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## Administrative Delay and Judicial Relief

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# ADMINISTRATIVE DELAY AND JUDICIAL RELIEF

Steven Goldman\*

For who would bear the whips and scorns of time,  
The oppressor's wrong . . . the law's delay.

*Hamlet*, Act III, s. 1

## I. THE CASE FOR JUDICIAL INTERVENTION

ADMINISTRATIVE agencies, created in part to provide simple, speedy, and efficient procedures, have often been prone to excessive delay in their proceedings.<sup>1</sup> Lapses of time in administrative proceedings may occasion considerable individual and social costs. Increased expenses may be a direct consequence of the delay, as are lawyers' fees and executives' time, or may result indirectly from factors such as the rising cost of necessary goods and services during an inflationary period. In addition, lengthy administrative proceedings may force abandonment of profitable projects or may create such uncertainty as to the outcome of the proceedings that the party's ability to plan is hampered and his credit position impaired. If the regulated party is a public corporation, even the market price of its stock may be affected by delay. The prospect of delay may discourage desirable activity by stifling individual initiative or may induce avoidance of the administrative process, thereby undermining its very *raison d'être*. Finally, all of these difficulties are compounded in the case of a small business that is unable to bear the risk and uncertainty incident to delay.<sup>2</sup>

In many instances, however, the passage of time is a requisite to the effective functioning of the administrative process. Time may be necessary to build an adequate record, to pursue informal negotiations, to reach settlements in other related cases, or to insure the parties a full and careful consideration of all the relevant issues.

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1. See H. FRIENDLY, *BENCHMARKS* 68 (1967):

I wonder whether law students still are taught, as we were in the 1920's, to contrast the celerity of those Mercury-like and wing-footed messengers, the administrative agencies, with the creeping and cumbersome processes of the courts. If they are, they have a rude awakening ahead, on both counts. To borrow Mr. Churchill's phrase, the regulatory agencies often tolerate delays up with which the judiciary would not put.

2. See Long, *Administrative Proceedings: Their Time and Cost Can Be Cut Down*, 49 A.B.A.J. 833 (1963); Note, *Judicial Acceleration of the Administrative Process: The Right to Relief From Unduly Protracted Proceedings*, 72 YALE L.J. 574 (1963).

On the other hand, delay is frequently unrelated to the proper functioning of the administrative process. Causes for such delay include crowded dockets, inadequate appropriations, lack of personnel, indecision on major policies, tactical delays by opposing parties, and unnecessary or repetitious procedures and hearings.

When parties suffer substantial harm from unwarranted administrative delay, they quite naturally turn to the courts for relief; indeed, disinterested judicial scrutiny of administrative lawmaking is a useful and recognized component of our legal system. The function of the courts as second-line reviewing agencies is not logically limited to reviewing administrative action as distinct from administrative inaction. The courts and administrative agencies share a concern for fashioning a legal system which is effective and responsive to individual demands for an orderly and expeditious resolution of issues. And, from the viewpoint of the private parties, the advantages of another potential avenue of relief are manifest: agencies seldom have internal review boards for expediting action, and informal relief through political pressure—while available to economically or politically powerful groups—is not within the reach of the average private party. Thus, judicial review of administrative delay may open an alternative channel of relief to all parties, irrespective of wealth and power.

The problem of judicial relief from protracted agency delay has been virtually undiscussed in the existing literature. The few courts that have dealt with the delay question have acted instinctively, without providing any rational framework and without articulating either relevant concerns or appropriate standards. This Article will explore the range of issues raised when courts are called upon to grant relief from excessive administrative delay.

## II. EFFECTIVE LIMITS OF JUDICIAL INTERVENTION: IS ADMINISTRATIVE DELAY JUSTICIABLE?

Although the above considerations may favor judicial intervention, considerations of judicial competence may limit the ability of courts to resolve questions of administrative delay. A court may be unable to obtain all of the information necessary for a reasoned judgment, to evolve meaningful standards that will guide future administrative conduct, or even to fashion an appropriate remedy. In short, the question of administrative delay may be a "managerial" question not soluble by generally applicable criteria of decision and

therefore more suitable for legislative or administrative control than for judicial supervision. The justiciability of the delay issue in varying contexts may be illustrated by several hypothetical cases.

*Case I: Evenhandedness*

In 1963, Pipeline Inc., a newly organized corporation, applied for a commission certificate to construct and operate a pipeline. The normal time necessary for the agency to dispose of pipeline certification cases is three years. Five years have passed, and Pipeline institutes suit in an appropriate court alleging that there is no substantial reason why its application should take longer than other routine certification cases. Pipeline requests the court to compel the agency either to expedite the proceedings or to show cause why a certificate should not be issued.

The delay issue in this case seems to be justiciable. Since there is proof of the normal time necessary to dispose of similar proceedings, the court has a ready-made standard for judgment. Assuming that Pipeline is able to show that it is within the class that normally receives certification in three years, the policy of evenhandedness—the notion that like cases should be treated alike—provides the court with a familiar and judicially manageable criterion for making a reasoned decision.<sup>3</sup> Presumably, the court also would be able to evaluate asserted administrative justifications for treating Pipeline differently. Moreover, unlike case III, discussed below, fashioning an appropriate remedy would not involve elaborate and time-consuming proof of comparative harm to other applicants similarly situated. If Pipeline is one of a very few applicants suffering from five years' delay, the court might easily expedite its case without undue prejudice to other pending applications. But, if Pipeline is only one of a large group of companies whose applications have been pending for five years, the court might conclude that the time required for disposal of similar cases is not really three years but five. Thus, the question of the propriety of judicial intervention may well turn upon whether there has been excessive delay at all—an issue which a court is clearly competent to decide.

*Case II: Bias*

The same facts as in case I, but Pipeline alleges that its application has been pending for two years longer than the average be-

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3. See, e.g., *International Business Mach. Co. v. United States*, 343 F.2d 914 (Ct. Cl. 1965).

cause a commissioner has a personal grudge against the president of Pipeline and has deliberately caused delay to force Pipeline out of business.

The delay issue in this case is equally appropriate for adjudication. The standards employed in case I are available to guide judicial judgment. And, the additional factor of bias provides the court with a further ground for assessing whether the delay is unreasonable, arbitrary, or capricious. Courts have carefully scrutinized administrative action tainted with bias or prejudice, and there seems to be no sound reason to distinguish those cases from an instance in which bias causes agency inaction. Even if there were legitimate reasons for denying Pipeline's application, there still would be little justification for the commission to delay decision; rather, the agency should issue a timely, outright denial, which would be subject to disinterested judicial review. Finally, as in case I, the appropriate remedy seems relatively easy to fashion.

### *Case III: Political Impotence*

The same facts as in case I, but Pipeline claims that its application has been pending for five years because Major Inc., a giant in the oil industry, has exerted its political and economic influence by pressuring congressmen to expedite consideration of its own application.

Delay resulting from the political strength of other regulated parties is a more troublesome issue for adjudication than is the delay in either case I or II. On the one hand, the policy of evenhandedness provides the court with some standard for judgment. And yet, perhaps a court should not attempt to redress the imbalance of economic and political power where no otherwise improper conduct has been shown. It is well recognized that the administrative process is not insulated from political forces, and it is at best doubtful whether a court can say that governmental regulation should be responsive to some legitimate political forces but not to others. Moreover, fashioning an appropriate remedy would be difficult in this situation. Any equitable considerations that favor accelerating Pipeline's application could also be urged on behalf of other applicants who have been forced to wait their turns while Major received preferred treatment. Thus, judicial relief for Pipeline alone might be unfair to these other applicants, unless it can be proved that Pipeline's case is different or that delay is more burdensome to

Pipeline. Proof of these factors would vastly expand the scope of judicial inquiry into issues more appropriate for resolution by the agency docket clerk than by a court. Furthermore, the weighing of relative harm suffered by various applicants might be not only judicially infeasible, but also seriously burdensome to the courts. The court could avoid some of these difficulties by enjoining the agency from expediting Major's case if it is not too late to do so. In effect, Pipeline would be viewed as bringing a class action on behalf of all similarly injured parties; but such an approach would still be open to the objection that the court is interfering with the normal functioning of the political process and meddling in agency business.

#### *Case IV: Agency Priority*

The same facts as in case I, but Pipeline argues that its application has been pending for five years because the agency has determined that Major's application deserves priority over other applicants due to the importance of its proposed facilities.

As in the preceding case, Pipeline has been harmed not as a single entity, but as a member of a class of applicants, all of whom have been pushed back one place in line. Even if this procedural objection could be obviated through the use of a class action, relief exclusively for Pipeline would be unfair to similarly situated parties and it seems doubtful that a court would be competent to resolve the "managerial" problem of allocating priorities to limited agency resources.<sup>4</sup> It is even more doubtful that the court could make a more informed decision than agency experts on the question of whether the social benefits of accelerating Major's application outweigh the detriments. Nevertheless, the court appears competent to exercise its normal limited review over agency action: to evaluate the legal sufficiency of the commission's reasons and determine whether the agency considered the proper factors in arriving at its judgment. Therefore, if the issue was presented in timely proceedings and the court found that Major's application was advanced for inadequate or unjustifiable reasons or without full consideration of the relevant factors, it might remand to the agency for additional findings or enjoin acceleration of Major's case.

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4. Cf. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 156 (1951) (Frankfurter, J., concurring): "Whether 'justiciability' exists . . . has most often turned on evaluating both the appropriateness of issues for decision by courts and the hardship of denying relief." See also note 58 *infra*.

*Case V: Judicial Priority*

In 1967, Major Inc., the oil industry giant, applied for a certificate to construct and operate a pipeline. The normal time necessary to dispose of pipeline certification cases is three years. One and one-half years has elapsed, and Major institutes suit seeking judicial acceleration of its application on the ground that its proposed facilities are important to the community and that it will have to forgo the project entirely unless approval is forthcoming.

Despite the fact that Major might be able to achieve its objective through the political process<sup>5</sup> or by agency action,<sup>6</sup> judicial relief seems inappropriate in this context. Apart from the question of whether the legislature intended the courts to intervene affirmatively in the administrative process, there are no meaningful standards which a court can use to determine whether Major's request for priority is warranted. Even if the court were to decide that the appropriate standard is "public interest," a comprehensive, comparative analysis of other matters pending on the commission's docket would be required to determine if other applications were of greater "public interest" or if the detriment to the public caused by deferring other cases outweighs the benefit from deciding Major's case immediately. Such a comparative determination would be time consuming and would require judicial balancing of largely immeasurable factors. Moreover, even if courts were capable of balancing these factors, they lack the equipment for gathering the information needed to assess these complex economic issues. And, more important, because of the numerous variables to be considered in determining priority between applicants, ad hoc administrative discretion seems more appropriate than judicial "reasoned elaboration" since it is largely impossible to develop "generally applicable premises of reasoning with reference to which the variables can be judged."<sup>7</sup>

Other factors lead to the conclusion that the priority question should not be justiciable in this context. Many applicants, as a matter of course, could apply to various courts for expediting orders. Conceivably, an administrative agency would be subjected to many conflicting court orders, resulting in a significant loss of agency control over the scheduling of its own docket, and making it impossible

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5. Cf. Case III *supra*.

6. Cf. Case IV *supra*.

7. H. Hart & A. Saks, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 669 (1968).

for the agency to comply with possibly inconsistent orders. If the courts were required to consider other court orders establishing priorities, there would be an unwarranted premium placed on the diligence of applicants who rush to the courthouse first. This problem could probably be avoided by vesting exclusive jurisdiction over priority cases in one court; but even if such an approach were politically feasible, it seems doubtful that a special court would be any better equipped to resolve the essentially "managerial" problems inherent in supervision of an agency docket.

#### *Case VI: Efficiency*

The same facts as in case I, except that after one and one-half years Pipeline institutes suit alleging that its case should be decided immediately because there is no reason for certification proceedings to take three years, and that if the agency were more efficient, certification decisions could be rendered in one and one-half years.

Unlike case V, where the applicant seeks priority over other parties by asserting an affirmative justification, the court in this case would not be required to undertake the difficult analysis of the competing claims of other applicants. Instead, since Pipeline's claim pertains to the efficient allocation of administrative resources as a whole, the court must decide whether the commission is acting with appropriate dispatch in all of its certification cases. In most cases a court would not be competent to make such a decision. While it might be argued that a workable test could be based upon the normal time required by this agency or other agencies to process similar cases, it is unlikely that a court could evolve viable standards to determine the appropriate length of time for any particular administrative action. The court would have to work with a relative standard such as "reasonable dispatch" rather than making an essentially legislative judgment that a particular administrative practice should take no longer than a specified period of time. However, a "reasonable dispatch" standard is not likely to be susceptible to reasoned elaboration: the large number of potentially relevant factors and the difficulty of assessing the relative importance of each variable seem to preclude effective adjudication. For example, to determine whether three years constitutes "reasonable dispatch" for pipeline certification proceedings, it may be necessary to examine the nature of the proceedings required by statute, the complexity of the substantive issues, the relative importance of pipeline certification matters to



other kinds of pending cases, the amount and quality of agency resources, and so forth. These factors are largely immeasurable, and their relative importance varies considerably over time because of the dynamic nature of the administrative process. Moreover, some of these factors—such as the relative importance of different types of agency actions—require an initial policy determination that is clearly nonjudicial in nature. Finally, the stare decisis effect of such a decision would be minimal. Considerable relitigation of the same issue under changing circumstances would be likely; and, as a matter of policy, there is serious question whether limited judicial resources should be allocated to making such ephemeral decisions.

The difficulty of acquiring enough evidence to formulate a reasoned judgment also leads to the conclusion that the delay issue is not justiciable when it turns on questions of administrative efficiency. Since independent judicial research is generally impractical, the court would be forced to rely upon those few factors which may be considered by judicial notice and on evidence gathered by the parties to the proceeding. To be sure, most of the relevant information would be in the hands of the agency. However, a rule of evidence requiring the agency to come forward with all the information justifying the length of its proceedings still would not suffice to provide the court with information about dilatory behavior or administrative inefficiency. And, it is certainly not clear that the court could require an agency to come forward with evidence proving the applicant's case as well. Perhaps discovery procedures would provide the applicant and the court with the relevant facts relating to administrative inefficiency. However, discovery would seem to be an inadequate tool unless the agency had compiled the relevant records and comparative time charts.<sup>8</sup> Finally, the courts' ability to fashion an appropriate remedy is also open to serious question when administrative delay is caused by inefficiency. If delay results from inadequate appropriations, lack of personnel, or incompetence, the remedy seems to lie with the legislature and not with the courts.

Notwithstanding these difficulties, however, some challenges to administrative inefficiency should be justiciable. For example, if an agency holds repetitive hearings, the delay issue is susceptible of ad-

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8. Even though many courts possess broad discovery powers, the time and expense burden of searching an agency's records could still defeat the plaintiff's case. Moreover, there appears to be inherent danger in opening agency files when competitors in the same industry have cases pending before the agency.

judication. The standard of "reasonable dispatch" is judicially manageable in this context: the court can determine whether the asserted benefits derived from additional hearings outweigh the potential harm that the delay would inflict upon the party before the agency. In this situation the court is not faced with a difficult inquiry into how agency resources should be allocated among competing activities; instead, agency resources may be freed from useless activity and put to more productive use. Furthermore, the information needed to weigh the asserted benefits and detriments would be readily accessible in the record of the agency proceedings, the asserted administrative justification for additional hearings, and the complaint alleging the harm suffered by the party before the agency. Finally, a court would be able to grant an appropriate remedy by enjoining the repetitious proceedings.

As the foregoing hypotheticals indicate, most cases fall between the polar extremes of complaints about useless hearings and general allegations of administrative inefficiency. In each such instance, the institutional competence of the court to adjudicate the delay issue depends upon a range of considerations including the nature and cause of the delay, the existence of ascertainable and judicially manageable standards, the availability of information needed to decide the case, and the possibility of fashioning an effective remedy. If an analysis based upon these considerations leads to the conclusion that a given case is within the court's sphere of competence, the prospective plaintiff must then construct an appropriate theory of relief.

### III. EQUITABLE RELIEF: PREREQUISITES AND THEORIES

#### A. *Prerequisites for Relief*

When a party suffers from agency delay, the cases indicate that he will probably seek some form of equitable relief.<sup>9</sup> If a court is to grant an injunction against agency delay, according to traditional theory, the plaintiff must demonstrate that he has no adequate legal remedy and that he is suffering irreparable harm<sup>10</sup> because of the delay. An example of such a showing is *American Broadcasting Co. v.*

9. A writ of mandamus, though technically a legal remedy [*Stern v. South Chester Tube Co.*, 390 U.S. 606 (1968) (dictum)], is "largely controlled by equitable principles." *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311 (1917). The federal district courts are empowered to issue writs "in the nature of mandamus" against "an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff," 28 U.S.C. § 1361 (1964), although the writ itself no longer exists as a "writ of mandamus." FED. R. CIV. P. 81(b).

10. See pages 1450-52 *infra*.

*Federal Communications Commission*,<sup>11</sup> where the American Broadcasting Company (ABC) successfully contended that agency inaction had nullified substantially its rights under the Federal Communications Act. The controversy first arose in 1941, when the Federal Communications Commission (FCC) temporarily assigned radio station KOB to a frequency of 770 cycles. WJZ, which operated on that frequency, protested, but the war intervened and WJZ did not press its objections. However, in 1944 KOB requested a permanent license for 770 cycles, and WJZ's motion requesting dismissal of the KOB application was denied. In August 1946 the FCC announced that it would not evaluate clear channel applications until the completion of a clear channel investigation then being conducted by the agency, and that it would extend KOB's special service authorization to maintain the status quo pending the outcome of the clear channel proceedings. Ten years after the first temporary, six-month license was issued, and after successive issuances of similar six-month licenses, both KOB and WJZ appealed from a further extension of KOB's special service authorization on the ground that these successive renewals had changed a temporary order into a permanent one. The Court of Appeals for the District of Columbia Circuit held that since there was no showing that the clear channel investigation would be completed in the near future, the FCC could not maintain the status quo indefinitely by arguing that the ultimate determination of KOB's status depended upon the outcome of the investigation:

WJZ has thus been required to bear a large part of the loss . . . . The Commission has in effect permitted this substantial loss to occur and to continue.

. . . [C]ourts must act to make certain that what can be done is done. Agency inaction can be as harmful as wrong action. The Commission cannot, by its delay, substantially nullify rights which the Act confers . . . .

We cannot . . . determine the ultimate disposition . . . of the . . . controversy . . . . But we can provide "a remedy against inaction" . . . .

. . . If appropriate proceedings are promptly begun and expeditiously carried forward . . . the Commission . . . [may] preserve the *status quo* for such reasonable period as may be necessary to make "a valid determination \* \* \* with all deliberate speed."<sup>12</sup>

The delay causing irreparable harm to the party before the agency may take several forms. For example, in *Application of Trico*

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11. 191 F.2d 492 (D.C. Cir. 1951).

12. 191 F.2d at 501-02.

*Electric Cooperative, Inc.*<sup>13</sup> the Arizona supreme court held that the serious financial loss that Trico was suffering because of delay was sufficient ground for compelling the state corporation commission either to approve a contract or to show cause why it would not assent. Irreparable harm may also result from administrative delay in failing to proceed against other similarly situated parties. In *C. E. Niehoff & Co. v. Federal Trade Commission*,<sup>14</sup> the agency proceeded against only one of nineteen competitors, all of whom allegedly engaged in the same illegal pricing practices. It appeared that if only Niehoff was enjoined, it would be forced out of business. The Court of Appeals for the Seventh Circuit suspended enforcement against Niehoff until similar orders were entered against Niehoff's competitors in order to achieve equal treatment of like-situated parties. The Supreme Court subsequently reversed, however, holding that the timing of orders was "peculiarly within the expert understanding of the Commission."<sup>15</sup> Unequal timing of related orders may be another cause of irreparable harm. In *Atlantic Seaboard Corp. v. Federal Power Commission*,<sup>16</sup> the agency suspended rate increases of Atlantic Seaboard, its supplier, and its supplier's supplier for a period of six months. However, Atlantic Seaboard's six-month suspension period began and ended twenty-two days later than that of its supplier. As a result, Atlantic Seaboard would have had to pay substantially higher prices to its supplier for twenty-two days before its own rates could have been increased. The Court of Appeals for the Fourth Circuit in effect eliminated this timing problem by making the six-month suspension period for all parties coincide.

Other policies, however, might outweigh a party's showing of irreparable harm and result in denial of relief from protracted agency delay. For example, in *Texaco, Inc. v. Federal Trade Commission*,<sup>17</sup> the Court of Appeals for the District of Columbia Circuit set aside a Federal Trade Commission (FTC) cease and desist order on the grounds that the order was not supported by substantial evidence and that one member of the FTC was disqualified from participating in the case. The court concluded that the normal procedure of remand was inappropriate because of inordinate delays throughout the litigation, and ordered the complaint dismissed. This order was vacated

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13. 92 Ariz. 373, 377 P.2d 309 (1962).

14. 241 F.2d 37, 41-43 (7th Cir. 1957), *rev'd sub. nom.* Moog Indus., Inc. v. FTC, 355 U.S. 411, 413 (1958).

15. Moog Indus., Inc. v. FTC, 355 U.S. 411, 413 (1958).

16. 201 F.2d 568 (4th Cir. 1953).

17. 336 F.2d 754 (D.C. Cir. 1964), *rev'd*, 381 U.S. 739 (1965).

by the Supreme Court and the case was remanded to the FTC for further action. The Court concluded that the proceedings against Texaco ought not to be terminated, because to do so would subordinate the public interest in effective competition to Texaco's interest in speedy adjudication.<sup>18</sup>

## B. *Theories of Relief*

### 1. *Constitutional Arguments*

Judicial relief from protracted administrative delay was first given during the period when federal courts exercised close constitutional supervision over the rate-making decisions of public utility commissions. In one of the few cases dealing with agency delay, *Smith v. Illinois Bell Telephone Co.*,<sup>19</sup> Illinois Bell successfully argued that a state commerce commission's delay unconstitutionally deprived it of property without due process of law. In July of 1919 Illinois Bell filed a schedule of rates that were to become effective on May 1, 1920. The commission repeatedly suspended the effective date of the rate increase, and in the latter part of 1921 it entered an order permanently suspending the rate increase. In April 1922, a state court reversed the commission order and remanded the case for further hearings. The commission held new hearings, but made no final determination. Illinois Bell then filed a motion requesting that the commission approve a temporary schedule of rates pending its final determination. This motion was ignored. Finally, in June of 1924, Illinois Bell successfully requested a federal court to enjoin the commission from enforcing the original schedule of rates, which it alleged to be confiscatory. In affirming the grant of the injunction the Supreme Court stated:

Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them . . . . [T]he injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief.<sup>20</sup>

When the confiscatory results of the delay are not as readily apparent as they were in the rate regulation cases, however, constitutional objections to administrative delay generally have been unsuc-

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18. *FTC v. Texaco, Inc.*, 381 U.S. 739 (1965).

19. 270 U.S. 587 (1926); *see also* *Banton v. Belt Line Ry. Corp.*, 268 U.S. 413 (1925); *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290 (1923); *Prendergast v. New York Tel. Co.*, 262 U.S. 43 (1923).

20. 270 U.S. at 591-92.

cessful. For example, in *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*<sup>21</sup> the employer requested that a National Labor Relations Board (NLRB) order be set aside on the ground that the NLRB's delay in issuing a complaint constituted a denial of due process. The evidence indicated that the issuance of the complaint had been postponed at the request of union officials in order to further their strategy at the bargaining table. The Court of Appeals for the Third Circuit held that agency delay in filing the complaint did not constitute a denial of due process:

The matter of time with regard to the issuance of a complaint by an administrative body must necessarily be one of the matters within the discretion of that body. Numerous considerations may make it desirable that a complaint be issued promptly or be delayed, for example, pending a court decision, or the likelihood of settlement of a dispute by other means; these and others are matters in which the judgment of the administrative agency must be exercised. We do not find lack of due process of law in the fact of delay . . . .<sup>22</sup>

Although an agency has broad discretion in controlling its procedures, it seems clear that the Constitution provides some limitations on protracted administrative delay. The *Illinois Bell* case indicates the limitation imposed by the due process clause on dilatory behavior, and arbitrary or capricious administrative behavior may also raise equal protection questions, as, for example, where an agency systematically discriminates against Negro applicants by deliberately employing dilatory tactics against them. Such discriminatory behavior could certainly be condemned as a denial of equal protection if the administrative body in question were a state agency. And, even though the equal protection clause does not by its terms apply to the federal government, overt racial discrimination by a federal agency would probably violate concepts of fairness inherent in the due process clause of the fifth amendment.<sup>23</sup> The harder case,

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21. 121 F.2d 235 (3d Cir. 1941).

22. 121 F.2d at 237.

23. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) [footnote omitted]:

The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

See also *Schneider v. Rusk*, 377 U.S. 163 (1964); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 584-85 (1937); Antieau, *Equal Protection Outside the Clause*, 40 CALIF. L. REV. 362 (1952).

however, is like case I, above, in which there is no affirmative evidence of discrimination other than the fact that similar proceedings are normally disposed of within a much shorter period of time. There is certainly a prima facie violation of the policy of evenhandedness. Assuming that the agency cannot justify the delay, it seems that the spirit of the equal protection clause has been frustrated by such differential treatment. However, it could be argued that the court should avoid the constitutional issue by relying on some other theory of relief.<sup>24</sup>

An analogous use of specific constitutional provisions to control delay can be found in several recent cases. In the free speech area, for example, prior restraint of motion pictures is permissible only if the censoring body either issues a license or seeks judicial prohibition within a "specified brief period" of time.<sup>25</sup> Similarly, the seizure of allegedly obscene books may be invalidated if governmental delay has suppressed the books for an unduly protracted period.<sup>26</sup>

First amendment concerns for "chilling" free speech were combined with the sixth amendment right to a speedy trial to strike down dilatory governmental proceedings in *Klopfer v. North Carolina*.<sup>27</sup> The delay in this case resulted from North Carolina's statutory nolle prosequi procedure which allowed the state to hold Klopfer—over his objection—subject to trial for an unlimited period. During this time, the solicitor could restore the case to the calendar, but Klopfer could neither obtain a dismissal nor have the case restored to the calendar for trial. Klopfer had been indicted for criminal trespass following a civil rights demonstration in February 1964, and prosecution began in March 1964. When the jury failed to reach a verdict, the judge declared a mistrial and ordered the case continued

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24. See Justice Brandeis' famous concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936), for an extensive discussion of the Court's practice of avoiding constitutional issues.

25. *Freedman v. Maryland*, 380 U.S. 51, 59 (1965). See also *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968).

26. *United States v. One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911 (S.D.N.Y. 1966). Cf. *United States v. Reliable Sales Co.*, 376 F.2d 803, 805 (4th Cir. 1967), in which the court held that during the government's appeal only a small proportion of allegedly obscene books could be retained in custody in order to prevent the case from becoming moot:

[W]hile the cases deal principally with administrative delay which invalidates prior submission processes of censorship, the Court in *Freedman* specified the safeguards necessary to make the process constitutional as follows: (1) the burden of proof must rest on the censor; (2) no valid final restraint may be imposed except by judicial determination, and any restraint prior to such determination must be designed to preserve the status quo; and (3) a prompt judicial determination must be assured. [Emphasis in original].

27. 386 U.S. 213 (1967).

for the term. Before the April 1965 term, the solicitor prevailed on a motion to continue the case for another term. When Klopfer's case was not listed for trial in the August 1965 term, he filed a motion expressing his desire to have the case pending against him concluded "as soon as reasonably possible" because the pending indictment interfered with his activities as a private citizen. The solicitor moved successfully for a *nolle prosequi* with leave, which allowed him to restore the case to trial at any future date. The Supreme Court, holding that this procedure denied Klopfer his right to a speedy trial, stated:

The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation," the criminal procedure . . . denies the petitioner the right to a speedy trial . . .<sup>28</sup>

Although the sixth amendment confines the right to a speedy trial exclusively to criminal prosecutions, it is not inconceivable that this right might extend to administrative proceedings which require a subsequent criminal prosecution and perhaps even to agency disciplinary hearings of a quasi-criminal nature. In instances where the agency must institute criminal proceedings for a willful violation of its rules, it is arguable that undue delay in seeking a court determination of guilt or innocence deprives the party before the agency of his right to a speedy trial. Although there is no indictment against such a party, the pending agency proceedings may subject the party to public scorn and have a "chilling effect" on his associational rights. And, if there is no statute of limitations prescribing the time within which the agency must come to court, the party before the agency would be subject to trial for an unlimited period during which he would have no means of securing a dismissal or of obtaining an adjudication on the merits. Such a situation might well constitute an infringement of the right to speedy trial, although a court might prefer to apply a nonconstitutional theory of relief such as laches. On the other hand, the foregoing analysis probably would not apply if there is an applicable statute of limitations, since the legislature has drawn a line between timely and tardy institution of suits.<sup>29</sup> Yet,

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28. 386 U.S. at 222.

29. It could be argued that the applicable statute of limitations is not the sole criterion for determining what is a "reasonable" period within which to institute suit, since a statute of limitations does not address itself to the question of whether or not



even if a "timely" suit were instituted, seriously dilatory behavior in prosecuting the action might also result in the denial of the party's sixth amendment rights.

When the agency is not required to seek enforcement in court, but rather is permitted by statute to impose a penalty itself, it might be contended that undue delay in the agency proceedings deprives the party before the agency of his right to a speedy trial. Such a contention could be based upon the due process clause as well as on the sixth amendment. If due process requires a "trial-type hearing,"<sup>30</sup> a speedy trial might be considered an integral part of the hearing requirement. It could also be argued, more broadly, that the right to speedy proceedings is implicit in the motion of fundamental fairness and orderly justice guaranteed by the due process clause.

Apart from the due process clause, it might also be contended that the speedy trial guarantee applies to quasi-criminal administrative prosecutions. Although the sixth amendment guarantee of a speedy trial may be narrowly construed to apply only to orthodox "criminal prosecutions,"<sup>31</sup> there is no apparent policy reason why it should be; quasi-criminal administrative prosecutions may involve the same element of public accusation as criminal prosecutions, and the party can be harmed just as much by the delay. However, two textual arguments seem to compel the conclusion that the speedy trial guarantee is not applicable to this class of administrative proceedings. The language of the sixth amendment—"right to a speedy . . . trial, by an impartial jury"—appears to bind the speedy trial guarantee to a proceeding in which there is a right to a jury. Since a party before an administrative agency clearly has no right to a jury, it would seem that the sixth amendment guarantee does not extend to quasi-criminal administrative proceedings. There is no

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the suit is brought as soon as is reasonably possible. For an example of this kind of analysis in the context of a criminal prosecution, see *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965).

30. Whether or not due process requires a trial-type hearing is of course a complex issue. The requirement varies with the nature of the administrative process applied, the kind of issue being determined, and other factors. "Due process" may not include all the elements of a common-law trial in particular types of proceedings. Compare *Londoner v. Denver*, 210 U.S. 373 (1908) with *Bimetallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). See generally *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281 (D.C. Cir. 1948); *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 265 (4th Cir. 1965).

31. See, e.g., *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (the withdrawal or suspension of a license, upon an administrative finding that a condition imposed in granting the license has not been observed, does not constitute a "criminal prosecution").

reason why the right to a speedy trial need be limited exclusively to proceedings where there is a right to a jury; yet the plain words of the sixth amendment strongly suggest that the guarantee is so limited. Moreover, even if the "speedy trial" guarantee were severable from proceedings requiring a jury, the word "trial" undoubtedly refers to an orthodox criminal trial. It would clearly expand the traditional meaning of the word "trial" to incorporate within it administrative prosecutorial proceedings. Finally, as a practical matter, a court presumably would be reluctant to stretch the seemingly clear language of the sixth amendment when the due process clause might be used to grant the requested relief.

## 2. *The Administrative Procedure Act*

Another doctrinal basis for obtaining relief from the delay of a federal agency may be found in the Administrative Procedure Act (APA).<sup>32</sup> Prior to the APA's recent revision,<sup>33</sup> section 6(a) provided that "every agency shall proceed with reasonable dispatch to conclude any manner presented to it . . . ." <sup>34</sup> This section was complemented by section 10(e)(A), which directed the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed."<sup>35</sup> The courts, however, appear to have been reluctant to rely upon these sections as grounds for remedying agency delay.

*Atlantic & Gulf Stevedores, Inc. v. Donovan*,<sup>36</sup> in which a stevedoring company sought to require a deputy commissioner to render a decision in a matter properly before him under the Longshoreman's Compensation Act, seems to have been the first case to indicate—at least in dictum—that both of these provisions of the APA could be enforced by a mandatory injunction:

The APA provides categorically that "every agency shall proceed with reasonable dispatch to conclude any matter presented to it" . . . . Apparently in recognition that a failure or refusal to hear and decide could be as destructive as bad deciding, Congress provided in §10(e) that courts may review the inaction of an agency and specifically "compel agency action unlawfully withheld or unreasonably delayed" . . . and enforcement may be by a mandatory injunction.<sup>37</sup>

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32. 5 U.S.C. §§ 551-59 (1967).

33. 80 Stat. 393 (1966).

34. 60 Stat. 240 (1946).

35. 60 Stat. 243 (1946).

36. 374 F.2d 794 (5th Cir. 1960).

37. 374 F.2d at 802.

The first case to hold that the "reasonable dispatch" requirement of section 6(a) gives rise to a legally enforceable right was *Deering Milliken, Inc. v. Johnston*.<sup>38</sup> The case arose out of NLRB hearings in 1957 dealing with the charge that Darlington Manufacturing Company had engaged in an unfair labor practice. At these hearings the union sought to introduce evidence to establish that Darlington was controlled by Deering Milliken in order to hold Deering responsible for Darlington's acts. The trial examiner rejected this evidence as being outside the scope of the complaint. When the NLRB reviewed the examiner's findings, however, it remanded the case so that evidence could be introduced on the question of control. The hearing after remand took ten months. More than a year after this hearing was completed, the trial examiner submitted a report to the NLRB which rejected the union's claim of single employer status between the two companies. In 1961, three years after the first remand order, the case again came before the NLRB and was remanded not only for a hearing on newly discovered evidence, but also for a rehearing of the entire single employer issue. At this point Deering sued to enjoin the remand for additional hearings, asserting that the NLRB's action constituted unreasonable delay in violation of section 6(a) of the APA. The district court found that the hearings were repetitive and granted the injunction. The Court of Appeals for the Fourth Circuit accepted this finding and concluded that Deering had a right to be free from supplemental hearings which were repetitive, purposeless, and oppressive. Accordingly, the Fourth Circuit modified the injunction to allow further hearings only on the newly discovered evidence.

Other petitioners, however, have been less successful in seeking injunctions against remands for additional hearings. In *Federal Trade Commission v. J. Weingarten, Inc.*,<sup>39</sup> Weingarten contended that an FTC order to remand to a trial examiner for additional hearings after nearly three years of formal proceedings violated the command of section 6(a). The district court held that the remand was a violation of the APA and ordered the FTC to make a final disposition of the matter within thirty days. However, the Court of Appeals for the Fifth Circuit reversed:

Absent proof of the normal time necessary to dispose of a similar proceeding or of facts tending to show a dilatory attitude on the part of the Commission or its staff . . . we are unable to say that

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38. 295 F.2d 856 (4th Cir. 1961).

39. 336 F.2d 687 (5th Cir. 1964).

a Judge can so hold. . . . [W]e think it would be the extremely rare case where a Court would be justified in holding . . . that the passage of time and nothing more presents an occasion for peremptory intervention of an outside Court in the conduct of an agency's adjudicative proceedings.<sup>40</sup>

Judicial relief has also been withheld when the injured party has not first sought acceleration of the action within the agency. This requirement is apparently a form of the exhaustion of administrative remedies doctrine. For example, in *M. G. Davis & Co. v. Cohen*,<sup>41</sup> the Securities and Exchange Commission (SEC) instituted a proceeding to revoke a broker-dealer registration. Two years had elapsed since the issuance of the SEC complaint and the SEC had done nothing more than appoint a hearing officer to rule on pre-trial matters. Davis sued for an injunction restraining the SEC from continuing its proceedings but the court refused to grant any relief, indicating that a complaint for failure to proceed with reasonable dispatch must first be made to the agency, regardless of whether the delay was justified. The court also observed that the proper remedy for unwarranted delay is a court order to expedite the proceeding, not a decree terminating it altogether. This judicially imposed requirement of prior demand seems eminently sensible. Such a requirement gives the agency a last opportunity to alleviate the delay. Moreover, this practice may facilitate the desirable development of internal review boards with authority to rule on the question of agency delay.

The recent revision of the entire APA<sup>42</sup> does not appear to alter the preceding case law significantly. The "reasonable dispatch" language of section 6(a) has been replaced by a "reasonable time" standard. Section 555(b) of the current APA provides that "[w]ith due regard for the convenience and necessity of the parties or their representatives and *within a reasonable time*, each agency shall proceed to conclude a matter presented to it."<sup>43</sup> It does not seem likely that Congress intended to dilute its statutory command by deleting "reasonable dispatch" and substituting "reasonable time" as a standard. The word "dispatch" arguably conveys a tone of haste not connoted by the "reasonable time" language. Nevertheless, the language of old section 10(e)(A), providing that the reviewing court

40. 336 F.2d at 691-92.

41. 256 F. Supp. 128 (S.D.N.Y. 1966); *accord*, *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798 (D.C. Cir. 1965).

42. See notes 32-35 *supra* and accompanying text.

43. 5 U.S.C. § 555(b) (1967) (emphasis added).

shall "compel agency action unlawfully withheld or unreasonably delayed," has been re-enacted verbatim in the new statute.<sup>44</sup> Retention of this language suggests that courts should use the same standards to review protracted administrative delay under the new APA as they did under the old. Indeed, despite the changed language, the legislative history of the new APA arguably indicates that the courts may have a somewhat expanded role in policing protracted administrative delay. In adopting the new APA, Congress rejected a proposed alternative draft of the new section 6(a). The proposal, Senate Bill 1879, provided:

Every agency shall proceed with reasonable dispatch to conclude any matter presented to it . . . . Upon application made to any Federal Court of competent jurisdiction by a party to any agency proceeding or by a person adversely affected by agency action, and a showing that there has been undue delay in connection with such proceeding or action, the court may direct the agency to decide the matter promptly. In any such case the agency may show that the delay was necessary and unavoidable.<sup>45</sup>

Although the legislative history appears to be silent as to why this alternative was rejected, deficiencies in the text itself provide a sufficient answer. There is a substantial risk that the statute could be read narrowly to limit judicial relief solely to "directing the agency to decide the matter promptly." Such a limitation would have hampered reasonable judicial experimentation with alternative remedies. Moreover, the affirmative defense granted to the agency—that the delay was "necessary and unavoidable"—might have been construed to preclude other equally valid defenses, such as an assertion that the delay was caused by the party before the agency.

Apart from the Senate bill's textual inadequacies, Congress may have had a more significant reason for rejecting the alternative construction: a desire to frame a broad statutory standard which would allow the courts to fill the interstices. If this was the intent of Congress, courts might begin to play a more active and creative role in granting relief from protracted administrative delay under the new APA.

### 3. *Abridgement of Review*

It may be argued that administrative delay also abridges the right of appeal or the statutory right to judicial review. In *Latvian*

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44. 5 U.S.C. § 706(1).

45. 89th Cong., 1st Sess. (1966).

*State Cargo & Passenger Steamship Line v. United States*,<sup>46</sup> the plaintiff sued to recover compensation for the taking of a ship which had been requisitioned nearly eight years earlier. During this period the Maritime Commission had failed to make any award or to take any action whatsoever. The Court of Claims reasoned that the owner of requisitioned property has a right to appeal to a court after an administrative determination of the issue of just compensation. This right, the court maintained, could not be taken away by refusal of the agency to act or by its unreasonable delay in acting.

This theory of abridgement of review seems to be more than a circuitous assertion that administrative delay is reviewable: in effect it assumes a right to prompt judicial review instead of a right to speedy administrative action. Moreover, this theory seems to prove too much. To be sure, protracted delay may postpone judicial review on the merits. But other administrative activity may also preclude judicial review. Informal settlements generally are not subject to judicial scrutiny; to argue that informal settlements should be subject to judicial review because they preclude judicial review would be absurd. Admittedly the abridgement of review theory has more plausibility in the context of administrative delay than it does when applied to informal settlements, partially because informal settlements are consensual and thus may give rise to a presumption that the parties agreed to forgo judicial review. Yet the abridgement theory on its face does not purport to distinguish between consensual and nonconsensual administrative activity, and absent such subtle distinctions, it seems that the theory does prove too much.

#### 4. *Divestment of Agency Jurisdiction*

Another theory of relief, which is based on the proposition that an agency may divest itself of jurisdiction through unreasonable delay, seems to have more merit than the abridgement theory, at least when applied to an agency's prosecutorial functions.<sup>47</sup> If the agency proceeds against a party within the time prescribed by the applicable statute of limitations and then acts at an unreasonably leisurely pace, it may be contended that a court should treat the case as one in which the agency never instituted proceedings at all.<sup>48</sup> However, the divest-

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46. 88 F. Supp. 290 (Ct. Cl. 1950).

47. For an example of an unsuccessful attempt to use the divestment theory, see *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925).

48. When there is no applicable statute of limitations, the divestment of jurisdiction theory may become a variant of the doctrine of laches.

ment of jurisdiction theory should not be applied mechanically to preclude desirable administrative action. Although a party has an interest in speedy adjudication, countervailing considerations<sup>49</sup> may justify retention of jurisdiction by the agency in spite of the delay. But the logic of the divestment of jurisdiction theory compels outright dismissal rather than judicial acceleration of the administrative proceeding or some lesser remedy; hence, its utility is limited whenever there are countervailing factors that would justify a less harsh remedy.

### 5. *Laches*

The use of the defense of laches, based upon an agency's delay in instituting suit, would be precluded in the majority of states and in the federal courts by the rule that laches is inapplicable to a suit by government to enforce a public right.<sup>50</sup> An example of the minority rule allowing laches to be asserted in this situation is *Schireson v. Shafer*,<sup>51</sup> in which Schireson received a citation in 1944 to appear before the state licensing board to answer charges that he obtained his medical license by fraud in 1910. He sued to enjoin the board from holding the hearing, alleging, *inter alia*, that laches precluded revocation of the license. The Pennsylvania Supreme Court held that the laches issue could not be resolved until after a hearing on the merits to determine if Dr. Schireson had been prejudiced by the delay.

## IV. OTHER POTENTIAL OBSTACLES TO JUDICIAL REVIEW

Once the potential litigant establishes that the particular delay issue is justiciable and adopts one or more of the above theories of relief, he may have to face the doctrines of exhaustion, ripeness, and finality. Judicial review of administrative delay does not invariably involve these problems. For example, if judicial relief is sought to compel an agency to assume initial jurisdiction or to set aside or modify a final order because of protracted delay, these doctrines are inapplicable. But when suit is brought to secure relief from delay during the course of the administrative process, the doctrines of exhaustion, ripeness, and finality may come into play. These overlapping concepts, unlike justiciability, deal with an issue of tim-

49. See text accompanying notes 17-18 *supra*.

50. See, e.g., *United States v. California*, 332 U.S. 19 (1947); *United States v. Pennsalt Chems. Corp.*, 262 F. Supp. 101 (E.D. Pa. 1967); *Sears v. Treasurer & Receiver Gen.*, 327 Mass. 310, 98 N.E.2d 621 (1951).

51. 354 Pa. 458, 47 A.2d 665 (1946).

ing—whether the party has come to court prematurely—and not with the ultimate question of whether the substantive issue is appropriate for judicial decision at all.

### A. Exhaustion

Normally, judicial relief is unavailable until the appropriate administrative remedies have been exhausted. A variety of policy reasons have been advanced in support of this rule. Primary among them is the consideration of economy, since inconvenience and delay normally result when agency proceedings are disrupted. In addition, judicial intervention may alter the proper relationship of the courts to the administrative process, negate the value of informed agency discretion, and overburden the courts. But these considerations have little force when, by hypothesis, the administrative process has become inert: rather than creating inconvenience or delay, court intervention seeks to remedy agency inaction. It may be true that an agency is better equipped than a court to determine the appropriate priority of its cases or the reasonable pace of its action, and that such discretion is essential to give necessary flexibility to the agency in dealing with a crowded docket; but, once a court has determined that the particular delay issue is justiciable, these considerations should be relevant only to the scope of review, and not to its availability.<sup>52</sup> Finally, the possibility of overburdening the courts<sup>53</sup>—if it is not exaggerated—may be a price which must be paid for necessary policing of the administrative process. The floodgates may be partially closed by creating a strong presumption in favor of the agency in order to discourage frivolous suits.<sup>54</sup>

Even if there are some residual policy reasons for applying the exhaustion rule in the context of administrative delay, it has never been contended that exhaustion is an essential prerequisite to judicial review.<sup>55</sup> The policies which favor requiring exhaustion must be balanced against the injury to the party which would result from denial of relief. If the potential litigant would suffer irreparable injury, there may be no need to exhaust administrative remedies.<sup>56</sup>

52. See Recent Case, *Administrative Law—Right to Expeditious Hearing—District Court May Enjoin Implementation of NLRB Remand Order Where Unreasonable Delay Would Result*, 76 HARV. L. REV. 401, 404 (1962).

53. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424-26 (1965).

54. See Recent Case, *supra* note 44, at 404 (1962).

55. See K. DAVIS, ADMINISTRATIVE LAW TEXT 370-71 (1959).

56. See, e.g., *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407 (1942); *Isbrandtsen Co. v. United States*, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954); *Atlantic Seaboard Corp. v. FPC*, 201 F.2d 568 (4th Cir. 1953).



Moreover, there is a well-defined exception to the exhaustion rule if the administrative remedy is inadequate or unavailable.<sup>57</sup> Consequently, when the administrative process is in a state of suspended animation, and the agency provides no mechanism for reviewing its own delay, the exhaustion rule seems inapplicable.

### B. *Ripeness*

While the exhaustion rule guards against unnecessary or inappropriate short-circuiting of the administrative process, the ripeness doctrine is concerned with whether the issue before the court has matured sufficiently to be a "controversy." The crucial considerations in deciding whether an issue is ripe for adjudication are the clarity of the issues to be determined and the hardship of denying relief to the party before the agency.<sup>58</sup> Protracted administrative delay, like reapportionment, is an issue which does not seem to become more concrete with the passage of time. Thus, once a court decides that the particular delay issue is justiciable, the ripeness doctrine should be inapplicable. Although it is possible that parties will seek judicial relief before the delay has become unreasonable, in these circumstances the court should dismiss the case on the merits, rather than for lack of ripeness. And if the party before the agency has been harmed irreparably by protracted delay, this injury may ipso facto imply reviewability.<sup>59</sup> Therefore, the ripeness doctrine does not seem to be a barrier to judicial review of administrative delay.

### C. *Finality*

The rule that only final orders are subject to judicial review is based upon considerations of administrative and judicial economy.

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57. *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856 (4th Cir. 1961); *Sunshine Publishing Co. v. Summerfield*, 184 F. Supp. 767 (D.D.C. 1960); *Southeastern Oil Florida, Inc.*, 115 F. Supp. 198 (Ct. Cl. 1953); *Latvian State Cargo & Passenger S.S. Line v. United States*, 88 F. Supp. 290 (Ct. Cl. 1950). See generally L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 424-26 (1965); 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 20.07 (1958); Davis, *Administrative Remedies Often Need Not Be Exhausted*, 19 F.R.D. 437, 476 (1956).

58. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967) (footnote omitted): Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance or premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. See also *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967); *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167 (1967).

59. *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407 (1942).

Review of intermediate orders interrupts and prolongs the administrative process while affording parties an opportunity for constant delays. Moreover, an intermediate order may become moot if the party who was prejudiced by it obtains a favorable final decision. In such circumstances interim judicial review would be unnecessary. Neither of the policy reasons underlying the finality rule appears to be applicable in the case of protracted delay. When the administrative process is at a standstill, judicial review will not interrupt agency proceedings.<sup>60</sup> Furthermore, since delay may be prejudicial despite the ultimate outcome on the merits, there is less likelihood that interim judicial relief will prove to have been unnecessary.

This conclusion is supported by *Deering Milliken, Inc. v. Johnston*,<sup>61</sup> in which the Fourth Circuit found that unreasonable delay by its very nature constitutes "final agency action" within the meaning of the APA.<sup>62</sup>

Delay, so long as it continues and so long as there is any vestige of a right which will suffer further impairment by an extension of the delay, may not be final in the usual sense of that word, but when it amounts to a violation of § 6(a) [reasonable dispatch] . . . and to a legal wrong within § 10(a) of that Act, it is final within the meaning of § 10(c).<sup>63</sup>

Such a construction clearly seems to implement the legislative mandate of section 10(e)(A), which authorizes the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." And, because the reasons for the final order rule do not seem to apply when the issue before the court is protracted administrative delay, it appears that the doctrine of finality, like ripeness and exhaustion, should not be a bar to judicial relief.

#### V. THE DELAY ISSUE ON THE MERITS: A SUGGESTED APPROACH

After the party has surmounted the foregoing obstacles to court review and has set forth a tenable theory of relief, he must prove the issue of delay on the merits. Since the delay problem might arise in an indefinite number of factual settings, the following analysis is suggestive rather than exhaustive. In any case in which the delay issue is presented, a court must ask at least three questions: Is there

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60. Although party exploitation of interim review as a dilatory tactic is unlikely where agency delay is the issue for review, interim review might divert some agency resources, thereby creating increased delay.

61. 295 F.2d 856 (4th Cir. 1961).

62. See notes 32-35 *supra* and accompanying text.

63. 295 F.2d at 865.

delay at all? Is the delay unreasonable? And, even if the delay is unreasonable, are there countervailing policies which preclude relief? Each of these questions will be examined in turn.

### A. *Is There Delay at All?*

There are no absolute standards for distinguishing agency delay from the normal or necessary passage of time. Nevertheless, certain factors seem relevant to the determination of whether a particular party has suffered from agency delay. The progress of the proceeding may be compared to the rate experienced in cases of the same kind;<sup>64</sup> it would be a *prima facie* indication of delay if more time has elapsed than the normal time necessary to dispose of similar proceedings. In addition, the existence of unnecessary administrative activity or other dilatory behavior or attitudes may be indicative of protracted delay.

If the party before the agency comes to court prematurely, judicial relief will be unavailable, since, by hypothesis, there will have been no unreasonable delay. However, the same party can return to court later with identical contentions and the court will be forced to make a *de novo* determination of the delay issue, since the principle of *res judicata* will not serve as a bar to the action. This result is extremely desirable to the party before the agency. However, the result is unfortunate from the standpoint of administrative and judicial economy. The agency and the court must expend valuable resources in defending and disposing of repetitious suits. In addition, the potential for harassment inherent in this situation might lead an agency to favor the more litigious party in its scheduling. Nevertheless, a party before the agency should not be limited to a single try in court. A good faith mistake ought not to preclude judicial relief permanently. Instead, something more than mere delay ought to be required in the second suit; perhaps the court might require a showing that both suits were instituted in "good faith." However, since subjective intent is difficult to ascertain, it might be preferable to require that a second suit could be instituted only after waiting a "reasonable" period of time. Neither the good faith nor the reasonable time requirement would foreclose completely the possibility of wasted administrative and judicial resources or harassing multiple suits. Nevertheless, these two requirements together would probably

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64. See *FTC v. J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964) (court unable to find unreasonable delay where corporation failed to show time necessary to dispose of similar agency proceedings or evidence of a dilatory attitude by the agency).

eliminate many potential abuses. The courts' ability to control abuse of the review opportunity could be further strengthened by expressly granting courts the power to assess attorneys' fees against a party committing such abuse.

### B. *Is the Delay Unreasonable?*

The determination of whether the passage of time is "unreasonable" requires balancing at least two factors: the administrative justification for the delay and the harm to the party resulting from the delay. If the harm to the party is substantial and the justification for delay is weak, even a short delay might be intolerable. If the harm to the party is de minimus and the justification for delay is strong, even a substantial lapse of time might be permissible. If the harm to the party and the administrative justification are both substantial, or both minimal, then other policies may have to be considered to make a rational determination of whether the delay is "unreasonable."

#### 1. *Cause of Delay: Administrative Justification*

Time passes for many reasons, and a given instance of administrative delay may or may not be defensible. Some causes of delay are inherently unjustifiable, such as discrimination or bias. Other causes bear no reasonable relation to the effective functioning of the administrative process, such as unnecessary or repetitive proceedings. Still, administrative delay may be reasonable, as when its source lies in the complexity of the issues to be resolved or in the time-consuming nature of the remedy. The court's function is to assess the administrative justification for the passage of time as it relates to the reasonable needs of the agency. The court may also ask whether the cause of the delay, even if unjustified, can be alleviated by judicial relief. Other institutions may be better equipped to provide a remedy—as, for example, when delay is caused by crowded dockets or inadequate legislative appropriations.

A special problem arises when delay is caused in whole or in part by the dilatory tactics of the party before the agency. In such circumstances, it can be argued that the party comes to court with "unclean hands" and should not be eligible for judicial relief. However, the "unclean hands" notion should not foreclose relief in all circumstances. A court should evaluate how substantially the party has contributed to the delay; if the party's degree of fault is insignificant

and the agency's contribution to delay is considerable, then judicial relief should not be precluded. Undoubtedly, there are many problems of proof when inquiry is directed to the question of which litigant has caused the delay. The court might require the party to prove that his activity or behavior did not contribute substantially to the delay. Alternatively, the agency could be allowed to assert party delay as an affirmative defense. Since proof of party delay differs from proof of agency delay in the respect that the necessary facts are not peculiarly within the knowledge of one litigant, considerations of fairness and convenience do not compel either alternative. Therefore, the burden of proof should be allocated to the party or to the agency on the basis of an initial policy decision as to how easy it should be to get relief from agency delay.

Irrespective of the cause of delay and of the related problems of proof, judicial relief might be foreclosed if the party before the agency waives his objection to the delay.<sup>65</sup> Yet the waiver notion has its limits. A waiver should not readily be implied from party inaction, since parties often will not know that the agency is taking an inordinately long time. Moreover, frequent application of the waiver doctrine would encourage unnecessary, repetitive, and time-consuming party activity designed to negate the possibility of waiver. Finally, in instances of gross agency delay other policies might justify judicial intervention despite an express waiver.

## 2. *Harm to the Party*

In addition to assessing the administrative justification for delay, a court must assay the nature and magnitude of the harm that the delay has inflicted upon the party before the agency. In making such an appraisal, the initial question is whether "irreparable harm" is a necessary prerequisite to invoking judicial relief.

Despite traditional theory, a showing of something less than irreparable harm may constitute adequate grounds for judicial relief in situations where there is no administrative justification for delay, or where a court perceives a need to police the administrative process. If, for example, delay results from unnecessary or repetitive proceedings, a court may relax the irreparable harm standard. Not only is such wasted administrative action unjustified, but also the strong independent policy of optimum allocation of administrative re-

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65. There appear to be no cases on waiver of a delay objection; however, *American Broadcasting Co. v. FCC*, 191 F.2d 492 (D.C. Cir. 1951), seems to imply that the waiver notion is applicable.

sources argues in favor of intervention. Likewise, pecuniary harm—whether irreparable or not—seems irrelevant when delay results from discrimination or bias. In such situations, complementary policies of equal protection and impartiality compel judicial intervention.

In those instances, however, where there are either some administrative justifications for delay or no other policies independently favoring judicial relief, a showing of irreparable injury should be necessary. And, if adequate and nonburdensome alternative remedies can serve to insulate the party from the harmful effects of the delay, judicial relief should not be available. In the case of a rate-making proceeding, for example, judicial relief from delay should be precluded if the applicant desiring higher rates were given the alternative of increasing its rate structure while placing the extra funds in escrow pending the outcome of the rate-making proceeding. But, as the burden of recovering losses from administrative delay increases, a court is faced with the necessity of deciding at what point the harm becomes irreparable. For example, is the harm irreparable when delay results in higher construction costs for a new facility? Although these costs eventually can be recovered through increased rates, recovery will be achieved over a long period of time and at an added cost to consumers.

Whether or not irreparable harm is always a required condition for court intervention, it is not necessarily a sufficient ground for judicial relief. This principle is illustrated in cases like hypothetical case I, where the most appropriate judicial remedy would be acceleration of the agency proceedings. Assuming a limited supply of administrative resources, acceleration might require the agency to alter its priority of cases. In this situation, a showing of irreparable harm may not be enough; the court might also require proof that the altered agency calendar would not impose an undue burden on other parties before the agency. Developing this kind of proof may be both time-consuming and difficult, and would involve the court in the judicially unmanageable task of balancing largely immeasurable factors. When these problems appear, the court might instead require the party seeking judicial relief to show that the harm it has suffered quantitatively outweighs the harm which judicial relief would cause to other parties before the agency. This objective test would simplify the judicial inquiry substantially. Yet, quite apart from the problem of how the court could evolve a meaningful standard to decide what the threshold level of harm ought to be, a rigid application of such a "quantitative substantiality" test might limit judicial relief from

administrative delay to larger applicants, since smaller parties would be less easily able to make the required threshold showing of harm. Nevertheless, there will still be instances in which the burden to other parties before the agency will be immeasurable. In those cases courts may be compelled to make an essentially arbitrary, intuitive judgment about comparative harm.

### C. *Competing Policies*

Even if a party shows the requisite harm to himself, absence of potential harm to other parties, and a lack of administrative justification for delay, other competing policies may still prohibit judicial relief. These countervailing considerations frequently arise in suits to review or enforce NLRB back pay orders<sup>66</sup> when employers contend that agency delay in issuing the order substantially increased their liability and prevented them from mitigating damages. Employers have been unsuccessful in this contention, despite a showing of the requisite irreparable harm and lack of administrative justification for the delay. Although the employer has an interest in a rapid determination of his liability, this interest can be vindicated only at the expense of imposing the burden of delay upon the workers against whom the employer discriminated. Even the entire back pay award is a wholly unsatisfactory remedy to these people; to reduce this award still further because of administrative delay would be harsh and unfair.

Other policies, aside from the equities asserted by other interested parties, may preclude judicial relief. In cases where an agency brings suit to obtain enforcement of a binding order, for example,<sup>67</sup> the lapse of time between the agency's issuance of the order and initiation of the court action should not be grounds either for denying enforcement or for granting the defendant leave to adduce additional evidence of interim compliance. Granting relief for delay in this situation would encourage deliberate violation of administrative regulations and subvert the policy favoring promptness in seeking court review.

Thus, although the party before the agency may have an interest

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66. *See, e.g.*, *NLRB v. Electric Vacuum Cleaner Co.*, 315 U.S. 685 (1942); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965); *NLRB v. American Creosoting Co.*, 139 F.2d 193 (6th Cir. 1943); *NLRB v. Grower-Shipper Vegetable Ass'n of Central Calif.*, 122 F.2d 368 (9th Cir. 1941); *NLRB v. Wilson Line, Inc.*, 122 F.2d 809 (3d Cir. 1941).

67. *See* *NLRB v. Pool Mfg. Co.*, 339 U.S. 577 (1950); *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949); *NLRB v. Eanet*, 179 F.2d 15 (D.C. Cir. 1949); *NLRB v. Aluminum Prods. Co.*, 120 F.2d 567, 573 (7th Cir. 1941).

in the rapid determination of his rights or liabilities, this interest may be subordinated to other interests or policies in appropriate circumstances. And conversely, if the party before the agency establishes the requisite harm from unjustified administrative delay, then, in the absence of other overriding interests or policies, the party seems entitled to a judicial remedy.

## VI. REMEDIES

There are many remedies to combat protracted administrative delay in the judicial arsenal. When the suit is brought before agency action is initiated, the remedy may be an order compelling the agency to assume jurisdiction<sup>68</sup> over the case or to refuse jurisdiction.<sup>69</sup> If suit is instituted after agency action is complete, the appropriate relief may take the form of an order to set aside<sup>70</sup> or modify<sup>71</sup> the original order, or to suspend,<sup>72</sup> equalize,<sup>73</sup> or deny<sup>74</sup> enforcement of that order. And when suit is instituted prior to the completion of the administrative process, there are at least three remedies available. The first of these is judicial acceleration, which can be achieved by enjoining agency activity that is purposeless, unduly oppressive, or repetitive,<sup>75</sup> by a remand to the agency with directions to proceed with all deliberate speed,<sup>76</sup> or by mandamus requiring the agency to approve party action or show cause why no approval should be forthcoming.<sup>77</sup> A second possibility is judicial pre-emption of the power to decide the substantive issues.<sup>78</sup> This remedy, since it precludes the agency from making the initial determination pursuant to its statutory mandate, should be employed sparingly, if at all.

The third means of disposition is judicial termination of agency proceedings. In *United States v. One Book Entitled "The Adventures of Father Silas,"*<sup>79</sup> for example, protracted delay between the time

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68. *Order of Railway Conductors of America v. Swan*, 329 U.S. 520 (1947).

69. *Schireson v. Shafer*, 354 Pa. 458, 47 A.2d 665 (1946).

70. *NLRB v. American Creosoting Co.*, 139 F.2d 193 (6th Cir. 1943).

71. *NLRB v. Electric Vacuum Cleaner Co.*, 315 U.S. 685 (1942).

72. *C. E. Niehoff & Co. v. FTC*, 241 F.2d 37 (7th Cir. 1957), *rev'd sub nom.* *Moog Indus., Inc. v. FTC*, 355 U.S. 411 (1958).

73. *Atlantic Seaboard Corp. v. FPC*, 201 F.2d 568 (4th Cir. 1953).

74. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965).

75. *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856 (4th Cir. 1961).

76. *American Broadcasting Co. v. FCC*, 191 F.2d 492 (D.C. Cir. 1951).

77. *Application of Trico Elec. Cooperative, Inc.*, 92 Ariz. 373, 377 P.2d 309 (1962).

78. *See, e.g., Sunshine Publishing Co. v. Summerfield*, 184 F. Supp. 767 (D.C. Cir. 1960) (agency delayed in processing an application for second-class mailing privileges; court ordered the application granted); *Southeastern Oil Florida v. United States*, 115 F. Supp. 198 (Ct. Cl. 1953) (agency delayed in processing a claim for payment; court decided that plaintiff was entitled to recover).

79. 249 F. Supp. 911 (S.D.N.Y. 1966).



that allegedly obscene books were seized by the Collector of Customs and the time that an action to confiscate the books was instituted served as grounds for invalidating the seizure. The remedy granted for this unlawful delay was release of the books, whether or not obscene, to the claimant. This kind of remedy will effectively deter administrative laxity and does not appear overly harsh, particularly when the delay impinges upon the constitutionally protected interest in a rapid determination of the obscenity issue. Moreover, the public interest in preventing obscene literature from circulating will not be seriously jeopardized by the isolated use of such a remedy because of the minimal number of books which will be released. On the other hand, dismissal in disciplinary cases seems inappropriate when the party's interest in speedy adjudication is clearly subordinate to the public interest in effectuating administrative policy.<sup>80</sup> Moreover, it is arguable that the agency, rather than the court, is a more appropriate body to decide whether dismissal would endanger the administrative regulatory scheme and be contrary to the public interest.

A somewhat related problem is whether a party to an administrative proceeding is entitled to a dismissal with prejudice. The limitations upon the power of an agency to terminate proceedings arbitrarily without disposing of the case were involved in *Minneapolis Gas Co. v. Federal Power Commission*,<sup>81</sup> where the court refused to let the agency terminate a rate proceeding prior to reaching a final decision. Despite the fact that the agency had complete discretion in instituting such proceedings, the court concluded that the party before the agency could—after completing lengthy and costly hearings which were arbitrarily discontinued without reaching a final decision—go to court to compel the agency to enter a final decision.

In choosing between judicial acceleration, judicial pre-emption, or judicial termination, a court should select that form of relief which has the least adverse effect on the proper functioning of the administrative process. In most cases, this consideration would indicate the choice of judicial acceleration. But if the only appropriate remedy will have some undesirable affect on the administrative process, then this effect must be balanced together with the harm to the party and the administrative justification for the delay in deciding whether relief should be granted at all. If there is no appropriate remedy, it may be that we have come full circle—that is, it may be that the particular delay issue is not justiciable in the first place.

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80. *FTC v. Texaco, Inc.*, 381 U.S. 739 (1965).

81. 294 F.2d 212 (D.C. Cir. 1961).