. *Id.*

58. 470 U.S. 821 (1985).

59. *See id.* at 832 (interpreting § 701(a)(2) of the APA).

60. *Id.*

61. *Id.* at 832–33.

62. *Id.*

63. *Id.* at 833.

64. *Id.*

take the courts out of the role of reviewing agency inaction in far too many cases⁶⁵

B. The Federal Circuits Are Split on When to Compel Action for Agency Non-Compliance with a Statutory Deadline

A split exists among the federal circuit courts regarding whether to automatically issue mandamus relief when an agency misses a statutory deadline.⁶⁶ Part II.B.1 examines decisions from federal circuit courts that interpret missed statutory deadlines as action “unlawfully withheld” under Section 706(1).⁶⁷ As such, these courts interpret the phrase “shall compel agency action” in Section 706(1) as mandating a court to issue mandamus relief.⁶⁸ In contrast, Part II.B.2 analyzes decisions from federal courts, including the D.C. Circuit, that interpret missed statutory deadlines as action “unreasonably delayed” under Section 706(1).⁶⁹ Under this framework, courts interpret the phrase “shall compel agency action” as providing discretion, rather than a mandate, for determining whether to issue mandamus relief.⁷⁰

1. Interpreting Section 706(1) of the APA as Requiring Courts to Issue Mandamus Relief When an Agency Misses a Statutory Deadline

Some federal circuit courts interpret a missed statutory deadline as “agency action unlawfully withheld” under Section 706(1).⁷¹ As such, noncompliance with a statutory deadline serves as a per se violation of the APA.⁷² For example, in Tenth Circuit jurisprudence, *Forrest Guardians v. Babbitt*⁷³ demonstrates that agency action is “unlawfully withheld” when an agency fails to meet “a statutorily imposed absolute deadline.”⁷⁴ Similarly, in the Ninth Circuit case, *Biodiversity Legal Foundation v. Badgley*,⁷⁵ the

65. *Id.* at 855 (Marshall, J., concurring).

66. *See infra* Part II.B.1.

67. *See infra* Part II.B.1.

68. *See infra* Part II.B.1.

69. *See infra* Part II.B.2.

70. *See infra* Part II.B.2.

71. *See infra* notes 74–76 and accompanying text; *see also* DANIEL T. SHEDD, CONG. RESEARCH SERV., R43013, ADMINISTRATIVE AGENCIES AND CLAIMS OF UNREASONABLE DELAY: ANALYSIS OF COURT TREATMENT 7 (2013) (identifying that various lower courts make a distinction between actions unlawfully withheld and actions unreasonably delayed).

72. SHEDD, *supra* note 71.

73. 174 F.3d 1178 (10th Cir. 1999) (determining that failure to comply with a statutorily imposed absolute deadline constitutes agency action unlawfully withheld).

74. *Id.* at 1190.

75. 309 F.3d 1166 (9th Cir. 2002).

court held that a missed statutory deadline violates the “clear congressional intent” and “frustrate[s] the policy Congress sought to implement.”⁷⁶

Federal courts that interpret a missed statutory deadline as “action unlawfully withheld” often strictly interpret the Section 706(1) phrase “shall compel agency action” to require mandamus relief.⁷⁷ As such, these courts automatically issue mandamus relief without discretion.⁷⁸ For example, in *Forrest Guardians*, the Tenth Circuit held that “when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline . . . courts, upon proper application, must compel the agency to act.”⁷⁹ In *Badgley*, the Ninth Circuit held that an agency’s “failure to [act] within the mandated time frame compelled the court to grant injunctive relief . . . [with] no discretion to consider the [agency’s] stated priorities.”⁸⁰

2. Interpreting Section 706(1) of the APA as Permitting Judicial Discretion to Issue Mandamus Relief When an Agency Misses a Statutory Deadline

The D.C. Circuit departs from the Ninth and Tenth Circuits in deciding how to issue mandamus relief when an agency does not comply with its statute.⁸¹ Specifically, the D.C. Circuit interprets the phrase “shall compel agency action” under Section 706(1) as permitting the court to use discretion in deciding whether to issue mandamus relief.⁸² For example, the D.C. District Court in *Center for Biological Diversity v. Pirie*⁸³ held that a court is not required to compel agency action under Section 706(1) “[d]espite language in the substantive provisions of the [statute] written in mandatory terms.”⁸⁴ The D.C. Circuit based its discretionary interpretation of Section 706(1) in the text of Section 702; “[b]ecause [Section] 702 of the APA explicitly states that a court retains equitable discretion, this Court can not hold that Congress has clearly and unequivocally limited that discretion under the APA.”⁸⁵

76. *Id.* at 1175.

77. See *infra* notes 79–80 and accompanying text.

78. See *infra* notes 79–80 and accompanying text.

79. 174 F.3d at 1190.

80. 309 F.3d at 1178.

81. Compare *Forrest Guardians*, 174 F.3d at 1190 (interpreting § 706(1) of the APA as mandating a court to issue mandamus relief), and *Badgley*, 309 F.3d at 1178 (same), with *Ctr. for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113, 118 (D.D.C. 2002), *vacated as moot*, *Ctr. for Biological Diversity v. England*, No. 02-5163, 2003 WL 179848, at *1 (D.C. Cir. Jan. 23, 2003) (criticizing the reasoning used by the Tenth Circuit in *Forrest Guardians*).

82. See text accompanying *infra* note 84.

83. *Pirie*, 201 F. Supp. 2d at 118.

84. *Id.*

85. *Id.* at 119.

In exercising the judicial discretion recognized in Sections 706(1) and 702, the D.C. Circuit uses a factor test to determine whether to issue mandamus relief.⁸⁶ The D.C. Circuit categorizes a missed statutory deadline as “unreasonably delayed” under Section 706(1) and will issue mandamus relief when an agency’s delay is “so egregious as to warrant mandamus.”⁸⁷ In *Telecommunications Research & Action Center v. FCC*⁸⁸ (“*TRAC*”), the D.C. Circuit established a factor test (the “*TRAC*” test) to determine when a delay is sufficiently egregious.⁸⁹ The *TRAC* test weighs six factors. The court should first consider “the time agencies take to make decisions must be governed by a rule of reason.”⁹⁰ Second, “where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason.”⁹¹ The court will also consider that “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake.”⁹² The court should consider, fourth, “the effect of expediting delayed action on agency activities of a higher or competing priority,”⁹³ and, fifth, “the nature and extent of the interests prejudiced by delay.”⁹⁴ Finally, the reason for the delay must not be due to any impropriety.⁹⁵ In *TRAC*, the court acknowledged that the factor test “is hardly ironclad, and sometimes suffers from vagueness, [but] it nevertheless provides useful guidance in assessing claims of agency delay.”⁹⁶

The D.C. Circuit has used the *TRAC* test with varied results depending on the strength of certain factors.⁹⁷ Strong showings of the first two *TRAC*

86. See *infra* notes 89–96 and accompanying text.

87. See *infra* notes 89–96 and accompanying text. *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984).

88. 750 F. 2d 70 (D.C. Cir. 1984).

89. *Id.* at 80 (establishing, but not applying, the factor test).

90. *Id.* (quoting *Potomac Electric Power Company v. ICC (PEPCO)*, 702 F.2d 1026, 1034 (D.C. Cir. 1983); and then citing *MCI Telecomm. Corp. v. FCC (MCI)*, 627 F.2d 322 (D.C. Cir. 1980)).

91. *Id.* (citing *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 34–35 (D.C. Cir. 1984); then citing *Pub. Citizen Health Research Grp. v. Aughter*, 702 F.2d 1150, 1158 n.30 (D.C. Cir. 1983); and then citing *PEPCO*, 702 F.2d at 1034).

92. *Id.* (citing *Pub. Citizen Health Research Grp.*, 740 F.2d at 34; then citing *Aughter*, 702 F.2d at 1157; and then citing *Blankenship v. Secretary of Health, Education and Welfare*, 587 F.2d 329, 334 (6th Cir. 1978)).

93. *Id.* (citing *Pub. Citizen Health Research Grp.*, 740 F.2d at 34; then citing *Aughter*, 702 F.2d at 1158).

94. *Id.* (citing *Pub. Citizen Health Research Grp.*, 740 F.2d at 35).

95. *Id.* (citing *Pub. Citizen Health Research Grp.*, 740 F.2d at 34).

96. *Id.* at 80.

97. Compare *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991) (emphasizing *TRAC* test factor number four to deny mandamus relief), with *In re People’s Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012) (emphasizing *TRAC* test factor number as “most important” in granting mandamus relief).

factors, which emphasize the importance of the deadline, weigh in favor of mandamus relief.⁹⁸ For example, in *In re People's Mojahedin Organization of Iran*,⁹⁹ the D.C. Circuit court issued mandamus relief when it found that a twenty-month failure to act on a 180-day statutory deadline “plainly frustrate[d] the congressional intent and cut[] strongly in favor of granting [the] mandamus petition.”¹⁰⁰ On the other hand, a strong showing of the fourth *TRAC* factor, which favors agency autonomy and deference, has traditionally made courts hesitant to use mandamus relief.¹⁰¹ For example, in *In re Barr Labs*,¹⁰² the D.C. district court determined that forcing the Food and Drug Administration (“FDA”) to comply with a 180-day deadline would inappropriately interfere with the deference Congress granted to FDA to order its priorities.¹⁰³

The D.C. Circuit has provided guiding principles that assist in evaluating the remaining *TRAC* factors.¹⁰⁴ Regarding the third and fifth factors—which concern the interest in delays that might be less tolerable when human health and welfare are at stake—the D.C. Circuit has explained that human health and welfare are at stake when agencies delay in action such as requiring Aspirin warning labels and regulating raw milk.¹⁰⁵ Regarding the sixth factor, the D.C. Circuit will not favor mandamus relief where an agency shows “marked improvement in managing its docket, and there is little reason to believe” a court order is “necessary to sustain that improvement or . . . helpful in spurring greater effort.”¹⁰⁶

In a nearly identical case regarding mandamus relief decided shortly after *American Hospital Association v. Burwell*, the United States District Court for the Eastern District of North Carolina held in *Cumberland County Hospital System v. Burwell*¹⁰⁷ that a plaintiff-hospital did not adequately plead a clear and indisputable right to an ALJ hearing.¹⁰⁸ The court reasoned that Congress “set[] out escalation as an alternate course in the

98. See *infra* note 100 and accompanying text.

99. 680 F.3d 832 (D.C. Cir. 2012).

100. *Id.* at 837.

101. See *infra* note 103 and accompanying text.

102. 930 F.2d 72 (D.C. Cir. 1991).

103. *Id.* at 75 (emphasizing *TRAC* test factor four in finding that a statutory deadline does not necessarily serve as proxy for Congress’s intent to dictate agency priorities).

104. See generally *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) (explaining each factor of the *TRAC* test).

105. See *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984) (“All scientific evidence in the record points to a link between salicylates and Reye’s Syndrome”); see also *Pub. Citizen v. Heckler*, 602 F. Supp. 611, 613 (D.D.C. 1985) (“Officials at the highest levels of the [agency] have concluded that certified raw milk poses a serious threat to the public health.”).

106. See *In re Am. Fed’n of Gov’t Emp., AFL-CIO*, 837 F.2d 503, 507 (D.C. Cir. 1988).

107. *Cumberland Cty. Hosp. Sys., Inc. v. Burwell*, No. 5:14-CV-508-BR, 2015 WL 1249959, at *6 (E.D.N.C. Mar. 18, 2015).

108. See *id.* (denying mandamus relief without reaching the merits of the case).

case of a delay . . . [and] therefore, expressly anticipated delays in Medicare adjudications and prescribed escalation as the remedy.”¹⁰⁹ The court also noted that had the plaintiffs been eligible for mandamus, the court would have found that the particular circumstances did not merit mandamus relief under a *TRAC*-like factor test.¹¹⁰

In summation, specific direction from Congress within an agency’s enabling statute provides a basis for a court to issue mandamus relief when an agency does comply with that direction.¹¹¹ When that specific direction from Congress is a statutory deadline, the federal circuits split as to how they interpret and apply the relevant judicial review provisions of the APA when an agency misses its deadline.¹¹² The Ninth and Tenth Circuits conclude, under Section 706(1), that agency action has been unlawfully withheld and a court must issue mandamus relief.¹¹³ Alternatively, the D.C. Circuit concludes, under Section 706(1), that agency action has been delayed and a factor test is required to determine if the delay is so egregious as to warrant mandamus relief.¹¹⁴

III. THE COURT’S REASONING

In *American Hospital Association v. Burwell*, the United States District Court for the District of Columbia denied mandamus relief when HHS failed to comply with a statutory deadline, holding that HHS’s delay was “not so egregious as to warrant intervention” in the form of mandamus relief.¹¹⁵ In reaching the merits of the case, the district court followed the D.C. Circuit’s jurisprudential position that an agency’s noncompliance with a statutory deadline concerns agency delay rather than an agency’s refusal to act.¹¹⁶ As such, the district court considered whether HHS’s delay was “so egregious” as to warrant mandamus relief.¹¹⁷ The district court noted that D.C. Circuit jurisprudence provides “no per se rule as to how long is too long” of a delay before a court should be compelled to issue mandamus relief.¹¹⁸ The district court applied the six-factor *TRAC* test to evaluate the delay.¹¹⁹

109. *Id.*

110. *Id.* at *7 n.5.

111. *See supra* Part II.A.1.

112. *See supra* Part II.A.2.

113. *See supra* Part II.B.1.

114. *See supra* Part II.B.2.

115. 76 F. Supp. 3d 43, 45 (D.D.C. 2014), *rev’d*, 812 F.3d 183, 194 (D.C. Cir. 2016).

116. *Id.* at 50 (quoting *Telecomm. Research & Action Ctr. v. FCC*, 705 F.2d 70, 79 (D.C. Cir. 1984)).

117. *Id.*

118. *Id.* (citing *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (quoting *In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir.1992))).

119. *Id.*

The district court first addressed *TRAC* factors one and two concurrently in evaluating HHS's noncompliance with its statutory deadline.¹²⁰ The court rejected plaintiffs' argument that noncompliance with a statutory deadline alone justified intervention, distinguishing the case from *People's Mojahedin* where the D.C. Circuit granted mandamus relief in response to an agency's failure to meet a statutory deadline.¹²¹ In contrast, the court adopted the Secretary's position that *Barr Labs* provided the controlling authority, explaining that although "HHS has violated its statutory framework, this conclusion 'does not, alone, justify judicial intervention.'"¹²²

Next, the district court concurrently examined *TRAC* factors three and five, which concern the consequences of non-intervention to plaintiffs and the public.¹²³ The court rejected the plaintiffs' argument that the effect of reimbursement delays—forcing hospitals to “reduce costs, eliminate jobs, forego services, and substantially scale back”¹²⁴—have sufficiently harmed patient health and welfare.¹²⁵ The court, rather, found that the effects were “real consequences to health and welfare, [but] . . . not the kind of immediate and undisputed dangers that have weighed heavily in the *TRAC* analysis in other cases.”¹²⁶ Moreover, the court noted, “[n]early everything HHS does affects human health and welfare—and that context matters.”¹²⁷ As the D.C. Circuit explained in *Sierra Club v. Thomas*,¹²⁸ “[a]lthough this court has required greater agency promptness as to actions involving interests relating to human health and welfare, . . . this factor alone can hardly be considered dispositive when, as in this case, virtually the entire docket of the agency involves issues of this type.”¹²⁹ The court, therefore, found that the third and fifth *TRAC* factors weighed “only very lightly in favor of granting relief.”¹³⁰

The district court then considered *TRAC* factor four, which considers the effect of mandamus relief on the agency's competing priorities.¹³¹ The court agreed with the Secretary's comparison of her case to that of *Barr Labs*, where the D.C. Circuit relied on *TRAC* factor four in denying

120. *Id.* at 51.

121. *Id.*

122. *Id.* (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991)).

123. *Id.* at 51–52.

124. *Id.* at 52.

125. *Id.*

126. *Id.* (contrasting the danger to public health caused by certified raw milk in *Pub. Citizen v. Heckler*, 602 F. Supp. 611, 613 (D.D.C. 1985), with unlabeled aspirin in *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984)).

127. *Id.*

128. 828 F.2d 783, 798 (D.C. Cir. 1987).

129. *Burwell*, 76 F. Supp. 3d at 52 (citing *Sierra Club*, 828 F.2d at 798).

130. *Id.*

131. *Id.* at 53.

mandamus relief.¹³² Similar to *Barr Labs*, the district court reasoned that mandamus relief would impinge on the “autonomy and comparative institutional advantage of the executive branch” by “assum[ing] command over an agency’s choice of priorities.”¹³³ The district court noted that mandamus relief in this case is “precisely the kind of conundrum the D.C. Circuit has cautioned courts against trying to solve.”¹³⁴ In short, the district court concluded that mandamus relief “is not a license to intermeddle, and the court is loath to horn in on the problem-solving efforts of the other two branches of government.”¹³⁵

Finally, the district court evaluated the Secretary’s previous efforts in addressing the backlog in the sixth and final factor of the *TRAC* test.¹³⁶ Under *TRAC* factor six, “the good faith of the agency in addressing the delay weighs against mandamus.”¹³⁷ The district court identified good faith in that HHS had “taken modest steps to increase ALJ work capacity: it is moving to electronic processing, has added ALJs, provided support for ALJs, and offered alternative adjudication options.”¹³⁸ The district court simultaneously rejected the plaintiffs’ argument that the Secretary’s measures “[did] not establish good faith, considering the fact that even the Secretary acknowledges that [these steps] will not solve the backlog problem.”¹³⁹ The district court found, however, that the “agency’s efforts do not offer a perfect resolution” but “move in the right direction,” enough to weigh against mandamus.¹⁴⁰

The district court concluded its decision to deny mandamus relief by noting that its “conclusion is bolstered by the fact that Congress is aware of the situation and is in a position to address the problem.”¹⁴¹ The district court urged the Secretary and Congress to continue working together toward a solution.¹⁴² The district court further opined that “[h]ospitals that are owed reimbursement should not be indefinitely deprived of funds” but they must wait until the *TRAC* test factors shift in their favor.¹⁴³

132. *Id.*

133. *Id.*

134. *Id.* at 54.

135. *Id.* at 54–55.

136. *Id.* at 55–56.

137. *Id.* at 56 (quoting *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 120 (D.D.C. 2005); *In re Am. Fed’n of Gov’t Emp., AFL–CIO*, 837 F.2d 503, 507 (D.C. Cir. 1988) (refusing mandamus relief where the agency showed “marked improvement in managing its docket, and there [was] little reason to believe” a court order was “necessary to sustain that improvement or . . . helpful in spurring greater effort”)).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

IV. ANALYSIS

In *American Hospital Association v. Burwell*, the United States District Court for the District of Columbia held that HHS's noncompliance with a statutory ninety-day Administrative Law Judge hearing deadline did not warrant mandamus relief.¹⁴⁴ Part IV.A proposes that the district court correctly interpreted the APA as allowing judicial discretion in deciding whether to issue mandamus relief when HHS failed to comply with its statutory deadline.¹⁴⁵ Part IV.B concludes that the district court erred, however, in exercising its discretion by misapplying the *TRAC* factor test to deny mandamus relief.¹⁴⁶ Instead, the district court should have granted mandamus relief based on a strong showing of the *TRAC* factors indicating that the delay was sufficiently "egregious."¹⁴⁷ Part IV.C asserts that, as an additional policy matter, the uncertainty of any forthcoming remedy from HHS and Congress in addressing the delay further bolsters the argument for mandamus relief.¹⁴⁸

A. The District Court Correctly Interpreted the APA to Allow Judicial Discretion Regarding Whether to Issue Mandamus

The district court's use of discretion regarding whether to issue mandamus relief follows the correct interpretation of the APA.¹⁴⁹ Part IV.A.1 demonstrates that the phrase "shall compel" within Section 706(1) allows for judicial discretion when considered within the context of preceding sections.¹⁵⁰ Part IV.A.2 establishes that the district court correctly analyzed HHS's noncompliance with its statutory deadline under the "unreasonably delayed" rather than "unlawfully withheld" framework, as the former operates consistently within the judicial discretion inherent within Section 706(1).¹⁵¹

1. The Phrase "Shall Compel" Allows for Judicial Discretion Under Section 706(1) of the APA

The district court correctly concluded that Section 706(1) does not mandate a court to issue mandamus relief.¹⁵² The phrase "shall compel" appears, on face value, to hamstring a court's discretion whenever an

144. *Id.*

145. *See infra* Part IV.A.

146. *See infra* Part IV.B.

147. *See infra* Part IV.B.

148. *See infra* Part IV.C.

149. *See infra* Part IV.A.1–2.

150. *See infra* Part IV.A.1.

151. *See infra* Part IV.A.2.

152. *See infra* Part IV.A.1.

agency misses a statutory deadline.¹⁵³ The argument for strictly construing the word “shall” to create a mandate, indeed, begins and ends with the plain meaning of Section 706(1).¹⁵⁴ The APA, however, should be interpreted differently from ordinary statutes and requires a contextual reading.¹⁵⁵ A contextual reading of the APA supports the district court’s decision to retain discretion regarding whether to issue mandamus relief notwithstanding the use of the word “shall” in Section 706(1).¹⁵⁶

The sections preceding Section 706(1) provide the contextual basis for finding that a Section 706(1) violation does not necessarily create an absolute mandate for a court to issue mandamus relief.¹⁵⁷ First, the seemingly draconian “shall” provision of Section 706(1) is softened by the Section 701(a)(2) requirement that a court must first analyze whether the action is committed to agency discretion and, therefore, unreviewable in court.¹⁵⁸ In other words, a court may choose not to review agency action if it determines that Congress committed discretion to the agency.¹⁵⁹ Second, Section 702 addresses judicial discretion by explaining, “[n]othing herein affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.”¹⁶⁰ Section 702 means that even if a court finds that an agency’s action is reviewable, a court may exercise discretion to deny mandamus relief for other reasons.¹⁶¹ A contextual reading, therefore, reveals that the word “shall” within Section 706(1) is subject to the discretionary provisions of the surrounding sections in the APA.¹⁶²

153. 5 U.S.C. § 706(1) (2012); *see, e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 569–70 (1998) (stating that “shall” is mandatory, not permissive, language); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (noting that “shall” is the strongest mandate Congress could possibly use).

154. *See* Catherine Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1571 (2001) (arguing that the word “shall” indicates mandatory conduct).

155. *See* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1250 (2015) (arguing that APA provisions require a contextual interpretation). Because the APA was designed to apply broadly to all agencies without sufficient deliberation, courts should interpret its provisions contextually and “adhere more closely to the compromises encoded in the statute’s text.” *Id.* at 1211.

156. *See infra* text accompanying notes 157–162.

157. *See infra* text accompanying notes 157–162.

158. 5 U.S.C. § 701(a)(2) (2012); *see* *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (interpreting § 701(a)(2) as a rebuttable presumption of unreviewability of action committed to agency discretion, rather than interpreting the Section strictly).

159. *Id.*

160. 5 U.S.C. § 702 (internal numbering omitted).

161. *See* *Ctr. for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113, 118 (D.D.C. 2002), *vacated as moot*, *Ctr. for Biological Diversity v. England*, No. 02-5163, 2003 WL 179848, at *1 (D.C. Cir. Jan. 23, 2003) (concluding that § 702 of the APA affords courts with discretion under § 706(1)).

162. *Id.*

The Supreme Court's interpretation of the relevant APA provisions lends support for a contextual interpretation that favors judicial discretion.¹⁶³ The Court has concluded, as a general matter, that mandamus is "an extraordinary remedy, to be reserved for extraordinary situations."¹⁶⁴ A reviewing court, therefore, has considerable discretion to decline judicial intervention in ordinary situations.¹⁶⁵ Additionally, the *Heckler* Court softened the seemingly strict language of the unreviewability provision in Section 701(a)(2) by creating a rebuttable presumption, enabling a court to intervene if a plaintiff can overcome the presumption of unreviewability.¹⁶⁶ The Court's interpretations of the APA, therefore, support judicial discretion even when the statute's plain meaning appears to give a court little room to maneuver.¹⁶⁷

In this case, the district court correctly concluded that mandamus relief against HHS was not mandated.¹⁶⁸ The district court announced, "whether mandamus relief should issue is discretionary."¹⁶⁹ Without mentioning the APA directly in its opinion, the district court followed the D.C. Circuit's statutory interpretation of Section 706(1).¹⁷⁰ The D.C. Circuit's statutory interpretation correctly affords a court with the flexibility necessary to examine Section 706(1) in light of Sections 701(a)(2) and 702.¹⁷¹

The D.C. Circuit's interpretation of Section 706(1) prevails on legal soundness compared to that of the Ninth and Tenth Circuits.¹⁷² The Ninth Circuit concluded in *Badgley* that a missed statutory deadline "compelled the court to grant . . . relief" and the "court had no discretion."¹⁷³ Similarly, the Tenth Circuit concluded in *Forrest Guardians* that Congress imposed a mandatory duty upon an agency when a statute uses the word "shall."¹⁷⁴

163. *See, e.g.*, *Norton v. SUWA*, 542 U.S. 55, 66 (2004) (finding that the principal purpose of the APA limitations on judicial intervention is to protect agencies from undue interference from courts); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (interpreting the APA to afford discretion to courts in matters of agency immunity from judicial review).

164. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988).

165. *Cf. id.* (implying that courts have discretion to deny mandamus relief in ordinary situations).

166. *See Heckler*, 470 U.S. at 832–33 (creating a rebuttable presumption against judicial review rather than an absolute bar).

167. *Id.*

168. *Am. Hosp. Ass'n v. Burwell*, 76 F. Supp. 3d 43, 52 (D.D.C. 2014), *rev'd*, 812 F.3d 183, 194 (D.C. Cir. 2016); *see supra* notes 158–167 and accompanying text.

169. *Burwell*, 76 F. Supp. 3d at 49.

170. *See id.* at 50 (noting that issue concerned agency delay rather than a refusal to act).

171. *See supra* note 163; *see also* *Ctr. for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113, 118 (D.D.C. 2002), *vacated as moot*, *Ctr. for Biological Diversity v. England*, No. 02-5163, 2003 WL 179848, at *1 (D.C. Cir. Jan. 23, 2003) (interpreting § 706(1) of the APA to afford courts with judicial discretion).

172. *See infra* text accompanying notes 173–177.

173. 309 F.3d 1166, 1178 (9th Cir. 2000); *see supra* note 75 and accompanying text.

174. *See supra* notes 72–74 and accompanying text.

Critics of the D.C. Circuit's jurisprudence side with the Ninth and Tenth Circuits in concluding that courts are duty-bound to force agencies to comply with statutory deadlines because the plain meaning of the word "shall" is a clear manifestation of Congress's intent to remove discretion from the courts.¹⁷⁵ Such a narrow reading of Section 706(1), however, frustrates the context of the APA's statutory scheme by reducing the discretionary provision of Section 702 to surplusage.¹⁷⁶ Instead, the D.C. Circuit's use of a balancing test to determine whether to issue mandamus relief harmonizes the seemingly inapposite provisions of the APA by reading the discretionary provision of Section 702 to qualify rather than contradict the language of Section 706(1).¹⁷⁷

2. *Courts Should Analyze Missed Statutory Deadlines Under Section 706(1) of the APA as "Unreasonably Delayed" Rather Than "Unlawfully Withheld"*

The district court correctly analyzed HHS's noncompliance with its statutory deadline under the "unreasonably delayed" rather than "unlawfully withheld" framework of Section 706(1).¹⁷⁸ In *Norton v. SUWA*, the Supreme Court infused Section 706(1) with additional judicial discretion by concluding that agency action "unreasonably delayed" does not provide the same basis for mandamus relief as agency action "unlawfully withheld."¹⁷⁹ The Supreme Court's bifurcation of Section 706(1) suggests that designating action as "unlawfully withheld" provides less need for judicial discretion, as the word "unlawfully" directly indicates illegal action.¹⁸⁰ In contrast, designating agency action as "unreasonably delayed" appears to invite judicial discretion in determining whether there is good reason for the delay.¹⁸¹ To read *SUWA* any other way is to assert the very unlikely conclusion that the Supreme Court made a meaningless distinction when bifurcating Section 706(1).¹⁸² The "unreasonably delayed" framework, therefore, affords a court with a significant amount of discretion to assess the reasonableness of an agency's delay when deciding whether to issue mandamus relief.¹⁸³

175. *See supra* note 154 and accompanying text.

176. *See* 5 U.S.C. § 706(1) (2012) (rendering meaningless the discretion noted in § 702 of the APA if a court is duty-bound to issue mandamus relief when applying § 706(1) of the APA).

177. *Id.*

178. *See infra* Part IV.A.2.

179. *See Norton v. SUWA*, 542 U.S. 55, 63 (2004) (differentiating "unlawfully withheld" from "unreasonably delayed" under § 706(1) of the APA).

180. *See id.* (suggesting that the word "unlawful" is tantamount to a refusal to act on a duty).

181. *Cf. id.* (suggesting that "unreasonable" is a subjective term).

182. *Id.* (assuming that the Supreme Court had good reason for differentiating "unlawfully withheld" from "unreasonably delayed" under § 706(1) of the APA).

183. *Id.*

In this case, the D.C. district court's characterization of HHS's noncompliance with the statutory deadline as "unreasonably delayed" rather than "unlawfully withheld" was consistent with *SUWA* and allowed the court to use the *TRAC* balancing test under the discretion afforded by the contextual reading of Section 706(1).¹⁸⁴ Here, the district court's decision highlights where the D.C. Circuit again correctly departs from the Ninth and Tenth Circuits' practice of precluding a discretionary balancing test.¹⁸⁵ The D.C. Circuit's use of the *TRAC* test—to determine whether the agency's delay is "so egregious" as to warrant judicial intervention—also more closely aligns with the Supreme Court's caution that mandamus relief should be reserved for extraordinary situations.¹⁸⁶

B. The District Court Erred in Applying the TRAC Test to Hold That HHS's Delay Was Not Sufficiently "Egregious" to Warrant Mandamus Relief

The district court should have granted mandamus relief based on a strong showing of the several *TRAC* factors indicating that HHS's delay was sufficiently "egregious."¹⁸⁷ This Part does not disturb or discredit the analysis performed by the district court regarding *TRAC* factors four and six, which weigh against mandamus relief.¹⁸⁸ This Part does demonstrate, however, that the factors favoring mandamus relief were sufficient to outweigh the factors against mandamus relief.¹⁸⁹ Part IV.B.1 asserts that *TRAC* factors one and two, relating to the text and purpose of deadline within the enabling statute, produced a showing sufficient to have warranted mandamus relief.¹⁹⁰ Part IV.B.2 proposes that *TRAC* factors three and five, regarding the consequences of the delay to human health and welfare, weighed strongly in favor of granting mandamus relief.¹⁹¹

1. Text and Purpose of the Deadline Within the Enabling Statute

The first two *TRAC* factors, taken together, weigh heavily in favor of mandamus relief when an agency violates a statutory deadline.¹⁹² In *In re People's Mojahedin Organization of Iran*, the D.C. Circuit determined that

184. See *supra* notes 169–171 and accompanying text.

185. See *supra* text accompanying notes 72–85.

186. See *supra* notes 43, 157–171 and accompanying text.

187. See *infra* Part IV.B.1–2.

188. See *Am. Hosp. Ass'n v. Burwell*, 76 F. Supp. 3d 43, 53–56 (D.D.C. 2014), *rev'd*, 812 F.3d 183, 194 (D.C. Cir. 2016) (finding that *TRAC* test factors four and six weigh against mandamus relief).

189. See *infra* Part IV.B.1–2.

190. See *infra* Part IV.B.1.

191. See *infra* Part IV.B.1–2.

192. See *infra* Part IV.B.1.

a violation of a statutory deadline “does not, alone, justify judicial intervention,” but does serve as the “first and most important” of the *TRAC* factors.¹⁹³ The D.C. Circuit granted mandamus relief in *People’s Mojahedin* by finding that “[t]he specificity and relative brevity of the 180-day deadline manifests the Congress’s intent that the Secretary act promptly” and the Secretary’s twenty-month failure to act “plainly frustrates the congressional intent and cuts strongly in favor” of granting mandamus relief.¹⁹⁴ In short, *People’s Mojahedin* makes clear two points: first, not all *TRAC* factors weigh equally and, second, delays of extensive length necessitate an examination of Congress’ purpose for creating a statutory deadline.¹⁹⁵

In this case, the district court incorrectly minimized the importance of the statutory deadline.¹⁹⁶ The district court’s position that the fourth *TRAC* factor, relating to agency priorities, “reduce[d] the heft of these first two factors” demonstrates that the court did not sufficiently emphasize the importance of the statutory deadline.¹⁹⁷ The statutory deadline in this case, ninety days, is half that of the deadline in *People’s Mojahedin*, and the average delay in this case, approximately two years, is larger than the delay in *People’s Mojahedin*.¹⁹⁸ In contrast, the court did not issue mandamus relief in *Barr Labs* when the delay was less than a year.¹⁹⁹ The violation of the statutory deadline at issue here is at least as, if not more, egregious than in *People’s Mojahedin*.²⁰⁰ Accordingly, the district court’s analysis and conclusion regarding HHS’s noncompliance with its statutory deadline should have more closely resembled *People’s Mojahedin* than *Barr Labs*.²⁰¹

193. 680 F.3d 832, 837 (D.C. Cir. 2012) (quoting *In re Barr Labs Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991); then quoting *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008)).

194. *Id.*

195. *See id.* (emphasizing that extensive agency delays weigh in favor of mandamus relief).

196. *Compare* *Am. Hosp. Ass’n v. Burwell*, 76 F. Supp. 3d 43, 51 (D.D.C. 2014), *rev’d*, 812 F.3d 183, 194 (D.C. Cir. 2016) (reducing the importance of the statutory deadline), *with In re People’s Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012) (emphasizing the importance of the statutory deadline).

197. *Burwell*, 76 F. Supp. 3d at 51.

198. *See id.*; *see also Office of Medicare Hearings and Appeals (OMHA)*, U.S. Dep’t of Health & Human Services, (Feb. 7, 2016), http://www.hhs.gov/omha/important_notice_regarding_adjudication_timeframes.html (explaining that the average processing time for appeals decided in fiscal year 2015 was 547.1 days).

199. *See In re Barr Labs, Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991) (finding that an average delay of 336 days was not sufficient to issue mandamus relief).

200. *Compare Burwell*, 76 F. Supp. 3d at 51 (approximately two-year delay on a ninety-day deadline), *with In re People’s Mojahedin*, 680 F.3d at 837 (approximately 600-day delay on a 180-day deadline).

201. *See In re People’s Mojahedin*, 680 F.3d at 837 (issuing mandamus relief for an average delay of 600 days); *In re Barr Labs.*, 930 F.2d at 74 (denying mandamus relief for an average delay of 336 days).

By minimizing the importance of first two *TRAC* factors, the district court also declined to follow *People's Mojahedin's* examination of the purpose of the deadline within the enabling statute.²⁰² The enabling statute in this case requires an ALJ to conduct and conclude a hearing within a ninety-day period.²⁰³ The statute also provides that a party requesting the hearing may escalate its claim to the Departmental Appeals Board (“DAB”) if the ALJ fails to meet the ninety-day deadline.²⁰⁴ The escalation provision is critical.²⁰⁵ In failing to make findings as to the purpose of deadlines within the statutory scheme, the district court ignored the plausible fact that Congress drafted the statute with an escalation clause to facilitate speed in the appeals process.²⁰⁶ In other words, if the ALJ cannot provide a timely administrative hearing, Congress assured that appellants could bring their appeal to another administrative body that can decide the matter quickly.²⁰⁷

The facts demonstrate that HHS's noncompliance with its statutory deadline, like in *People's Mojahedin*, “plainly frustrates the congressional intent.”²⁰⁸ The chain reaction caused by ALJ delays frustrate the design of the escalation process within the statute.²⁰⁹ For instance, when ALJs do not meet their ninety-day deadline, more appellants escalate their claims to the DAB.²¹⁰ The DAB admits that it is “unlikely” that it will “meet the 90-day timeframe for issuing decisions in most appeals” because of the increased caseload from ALJ escalations.²¹¹ Therefore, HHS cannot currently issue timely adjudications at either the ninety-day ALJ deadline or the ninety-day DAB deadline, leaving judicial review in federal court as the only remaining option for a timely adjudication.²¹² In other words, a party can escalate through both the ALJ and DAB levels and seek judicial review in federal court in approximately 180 days while the average delay for an ALJ hearing is nearly 550 days.²¹³ A rational appellant would certainly choose

202. See *In re People's Mojahedin*, 680 F.3d at 837 (examining Congress's rationale for instituting a statutory deadline).

203. 42 U.S.C. § 1395ff(d)(1)(A) (2012).

204. *Id.* § 1395ff(d)(3)(A).

205. See *In re People's Mojahedin*, 680 F.3d at 837 (acknowledging that deadlines manifest Congress's intent).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *OMHA Medicare Appellant Forum*, Office of Medicare Hearings and Appeals (“OMHA”) Medicare Appellant Forum, Oct. 29, 2014, Washington, D.C., http://www.hhs.gov/omha/files/appellant_forum_presentations.pdf (indicating that escalation from the ALJs to DAB increased nearly tenfold from 2013 to 2014).

211. *Id.* at 60.

212. *Id.*

213. See *supra* note 198.

the shorter timeline.²¹⁴ This scenario plainly violates congressional intent, as federal courts were not meant to process the bulk of administrative appeals, especially those that have not received any previous on-the-record hearings.²¹⁵ Consequently, the district court should have issued mandamus relief based on the severity of the delay and the lack of an adequate remedy in the escalation process.²¹⁶

2. *Human Health and Welfare Interest Associated with Hospital Services*

The district court erred in concluding that the human health and welfare interests at stake “weigh[ed], if at all, only very lightly,” in favor of mandamus relief.²¹⁷ The third and fifth *TRAC* factors, taken together, more readily compel a court to issue mandamus relief when the interests prejudiced by the delay affect human health and welfare.²¹⁸ The D.C. Circuit has explained that human health and welfare are at stake when the consequences pose a serious threat to public health.²¹⁹ The D.C. Circuit’s standard for finding such a serious threat derives from cases in which an agency delayed in regulating raw milk and when an agency delayed in issuing label warnings on aspirin products.²²⁰

In this case, the district court erred in its factual findings regarding the impact of HHS’s delay on health and human welfare.²²¹ The district court did not dispute that the ALJ hearing backlog and related reimbursement delays caused hospitals to “reduce costs, eliminate jobs, forgo services, and substantially scale back.”²²² The district court found, however, that these facts insufficiently affected public health and welfare to compel the court to issue mandamus relief.²²³ For example, the district court found “very few specific *services* . . . are actually less available to the public as a result of the delays.”²²⁴ At most, the district court found that the uncertainty of timely reimbursement forced some rehabilitation facilities party to the suit

214. See *supra* note 210 (indicating that escalation from the ALJs to DAB increased nearly tenfold from 2013 to 2014).

215. See generally 42 U.S.C. § 1395ff (2012) (designating administrative entities rather than courts to adjudicate appeals). See also *In re People’s Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012) (issuing mandamus relief when the missed statutory deadline plainly frustrated Congress’s intent).

216. See *infra* text accompanying notes 217–221.

217. *Am. Hosp. Ass’n v. Burwell*, 76 F. Supp. 3d 43, 52 (D.D.C. 2014), *rev’d*, 812 F.3d 183, 194 (D.C. Cir. 2016); see also *infra* Part IV.B.2.

218. *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984).

219. See *supra* note 105.

220. See *supra* note 105.

221. See *infra* notes 222–232.

222. *Burwell*, 76 F. Supp. 3d at 52.

223. *Id.*

224. *Id.*

to decline to admit patients with lower extremity joint replacements and certain debilitated physical conditions.²²⁵ The district court concluded, however, that the inability to admit certain patients was not sufficiently comparable to the examples of raw milk or mislabeled aspirin.²²⁶

The district court's narrow findings of fact overlooked important statements related to human health and welfare that were included in the plaintiffs' pleadings.²²⁷ For example, one plaintiff hospital pled that it has been unable to purchase basic equipment, such as beds for its Intensive Care Unit, and has not been able to replace a failing roof in its surgery department.²²⁸ Additionally, other plaintiff hospitals alleged that they have postponed necessary upgrades to their electronic health record systems.²²⁹ The plaintiffs also asserted that they cannot pay competitive wages, which risks losing highly skilled and experienced health care professionals.²³⁰ By declining to address these facts directly, the district court was able to conclude that the hospital services mentioned in the pleadings posed fewer "immediate and undisputed dangers" to health and human welfare than did raw milk or mislabeled aspirin.²³¹ Given the nature of hospital care, however, particularly the care of the elderly Medicare population, it is plausible that a hospital's inability to purchase beds, repair roofs, update records systems, or keep its skilled doctors, does present immediate and undisputed dangers to human health and welfare.²³²

Moreover, the district court's conclusion that interests relating to human health and welfare should be discounted because "virtually the entire docket of the agency involves issues of this type" is problematic as a matter of law in this case.²³³ The D.C. Circuit developed this rule, in *Sierra Club v. Thomas*,²³⁴ where the court analyzed the health and human welfare TRAC factor within the context of delays in the Environmental Protection Agency's ("EPA") rulemaking regarding the regulation of strip mine

225. *Id.*

226. *Id.* (contrasting the danger to public health cause by certified raw milk in *Pub. Citizen v. Heckler*, 62 F. Supp. 611, 613 (D.D.C. 1985) and unlabeled aspirin in *Pub. Citizen Health Research Grp. v. FDA.*, 740 F.2d 21, 34 (D.C. Cir. 1984)).

227. *See infra* notes 228–232.

228. Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 10, *Am. Hosp. Ass'n v. Burwell*, 76 F. Supp. 3d 43 (D.D.C. 2014) (No. 1:14-CV-851-JEB), 2014 WL 10093552.

229. Brief by the Fund for Access to Inpatient Rehabilitation as Amicus Curiae Supporting Plaintiff at 27, *Am. Hosp. Ass'n v. Burwell*, 76 F. Supp. 3d 43 (D.D.C. 2014) (No. 1:14-CV-851-JEB), 2014 WL 10093552.

230. *Id.* at 28.

231. *See Burwell*, 76 F. Supp. 3d at 53 (overlooking certain facts from petitioner's brief); *see also supra* note 220.

232. *See supra* notes 228–231.

233. *See Burwell*, 76 F. Supp. 3d at 52 (citing *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987)).

234. 828 F.2d 783 (D.C. Cir 1987).

fugitive emissions.²³⁵ The factual differences between *Sierra Club* and the present case highlight the error of comparison.²³⁶ For example, unlike the ninety-day ALJ hearing deadline in *American Hospital Association v. Burwell*, the EPA was not under a statutory deadline to issue a rulemaking in *Sierra Club*.²³⁷ Additionally, emissions have a relatively remote impact on human health and welfare compared to the direct impact that underfunded and understaffed hospitals has on human welfare.²³⁸ Finally, the application of the *Sierra Club* principle, tailored to delays in EPA rulemakings, to HHS, an agency exclusively chartered for health and human welfare, creates a scenario where nearly every HHS action is immune from a health and human welfare analysis.²³⁹ The absurdity of this result reveals that the district court should have distinguished *Sierra Club* from this case.²⁴⁰

In summation, the district court's conclusion that the human health and welfare interests at stake in *American Hospital Association v. Burwell* were insufficient for mandamus relief rested on incomplete findings of fact and erroneously applied legal principles.²⁴¹ The effect of HHS's delay on the human health and welfare interests removes any lingering doubt that the district court should have issued mandamus.²⁴²

C. The Uncertainty of Any Forthcoming Remedy from HHS and Congress in Addressing the Delay Further Bolsters the Conclusion for Mandamus Relief

As a matter of public policy, district court's overreliance on the fourth TRAC factor underscores the conclusion that mandamus is appropriate.²⁴³ The district court relied on the principle that "mandamus jurisdiction is not a license to intermeddle, and the Court is loath to horn in on the problem-solving efforts of the other two branches of government."²⁴⁴ However, the uncertainty of any forthcoming remedy from HHS or Congress in

235. *Id.* at 798.

236. *See infra* notes 237–239.

237. *Cf. Burwell*, 76 F. Supp. 3d at 52 (citing *Sierra Club*, 828 F.2d at 798) (erroneously comparing a statutory adjudication deadline to a regulatory rulemaking).

238. *Id.* (erroneously equating the remote impact of emissions to the more direct impact of medical care for hospital patients).

239. *Id.* (erroneously equating the health and human welfare focus of the EPA to that of HHS).

240. *See supra* notes 237–239.

241. *See supra* Part IV.B.

242. *See supra* Part IV.B.

243. *See infra* Part IV.C. This Part does not attempt to provide solutions to the ALJ Hearing backlog and the related problems. Such solutions are outside the scope of this Note.

244. *Burwell*, 76 F. Supp. 3d at 54–55.

addressing the delay of Medicare reimbursement hearings bolsters the argument for mandamus relief.²⁴⁵

The U.S. Department of Health and Human Services has demonstrated that it is unable to meet, or even come relatively close to meeting, the statutory adjudication deadlines for ALJ appeals under the current budgetary constraints.²⁴⁶ While ALJs have recently become more productive, the volume of ALJ appeals has outpaced ALJ decisions since 2008 and has recently exceeded four times the amount of cases that the ALJs can decide in one year.²⁴⁷ HHS has offered some solutions, including standardizing business practices, encouraging mediation, using statistical sampling, and implementing electronic case processing.²⁴⁸ These solutions, however, will not have a significant or immediate impact in curing the ALJ delays.²⁴⁹

Even an optimistic view of Congress's commitment to address the ALJ adjudication delay brings little comfort to the district court's decision to defer to Congress as problem solver.²⁵⁰ First, both the Senate and House Committees on Appropriations have approved different bills with different levels of funding for the ALJ hearings for the fiscal year 2016 budget.²⁵¹ Both bills, however, would only increase the level of funding by, at most, \$10 million.²⁵² Furthermore, these bills must still pass in both the House and Senate, and the House and Senate must reconcile any differences in budget negotiations before the President can sign the budget into law.²⁵³ Second, in June of 2015, the Senate Finance Committee passed the Audit & Appeal Fairness, Integrity, and Reforms in Medicare ("AFIRM") Act of 2015, an original bill to improve the Medicare audit and appeals process.²⁵⁴

245. See *infra* Part IV.C.

246. See generally *supra* note 210.

247. See generally *supra* note 210.

248. See generally *supra* note 210.

249. Amy F. Lerman & Robert E. Wanerman, *OMHA's Second Medicare Appellant Forum Reveals Some Forward Momentum but No Simple or Quick Solutions for Medicare Administrative Appeals Backlog* (Epstein Becker Green, Nov. 6, 2014), http://www.ebglaw.com/content/uploads/2014/11/HCLS-Client-Alert_OMHA-Second-Medicare-Appellant-Forum.pdf.

250. See *infra* note 251.

251. H.R. REP. NO. 114-195, at 111 (2015), <https://www.congress.gov/114/crpt/hrpt195/CRPT-114hrpt195.pdf> (providing \$87,381,000 for the Office of Medicare Hearings and Appeals, which is the same as the fiscal year 2015 enacted level and \$52,619,000 below the budget request); S. REP. NO. 114-74, at 151 (2015), <https://www.congress.gov/114/crpt/srpt74/CRPT-114srpt74.pdf> (providing \$97,381,000 for the Office of Medicare Hearings and Appeals, which is \$10 million more than provided in the fiscal year 2015 but \$42,619,000 below the budget request).

252. *Id.*

253. *Id.*

254. See also S. REP. NO. 114-177, at 9 (2015), <http://www.finance.senate.gov/imo/media/doc/S.Rpt.114-177.pdf>; Press Release, U.S. Senate Finance Committee, Hatch, Wyden Praise Committee Passage of the Audit & Appeal Fairness,

Assuming an expeditious path for AFIRM into law, the majority of its effects would not take effect until 2017.²⁵⁵ Notably, these effects do not include a direct solution to the issue of noncompliance with the ALJ's statutory deadline.²⁵⁶

The undesirable legislative outlook demonstrates bleak hope for HHS and Congress to address the problem on their own.²⁵⁷ Moreover, the district court's resistance to intervention enacts the warning offered by Justice Marshall's concurrence in *Heckler*:

[R]ecognizing that courts must approach the substantive task of reviewing such failures [to meet statutory requirements] with appropriate deference to an agency's legitimate need to set policy through the allocation of scarce budgetary and enforcement resources. . . . [T]he Court's approach, if taken literally, would take the courts out of the role of reviewing agency inaction in far too many cases²⁵⁸

V. CONCLUSION

Justice Marshall's caution in *Heckler* is most appropriate when the stakes are high, as in this case.²⁵⁹ Plaintiffs have essentially lost their appeal rights, with nearly 2000 appeals, collectively worth more than \$10 million, backlogged at the ALJ level.²⁶⁰ Justice Marshall warned that the "dangers of agency inaction are too important, too prevalent, and too multifaceted to . . . mandat[e] that courts cover their eyes and their reasoning power when asked to review an agency's failure to act."²⁶¹ Absent mandamus, hospitals will be forced to weather HHS's extraordinary delays, without Medicare payments for services that were already furnished to beneficiaries and to which they are entitled.²⁶² The danger to health and safety is real and the scope of the problem is measureable in both reimbursement dollars and the impact on patients affected by cost cutting.²⁶³ By noting that Congress is aware of the situation and is in a position to address the problem, the D.C. district court proclaimed

Integrity, and Reforms in Medicare Act of 2015 (June 3, 2015), <http://www.finance.senate.gov/newsroom/chairman/release/?id=bc09dd5b-84d6-45e2-ba89-c61a40481489>.

255. S. REP. NO. 114-177, at 9.

256. *Id.*

257. *See supra* notes 250–258 and accompanying text.

258. *Heckler v. Chaney*, 470 U.S. 821, 855 (1985) (Marshall, J., concurring).

259. *See infra* notes 260–263.

260. Plaintiff's Memorandum of Points and Authorities, *supra* note 228, at 30.

261. *Heckler*, 470 U.S. 821 at 854–55 (1985) (Marshall, J., concurring).

262. *Am. Hosp. Ass'n v. Burwell*, 76 F. Supp. 3d 43, 45 (D.D.C. 2014), *rev'd*, 812 F.3d 183, 194 (D.C. Cir. 2016).

263. *See supra* notes 227–232 and accompanying text.

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absolution from a problem it declares it has no business solving.²⁶⁴ But after years of delay and no sign of a solution from HHS or Congress, who better than the district court to champion the cause of those who seek the relief to which they are entitled? The recent D.C. Circuit remand order only reinforces the point that the responsibility, indeed, falls squarely with the district court when adequate and timely remedies are not forthcoming from the coordinate branches.²⁶⁵

In failing to issue mandamus relief, the district court succumbed to the trappings of a strict posture of deference warned against by Justice Marshall.²⁶⁶ Justice Marshall reasoned that a court's deference to an "agency's legitimate need to set policy through the allocation of scarce budgetary and enforcement resources . . . if taken literally, would take the courts out of the role of reviewing agency inaction in far too many cases."²⁶⁷ *American Hospital Association v. Burwell* stands as a glaring example of a case where the court took too literally the charge of deference to an agency at the expense of providing relief due under the law.

264. See *Burwell*, 76 F. Supp. 3d at 56 (noting that the court is "not in a position to provide that fix").

265. *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 192–94 (D.C. Cir. 2016); see *supra* Part IV.C.

266. See *Heckler*, 470 U.S. at 854–55 (Marshall, J., concurring) (warning that a court should not interpret § 706(1) of the APA too literally at the expense of necessary judicial review and intervention).

267. *Id.* at 855.