Florida Law Review

Volume 72 | Issue 5 Article 10

Mission (Im)possibility: Determining When Mandamus is an Appropriate Remedy to Address Agency Delay or Inaction

Faith Proper

MISSION (IM)POSSIBILITY: DETERMINING WHEN MANDAMUS IS AN APPROPRIATE REMEDY TO ADDRESS AGENCY DELAY OR INACTION

Faith Proper[*]

Abstract

Judicial review of administrative agency delay or inaction presents delicate questions about, and potent opportunities to define, the balance of power within the American system of governance. Recently, a significant backlog of Medicare appeals for healthcare providers has spawned litigation, with providers asking the courts to address agency delay by compelling action through a writ of mandamus. Though relying on substantively similar factual bases, the U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the District of Columbia Circuit reached divergent mandamus analyses. Despite differing outcomes, both analyses suffer from the same fundamental flaws: the courts not only fail to identify the cause of the problem, but also fail to design a remedy that addresses that cause. This Note argues that courts should make an explicit factual finding of possibility before issuing a writ of mandamus against an administrative agency due to inaction or delay. Adding this element in the initial mandamus inquiry will help courts avoid dictating policy priorities, avoid infringing on the legislative funding power, and accord proper respect to the underlying principles of the separation of powers within the American system.

[*] J.D., University of Florida Levin College of Law 2020; B.A., Emory University 2014. My thanks to Professor Merritt McAlister for invaluable assistance refining the thesis of this Note. I would also like to thank Samantha Siegel for her careful edits and constant encouragement.

"*[T]he most serious mistakes are not being made as a result of wrong answers. The truly dangerous thing is asking the wrong questions.*"[1]

INTRODUCTION

Judicial review of administrative agency inaction and delay presents delicate questions about, and potent opportunities to define, the balance within the American system.[2] Constitutionally-founded checks and balances are increasingly scarce in a progressively administrative state,[3] and striking the right balance between efficiency and tyranny is no small task.[4] Administrative agencies play a vital yet not constitutionalized role that treads a fine line between efficiency and overreach.[5] The courts' role in monitoring or reforming agency action must walk—and often draw—a line between process and policy, enforcing the former while leaving the latter to the political branches.[6]

The tension between agency autonomy and judicial oversight has been set in sharp relief through recent litigation about a backlog in Medicare claims on appeal.[7] In the face of agency inaction, healthcare providers sought refuge in the courts to address the delays.[8] Though relying on

1. PETER F. DRUCKER, MEN, IDEAS, AND POLITICS, at ix (2010).

2. *See generally* Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381 (2011) (discussing one possible way to frame the tensions inherent in an administrative state).

3. *See* Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 190 (2011) (discussing the impact of increased administrative power on constitutional due process guarantees).

4. *See generally* D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49 (2017) (arguing that the administrative state relies on assumptions that inherently conflict with the U.S. Constitution).

5. *See generally* Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1215 (2014) (arguing that American administrative rules fulfill important functions, including "determining institutional boundaries, establishing the government–citizen relationship, and protecting fundamental values.").

6. Criddle, *supra* note 3, at 135–37 (discussing the development of the nondelegation doctrine).

7. *See HHS Primer: The Medicare Appeals Process*, HHS.GOV 3, https://www.hhs.gov/sites/default/files/dab/medicare-appeals-backlog.pdf [https://perma.cc/A9AA-6ZMS] (describing the backlog).

8. *See generally, e.g.*, Am. Hosp. Ass'n v. Price, 867 F.3d 160 (D.C. Cir. 2017) (seeking mandamus to compel the Secretary of Health and Human Services to process administrative appeals of denials of Medicare patient reimbursement claims within the statutory timeline).

substantively similar factual bases, the U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the District of Columbia Circuit reached opposing outcomes on whether mandamus was an appropriate remedy.[9] Cabining the question of which court arrived at the "right" answer, this Note argues that both courts' analyses suffer from the same fundamental flaws: the courts not only fail to identify the underlying cause of the problem, but also fail to design a remedy that addresses that cause.[10] Understanding the cause of a problem is an essential step in determining an appropriate solution. Because an agency's power to fix a problem is limited by the role the agency plays in creating the problem, determining the root cause would allow the court to determine whether a writ of mandamus would be effective. This Note argues that courts should include an explicit factual finding of possibility before issuing a writ of mandamus simply ordering an agency to take action.

This Note proceeds in three parts. Part I provides a brief description of the statutorily established Medicare appeals process and paints a picture of the backlog that led to litigation beginning in 2014. Part II describes the diverging decisions between the Fourth and D.C. Circuits in declining and granting mandamus, respectively. Part III argues that neither court's process was sufficient for fashioning an appropriate remedy because both courts failed to define whether the problem was caused by inadequate funding or inefficient management. If the backlog was caused by inefficient management of agency resources, mandamus is an appropriate remedy because this is a cause internal to the agency and, thus, more within the agency's control to fix. However, if the backlog was caused by inadequate funding, mandamus is not an appropriate remedy because the court cannot and should not order an agency to do what an agency cannot possibly do without legislative intervention. Part III also suggests a solution: courts should incorporate an explicit factual finding of possibility before issuing a writ of mandamus against an administrative agency to ensure that the writ does not infringe on the legislative purview by dictating funding priorities to Congress. This Note concludes with a broader discussion of the implications of mandamus for separation of powers in an administrative state.

9. *See infra* Sections II.B, II.C (describing the different analyses and outcomes).
10. *See infra* Sections III.B, III.C.

I. THE MEDICARE APPEALS PROCESS AND BACKLOG

Medicare is the United States' federally funded health insurance program for individuals over the age of sixty-five or with certain medical disabilities.[11] As a single-payer program, Medicare unifies healthcare services for its beneficiaries by providing payment directly to healthcare providers.[12] Medicare accounts for 14% of the entire federal budget and cost $582 billion in the 2018 fiscal year.[13] Financing approximately 20% of all healthcare spending in the United States,[14] Medicare plays a vital role in supporting the sustainability of the entire American healthcare system.[15] Considering that 44 million people (about 15% of the U.S. population) are covered by Medicare, the stakes are high.[16] So, by statute,[17] Congress has established a comprehensive process for both individuals and providers to appeal Medicare coverage and reimbursement determinations.[18] Beginning in 2013, the number of appeals surged,[19] causing a significant backlog of pending appeals that the Office of Medicare Hearings and Appeals (OMHA) was unable to adjudicate within the statutory deadlines.[20] This Part explains the Medicare appeals process, timelines, and alleged causes of the backlog.

A. *The Medicare Appeals Process*

After treating patients covered by Medicare, healthcare providers submit a claim for reimbursement that is reviewed by a Medicare Administrative Contractor (MAC).[21] The MAC makes an initial determination on payment within 45 days of receiving the claim.[22] If the

11. *Medicare Program - General Information*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/Medicare/Medicare-General-Information/MedicareGenInfo/index.html [https://perma.cc/FXQ5-C5J3] (last modified Nov. 13, 2019, 10:51 PM).

12. *Id.*

13. *Budget Basics: Medicare*, PETER G. PETERSON FOUND. (Apr. 30, 2019), https://www.pgpf.org/budget-basics/budget-explainer-medicare [https://perma.cc/HH6A-9RTY].

14. *Id.*

15. *See* Bob Rosenblatt, *Why Medicare Matters to All Americans*, AARP (Feb. 7, 2017), https://www.aarp.org/politics-society/advocacy/info-2017/why-medicare-matters-to-all-americans.html [https://perma.cc/657X-7AKZ].

16. BEN UMANS & K. LYNN NONNEMAKER, AARP PUB. POLICY INST., THE MEDICARE BENEFICIARY POPULATION 1 (2009), https://assets.aarp.org/rgcenter/health/fs149_medicare.pdf [https://perma.cc/MR43-JH67].

17. *See* 42 U.S.C. § 1395ff (2012) (outlining the appeals process).

18. *See HHS Primer: The Medicare Appeals Process*, *supra* note 7, at 1–2.

19. *Id.* at 3 (showing an increase from approximately 100,000 claims in 2012 to over 400,000 claims in 2013).

20. Am. Hosp. Ass'n v. Burwell, 76 F. Supp. 3d 43, 47 (D.D.C. 2014), *rev'd*, 812 F.3d 183 (D.C. Cir. 2016).

21. *Id.* at 46; *see* 42 U.S.C. § 1395kk-1(a)(1)–(4).

22. 42 U.S.C. § 1395ff(a)(2)(A).

claim is denied and the healthcare provider wants to appeal that determination, Congress has established a four-step appellate process, which includes the possibility of escalation for judicial review on the merits.[23] First, within 120 days, the healthcare provider may request a redetermination by the MAC; once requested, the MAC must reconsider the decision within 60 days.[24] If unsatisfied, the healthcare provider may appeal next to a Qualified Independent Contractor (QIC).[25] The QIC has up to 60 days to consider the appeal and return a decision.[26] Both the MACs and QICs operate under the umbrella of Centers for Medicare & Medicaid Services (CMS).[27] If the healthcare provider wants to appeal the QIC's determination, the healthcare provider can file a request for a hearing before an administrative law judge (ALJ) in OMHA.[28] OMHA is independent of CMS;[29] thus, arguably, this third stage is the first opportunity for all parties to present their cases in a neutral forum.[30] ALJs have 90 days from the time the healthcare provider requests a hearing to issue a decision.[31] After the ALJ has issued a decision, healthcare providers have one final administrative stop before escalation to the federal district court: an appeal to a division of the Departmental Appeals Board (DAB), which conducts a de novo review.[32] The DAB has 90 days to issue a decision and rarely holds a hearing unless presented with a particularly unique or challenging point of fact or law.[33] The DAB makes a determination on behalf of the Secretary of Health and Human Services

23. *Id.* § 1395ff(b)(1)(A); *HHS Primer: The Medicare Appeals Process*, *supra* note 7, at 1. *See generally, e.g.*, Cumberland Cty. Hosp. Sys., Inc. v. Price, No. 5:15-CV-319-D, 2017 WL 1048102 (E.D.N.C. Mar. 1, 2017) (adjudicating a Medicare claim for reimbursement for approximately $66,000 on the merits), *adopted by* 2017 WL 1049476 (E.D.N.C. Mar. 17, 2017).

24. 42 U.S.C. § 1395ff(a)(3)(C); *HHS Primer: The Medicare Appeals Process*, *supra* note 7, at 1.

25. 42 U.S.C. § 1395ff(c)(3)(B)(i); *HHS Primer: The Medicare Appeals Process*, *supra* note 7, at 1.

26. 42 U.S.C. § 1395ff(c)(3)(C)(i); *HHS Primer: The Medicare Appeals Process*, *supra* note 7, at 2.

27. *See HHS Primer: The Medicare Appeals Process*, *supra* note 7, at 2.

28. *Id.*; *see* 42 U.S.C. § 1395ff(d)(1)(A).

29. Am. Hosp. Ass'n v. Burwell, 76 F. Supp. 3d 43, 46 (D.D.C. 2014), *rev'd*, 812 F.3d 183 (D.C. Cir. 2016); *HHS Primer: The Medicare Appeals Process*, *supra* note 7, at 2.

30. *Am. Hosp. Ass'n*, 76 F. Supp. 3d at 46.

31. 42 U.S.C. § 1395ff(d)(1)(A); *Am. Hosp. Ass'n*, 76 F. Supp. 3d at 46.

32. 42 U.S.C. § 1395ff(d)(2). The specific division of the DAB that reviews Medicare claims is called the Medicare Appeals Council, and this body is referred to as the "MAC" in relevant regulations. *Am. Hosp. Ass'n*, 76 F. Supp. 3d at 46. To avoid confusion, the courts (and this Note) adopt the conventions of the parties and refer to the body overseeing this fourth and final administrative step as "DAB." *See id.*

33. *Am. Hosp. Ass'n*, 812 F.3d at 186.

(Secretary).[34] This determination may be appealed to a federal district court to evaluate the merits of reimbursement for the underlying claim.[35] If this stage is reached, the district court judge evaluates whether the patient's treatment for her medical conditions fall within the Medicare guidelines.[36]

Central to the question of mandamus, the Medicare Act provides healthcare providers with the opportunity to "escalate" a claim if forced to wait longer than the prescribed statutory period.[37] Thus, a healthcare provider who waits longer than 60 days for a decision from a QIC may escalate the appeal to the ALJ;[38] a healthcare provider who waits longer than 90 days for an ALJ decision may escalate the appeal to the DAB;[39] and a healthcare provider who waits longer than 90 days for a DAB decision may escalate the appeal to a federal district court by filing a civil action.[40] The federal district court may then review the case on the merits, but the standard of review is more deferential to the decision of the last deliberative administrative body than the ALJ's essentially de novo review.[41]

B. *The Medicare Appeals Backlog*

Beginning in 2012, an increased volume of claims overwhelmed this appellate process.[42] Between 2010 and 2015, OMHA experienced a 442% increase in the number of appeals received annually.[43] During this timeframe, however, OMHA's funding remained stagnant.[44] By the end of 2015, over 800,000 appeals were pending adjudication.[45] The causes of this increase are debated. The Secretary points primarily to external factors, including a surge in the number of Medicare enrollees as "baby

34. *See Departmental Appeals Board (DAB)*, HHS.GOV, https://www.hhs.gov/about/agencies/dab/index.html [https://perma.cc/N68P-CZ7P].

35. 42 U.S.C. § 1395ff(b)(2)(C)(i); *Am. Hosp. Ass'n*, 812 F.3d at 186.

36. *See, e.g.*, Cumberland Cty. Hosp. Sys., Inc. v. Price, No. 5:15-CV-319-D, 2017 WL 1048102, at *18 (E.D.N.C. Mar. 1, 2017) (discussing the underlying claim of medical necessity in great detail, holding that a Medicare reimbursement claim was improperly denied, and reversing in favor of the healthcare provider), *adopted by* 2017 WL 1049476 (E.D.N.C. Mar. 17, 2017).

37. *See id.* at *2.

38. 42 U.S.C. § 1395ff(c)(3)(C)(ii).

39. *Id.* § 1395ff(d)(3)(A).

40. *Id.* § 1395ff(d)(3)(B).

41. Am. Hosp. Ass'n v. Burwell, 812 F.3d 183, 191 (D.C. Cir. 2016).

42. *HHS Primer: The Medicare Appeals Process*, *supra* note 7, at 3.

43. *Id.*

44. *Id.*

45. *Id.*

boomers" become eligible,[46] additional appeals resulting from a new Recovery Audit Program (instituted in 2010 in response to a Congressional mandate to increase accountability and accuracy in Medicare reimbursements), and additional Medicaid State Agency appeals of Medicare and Medicaid coverage denials.[47] In contrast, healthcare providers pointed to factors internal to the agency that were contributing to the backlog, including the Secretary's refusal to settle pending claims en masse[48] and an overzealous Recovery Audit Program[49] that reclaims improperly reimbursed Medicare claims due to "perverse [financial] incentives."[50] Whatever the cause, according to the Secretary's own estimates, it would take over ten years to address a backlog of this size (assuming no additional appeals are filed).[51] With millions of dollars at stake, some healthcare providers opted to carve their own pathway towards reimbursement through the courts.

II. DIVERGING MANDAMUS DECISIONS

Facing large deductions from anticipated operating budgets, some healthcare providers pursued a new path forward: petitioning the courts to issue a writ of mandamus to force administrative action.[52] This writ, if granted, would order the Secretary to hear the healthcare providers' pending appeals within the statutory period of ninety days and require the U.S. Department of Health and Human Services (HHS) to comply with the statutory timelines for appeals from all healthcare providers.[53] This

46. *See American Generation Fast Facts*, CNN, https://www.cnn.com/2013/11/06/us/baby-boomer-generation-fast-facts/index.html [https://perma.cc/5XBD-FSAJ] (last updated Aug. 17, 2019, 9:36 AM) (stating that the baby boom began between 1943 and 1946 and led to a peak population of 78.8 million baby boomers).

47. Cumberland Cty. Hosp. Sys., Inc. v. Burwell, 816 F.3d 48, 51 (4th Cir. 2016); *see HHS Primer: The Medicare Appeals Process*, *supra* note 7, at 3.

48. *Cf.* Matt Phifer, *Let's Make a Deal: Medicare Expands Settlement Process*, BLOOMBERG L. (May 24, 2018, 3:57 PM), https://news.bloomberglaw.com/health-law-and-business/lets-make-a-deal-medicare-expands-settlement-process [https://perma.cc/XYS3-N9MD].

49. *See generally Program History and Authorities*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/recovery-audit-program-parts-c-and-d/Program-History-and-Authorities.html [https://perma.cc/8LY6-GKTQ] (last updated Nov. 15, 2019, 5:39 PM) (explaining the history of creating and expanding the Recovery Audit Program).

50. *Cumberland Cty. Hosp. Sys.*, 816 F.3d at 51 (stating that the independent contractors hired to run the Recovery Audit Program are inappropriately paid on a contingency basis calculated based on how much money is reclaimed from reimbursements already given to healthcare providers).

51. *Id.* at 50–51.

52. Complaint at 21–22, Am. Hosp. Ass'n v. Burwell, 209 F. Supp. 3d 221 (D.D.C. 2016) (No. 1:14-cv-851).

53. *Id.*

Part describes the elements of mandamus, outlines the two cases at the center of the circuit split, and describes each court's analysis leading up to either granting or denying mandamus.

A. *Elements of Mandamus*

District courts have original jurisdiction in a federal mandamus action and may compel a federal officer or agency to perform a duty owed to the plaintiff.[54] Injunctive relief is not a right[55] but rather a tool left to the court's discretion that should be exercised for the public good within the bounds of the law.[56] The three elements to establish a right to mandamus are well-known and uncontroversial. Mandamus will be issued when: (1) the plaintiff has a clear and demonstrable right to relief; (2) there is a clear duty imposed on the defendant to do the act in question; and (3) no other adequate remedy is available.[57] With this foundation in the elements of mandamus, the following subsections describe the two cases: one granting mandamus and one denying mandamus.

B. American Hospital Association v. Burwell

American Hospital Association v. Burwell[58] is the first major case filed in the U.S. District Court for the District of Columbia asking for a writ of mandamus rather than judicial review on the merits of the claim. The healthcare-provider plaintiffs asserted that escalation was not an adequate alternative remedy because it would force them to relinquish the right to establish an administrative record during the ALJ hearing.[59] Without the administrative record from the ALJ hearing, the DAB would likely base its review solely on the MAC record.[60] Sympathetic to the healthcare providers' argument, the D.C. District Court issued

54. 28 U.S.C. § 1361 (2012).

55. *See* 33 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 8385 (2d ed.), Westlaw (database updated Aug. 2019).

56. Eccles v. Peoples Bank, 333 U.S. 426, 431 (1948) ("[D]eclaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.").

57. *See* United States v. Monzel, 641 F.3d 528, 534 (D.C. Cir. 2011); United States *ex rel.* Rahman v. Oncology Assocs., P.C., 198 F.3d 502, 511 (4th Cir. 1999); Ethel R. Alston, Annotation, *Mandamus, Under 28 U.S.C.A. §1361, to Compel Prompt Hearing in Appeal from Denial of Social Security Disability Benefits*, 47 A.L.R. Fed. 929 (2011).

58. 76 F. Supp. 3d 43, 55 (D.D.C. 2014), *rev'd*, 812 F.3d 183 (D.C. Cir. 2016).

59. *Id.* at 48.

60. *Id.* ("[A]lthough the DAB *may* conduct additional proceedings, it is not required to do so. . . . As a consequence, hospitals find that they are most likely to succeed on their appeals at the ALJ level.").

mandamus.[61] The mandamus order discussed the form of relief the court would provide and, due to lack of a suggested plan from the Secretary, relied heavily on the plaintiffs' suggested remedies.[62] The order targeted the backlog existing in the third stage of the Medicare appeals process—the ALJ hearings—and set percentage reduction goals for the Secretary to meet over the next four years.[63] The order also provided that any healthcare providers with claims still pending on January 1, 2021, that have been pending for longer than one year may petition a federal court for a declaratory judgment in their favor for payment on the claim.[64]

After the D.C. District Court denied the Secretary's motion for reconsideration,[65] the Secretary appealed to the D.C. Circuit.[66] The Secretary argued that it would be impossible to meet the timeline set by the D.C. District Court given current funding and congressional constraints.[67] The D.C. Circuit agreed with the Secretary (to an extent), vacated the mandamus order, and remanded to the D.C. District Court for an explicit finding of possibility.[68] Regardless of the vacated mandamus order, however, the Secretary and Congress had already begun to take financial steps to comply with the D.C. District Court's timeline.[69] Part III will take up the trajectory of this case again.

C. Cumberland County Hospital System, Inc. v. Burwell[70]

Meanwhile, in North Carolina, Cumberland County Hospital System had a similar idea but received a less welcome outcome.[71] Like the American Hospital Association, Cumberland County Hospital System brought an action requesting that the court force the Secretary to meet the statutory deadlines for administrative review of denied claims for

61. Am. Hosp. Ass'n v. Burwell, No. 14-cv-851 (JEB), 2016 WL 7076983, at *1 (D.D.C. Dec. 5, 2016), *vacated*, 867 F.3d 160 (D.C. Cir. 2017).

62. *See id.* at *2–3.

63. *Id.* at *3 (ordering the Secretary to reduce the backlog by 30% by the end of 2017, 60% by the end of 2018, 90% by the end of 2019, and eliminate the backlog by the end of 2020).

64. *Id.*

65. Am. Hosp. Ass'n v. Burwell, No. 14-cv-851 (JEB), 2017 WL 6209175, at *1 (D.D.C. Jan. 4, 2017), *vacated*, 867 F.3d 160 (D.C. Cir. 2017).

66. *Am. Hosp. Ass'n*, 867 F.3d at 165.

67. *Id.* (arguing that meeting the timeline would (1) require illegally eliminating the RAC program, (2) require violating the Medicare Act by resolving claims en masse and not based on merit, and (3) exacerbate the backlog by giving healthcare providers a perverse incentive to file unmeritorious claims with the hope and knowledge of the pending deadline).

68. *See id.* at 161 (stating that "[*o*]*ught* implies *can*" when issuing a writ of mandamus).

69. *See infra* notes 105–112 and accompanying text.

70. 816 F.3d 48 (4th Cir. 2016).

71. *See id.* at 57.

Medicare reimbursement.[72] While advancing similar arguments as the American Hospital Association, Cumberland County Hospital System further argued that the third stage of administrative review, before an ALJ in OMHA, presents the first opportunity for hospitals to obtain a hearing and review by an independent adjudicator with no financial stake in the outcome.[73] While evaluating the appropriateness of the mandamus remedy, the district court focused on whether the statute provided a "[c]lear right to relief and clear duty to act."[74] The district court found that the statute did not impose a clear duty on the Secretary to act within the timeline;[75] rather, the court found that the escalation procedures spelled out within the same statute[76] indicate that Congress anticipated delays in the Medicare appeals adjudication process and prescribed the appropriate remedy.[77] Given the full context of the statute, the court found that Congress did not intend to confer an imperative duty on the Secretary[78] but rather to set forth the recommended process to be followed in adjudicating Medicare appeals.[79]

Beyond this, the court further stated that equitable considerations weighed against granting mandamus in this situation.[80] The court emphasized that mandamus is a drastic remedy that is appropriate only in tightly cabined circumstances.[81] Citing the district court opinion in *American Hospital Association v. Burwell*,[82] this court stated that the state of affairs at OMHA was beyond the ability of the court to solve[83]:

> Congress funds OMHA, Congress created the RAC program, and Congress is aware of the inundation of appeals . . . . So what might the Court do? It makes little sense to force the Secretary to ask Congress for funding to solve a problem of which Congress is well aware. At best, [issuing mandamus] would be an empty gesture, at worst judicial overstepping.[84]

---

72. *See* Complaint, at 1, Cumberland Cty. Hosp. Sys., Inc. v. Burwell, (E.D.N.C. Mar. 18, 2015), *aff'd*, 816 F.3d 48 (4th Cir. 2016).

73. *See id.* at 3.

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

75. *Id.* at *6.

76. 42 U.S.C. § 1395ff (2012).

77. *Cumberland Cty. Hosp. Sys.*, 2015 WL 1249959, at *6.

78. *Id.*

79. *Id.*

80. *Id.* at *7.

81. *Id.* at *5.

82. 76 F. Supp. 3d 43, 55 (D.D.C. 2014), *rev'd*, 812 F.3d 183 (D.C. Cir. 2016).

83. *Cumberland Cty. Hosp. Sys.*, 2015 WL 1249959, at *8.

84. *Id.* at *7 (quoting *Am. Hosp. Ass'n*, 76 F. Supp. 3d at 55).

The court discussed the difficult and precarious financial situation of OMHA and found that the Secretary had limited flexibility to address the problem.[85] Without making a factual finding as to the cause of the problem, the court held that the problem was best left for the political branches to address.[86] Implying that the court believed the issue to be inadequate resources, the court stated that intervening would not solve the problem but would simply disrupt the Secretary's ability to allocate limited resources amongst competing priorities.[87] So, while sympathetic to the difficult position the delays placed the Cumberland County Hospital System in, the court declined to intervene.[88] On appeal, the Fourth Circuit upheld the district court's decision denying mandamus.[89] The court agreed with the district court's equitable concerns, indicating that this problem was best left for the political branches.[90]

D. *Diverging Analyses*

There are two main differences between the D.C. Circuit and Fourth Circuit approaches. First, the D.C. Circuit put more emphasis on the mandatory nature of the administrator's duty to hear Medicare appeals cases within 90 days at the ALJ stage. Second, the Fourth Circuit found the statutory escalation procedures adequate, while the D.C. Circuit did not. In these cases, the courts' analyses first diverge in their interpretations of the word "shall." Differing interpretations of the word "shall" led to different outcomes. The D.C. Circuit emphasized the mandatory nature of this word as yielding both a right and a duty,[91] while the Fourth Circuit found the language directive rather than obligatory—given the analysis of the entire statutory scheme as a whole—and found neither a right nor a duty imposed on the Secretary.[92]

The other substantive point of disagreement is the courts' analyses of whether the statutorily provided escalation procedure yields an "adequate" alternative remedy. Surprisingly, neither court defined the term "adequate" or explained its rationale behind its decision on this factor.[93] The Fourth Circuit stood behind the sufficiency of the process established by the Medicare Act.[94] The court rejected the plaintiff's

85. *Id.* at *8.
86. *Id.* at *9.
87. *Id.*
88. *Id.* at *10.
89. Cumberland Cty. Hosp. Sys., Inc. v. Burwell, 816 F.3d 48, 57 (4th Cir. 2016).
90. *Id.*
91. Am. Hosp. Ass'n v. Burwell, 812 F.3d 183, 192 (D.C. Cir. 2016).
92. *Cumberland Cty. Hosp. Sys.*, 816 F.3d at 56.
93. *See id.* at 52; *Am. Hosp. Ass'n*, 812 F.3d at 191.
94. *Cumberland Cty. Hosp. Sys.*, 816 F.3d at 56.

argument that the third stage—review by an ALJ—provides significant procedural rights unavailable at other points in the process.[95] Indeed, the Fourth Circuit pointed out that there is no guaranteed right to introduce new evidence during the ALJ stage even when that stage is reached.[96] On the other hand, the D.C. Circuit emphasized that the escalation process available by statute is insufficient given the unlikelihood of receiving a timely hearing by moving past the ALJ to the DAB.[97] The court stated that "[m]erely providing a consequence for noncompliance does not necessarily undermine the force of [the] command."[98]

The problem inherent in these conflicting analyses is that both are justifiable given the content of the statute and prevailing norms of statutory construction.[99] In the face of two justifiable explanations, the Fourth Circuit exercised deference to the legislative process,[100] while the D.C. Circuit decided that judicial action was justified to enforce what it perceived as already declared mandatory deadlines.[101] While an entire paper could be dedicated to a discussion of which court got it "right,"[102] subsequent events moot this discussion: Congress decided to act.[103] In light of this development, this Note discusses the implications of the D.C. Circuit's decision to issue mandamus and questions whether clearing the backlog was achieved in a constitutionally justifiable manner.

III. THE ENDS AND THE MEANS

Although Congress has acted to moot this controversy by increasing the agency's funding, the larger question regarding the propriety of using mandamus relief to redress the quagmire remains. Because neither court identified the cause of the problem before determining the appropriate solution, both circuits risk inefficiency and infringement by not determining when mandamus would help to solve the problem. This Part

95. *Id.* at 55–56.

96. *Id.* at 56.

97. *See Am. Hosp. Ass'n*, 812 F.3d at 191.

98. *Id.* at 190.

99. For an interesting discussion of the modern rules of statutory interpretation, see generally Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018).

100. *Cumberland Cty. Hosp. Sys.*, 816 F.3d at 56.

101. *Am. Hosp. Ass'n*, 812 F.3d at 190.

102. *See, e.g.*, Stephen C. Robin, Recent Development, *Healing Medicare: Enforcing Administrative Law Deadlines in Medicare Appeals*, 95 N.C. L. REV. 1293, 1310–12 (2017) (discussing how courts should enforce agency deadlines when facing agency inaction and concluding in favor of the D.C. Circuit's approach).

103. Virgil Dickson, *Medicare Appeals Backlog Plummets More than 30% Since 2017*, MOD. HEALTHCARE (Aug. 6. 2018, 1:00 AM), https://www.modernhealthcare.com/article/20180806/NEWS/180809936 [https://perma.cc/E7C9-6FPE].

identifies problems with both courts' analyses and argues, as a threshold matter, that courts should make an explicit finding that it is possible for the agency to comply with the writ of mandamus before continuing any mandamus analysis. This finding of fact that an agency is able to comply with the order will enhance judicial efficiency and avoid infringing on separation of powers principles.

A. *An Unexpected Outcome*

Temporarily leaving aside any concerns with the circuits' analyses, something unexpected happened: Congress acted.[104] After the mandamus relief was ordered in December of 2016, Congress appropriated significant additional funding to OMHA.[105] The increased funding enabled the Secretary to hire additional ALJs and double OMHA's previous adjudication capacity.[106] Because of this increased funding—coupled with increased settlement initiatives—the Secretary now projects that OMHA will eliminate the backlog by 2022.[107] The American Hospital Association objected to this timeline.[108] It argued that this timeline does not comply with the court's order and is insufficient given OMHA's newfound resources.[109] The D.C. District Court ordered mandamus that aligns with the government's own projections.[110] The order requires the government to reduce the backlog by 19% by the end of fiscal year 2019, 49% by the end of fiscal year 2020, 75% by the end of fiscal year 2021, and to eliminate the backlog by the end of fiscal year 2022.[111]

This series of events begs the question: does it *matter* if the court was right to issue mandamus in the first place? Congress took action to resolve an ongoing problem that had been neglected for years. While correlation

104. Jacqueline LaPointe, *HHS to Clear Medicare Appeals Backlog by 2022, Court Docs Show*, REVCYCLEINTELLIGENCE (Aug. 22, 2018), https://revcycleintelligence.com/news/hhs-to-clear-medicare-appeals-backlog-by-2022-court-docs-show [https://perma.cc/GJ3R-JGC6].

105. Defendant's Status Report and Response to Plaintiffs' Proposed Non-Deadline Remedies at 1, Am. Hosp. Ass'n v. Azar, No. 14-cv-851 (JEB) (D.D.C. Nov. 1, 2018) [hereinafter Defendant's Status Report]; *HHS Fiscal Year 2018 Budget in Brief - OMHA*, HHS, https://www.hhs.gov/about/budget/fy2018/budget-in-brief/omha/index.html [https://perma.cc/3EJT-PEBD] (last updated May 23, 2017); Matt Phifer, *Hospitals, Government at Odds Over Medicare Appeals Drawdown*, BLOOMBERG L. NEWS (Aug. 13, 2018, 4:09 PM), https://news.bloomberglaw.com/health-law-and-business/hospitals-government-at-odds-over-medicare-appeals-drawdown [https://perma.cc/QT78-BG9G].

106. Defendant's Status Report, *supra* note 105.

107. *Id.*

108. LaPointe, *supra* note 104.

109. *Id.*

110. Am. Hosp. Ass'n v. Azar, No. 14-cv-851 (JEB), 2018 WL 5723141, at *3–4 (D.D.C. Nov. 1, 2018).

111. *Id.* at *3.

does not amount to causation, the timing is too coincidentally close to seriously argue that the court's decision on mandamus was a nonfactor in Congress's appropriations decisions. So, when all is said and done, does it matter if mandamus was appropriate in this situation? Do the ends justify the means?

This Note argues that the means matter—or, rather, that they should matter. The outcome in this case amounts to judges legislating from the bench, determining legislative priorities through judicial fiat. Due to the national role of HHS, one activist circuit controlled the outcome for the entire country. This decision has precarious implications for the separation of powers.

In the face of ambiguity, judicial deference to executive interpretation and agency prioritization has long been the standard.[112] The strongest rationale the D.C. Circuit presented in issuing mandamus was an obligation to "enforce the law as Congress has written it."[113] However, given the built-in relief valve in the system through the ability to escalate a claim,[114] the deadline in question is not unambiguously mandatory. Even in situations where Congress has written a clear and unambiguous mandatory deadline, the courts are split on whether an action under § 706(1) of the Administrative Procedure Act (APA)[115] grants the courts discretion when the agency misses a mandatory deadline or if the courts are mandated to enforce the deadline without deference to agency priorities.[116] The D.C. Circuit picked and chose from its own precedent,[117] focusing on the extended delay present in this case to justify intervention. By doing so, the D.C. Circuit exercised pressure on the legislative branch to act quickly or risk placing the executive branch in contempt of court. While Congress can attempt to limit an agency's discretion in implementing policy directives through clear directives,[118] the amount of funding originally appropriated speaks even louder than the statutory relief valve as to congressional priorities: OMHA's ability

112. *See generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912 (2017) (stating that judicial deference to executive and administrative interpretation "casts a long shadow" over American administrative law).

113. Am. Hosp. Ass'n v. Burwell, 812 F.3d 183, 193 (D.C. Cir. 2016).

114. *See* 42 U.S.C. § 1395ff(d)(3) (2012).

115. Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

116. *See generally* Catherine Zaller, Note, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1546 (2001) (discussing varied interpretations of § 706(1) of the APA as it relates to the courts' discretion).

117. *See, e.g.*, *In re* United Mine Workers of Am. Int'l Union, 190 F.3d 545, 554 (D.C. Cir. 1999) (arguing that limited resources provide only a temporary excuse for inaction when facing a statutory deadline).

118. *See* Zaller, *supra* note 116, at 1553.

to meet the statutory deadlines was not a congressional priority until the D.C. Circuit made it so.

Granted, "[i]nformal pressure" has been recognized as acceptable under the separation of powers doctrine.[119] While the Constitution assigns functions to the different branches and officials of government, "separation of powers does not prohibit officials in other branches from using their governmental power to exert informal influence over the carrying out of th[at] function."[120] Indeed, this is quite commonplace; the President may consider the impact on his legislative agenda if he pursues an unpopular appointment,[121] and agencies look to congressional committee records for indications of how the legislature intended that funds be spent.[122] But this case is distinguished from these typical and expected political barters: this is a case of *formal*, not *informal*, pressure. The D.C. Circuit ordered the district court to issue mandamus to the Secretary.[123] This order resulted in legislative, rather than administrative, action. This type of political maneuver is expected in the halls of the Capitol but is disillusioning and discouraging coming from the federal bench.

The events of this case make clear that at least Congress believed that OMHA truly did not have sufficient resources to properly enact its mandate as interpreted by the court.[124] Once the D.C. District Court issued mandamus, Congress allocated significant additional funding to OMHA, even though the order was still being appealed.[125] Ironically, the D.C. District Court eventually stated that complying with the order of mandamus was "possible" only in light of the additional funding granted by Congress.[126] Essentially, this writ of mandamus functioned as a judicial order dictating the legislative agenda; since this agenda was followed post hoc, the originating order was self-justified.

---

119. Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 510 (2011) (emphasis omitted).

120. *Id.*

121. *See, e.g.*, Mark Landler & Maggie Haberman, *Brett Kavanaugh Is Trump's Pick for Supreme Court*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html [https://perma.cc/KW9T-EF68].

122. Beermann, *supra* note 119, at 511.

123. Am. Hosp. Ass'n v. Azar, No. 14-cv-851 (JEB), 2018 WL 5723141, at *3 (D.D.C. Nov. 1, 2018).

124. *See id.* at *2.

125. Defendant's Status Report, *supra* note 105, at 1; *HHS Fiscal Year 2018*, *supra* note 105; Phifer, *supra* note 105.

126. *Am. Hosp. Ass'n*, 2018 WL 5723141, at *4.

B. *An Undefined Problem*

Though reaching different results, both circuits prescribed treatment without ever diagnosing the cause. The Fourth Circuit evaded the question of causation by leaving the remedy entirely to the political process.[127] In doing so, the court assumed that a legislative solution was available to solve what could just as easily have been an issue of agency drift or mismanagement of resources. The D.C. Circuit took a more straightforward "enough is enough" stance and ordered action, in whatever form the Secretary saw fit, to fix the problem.[128] The court assumed that there were solutions within the Secretary's power to pursue. Both courts erred in failing to identify the root cause of the problem before providing an answer.

This is not to say that the courts did not exercise sufficient caution in their analyses. Both courts acknowledged the underlying equitable nature of mandamus: even if the courts can properly exercise mandamus jurisdiction,[129] that does not mean they should.[130] A preference for one circuit's outcome over the other is rooted in a philosophical preference for a deferential or active judiciary.[131] This Note does not argue that either court failed to exercise sufficient caution or due care in making a decision. Indeed, each circuit can be seen as deferring to different parts in the legislative timeline: the Fourth Circuit deferred to the ongoing legislative process,[132] whereas the D.C. Circuit enforced the legislation

127. Cumberland Cty. Hosp. Sys., Inc. v. Burwell, 816 F.3d 48, 57 (4th Cir. 2016) ("While the Secretary laments this and Congress recognizes it, both are presently attempting to revive the process. As bleak as these circumstances appear to be, however, we are unpersuaded that Article III treatment of the ailing Article II patient in the manner the Hospital System urges is the answer or, indeed, even possible or desirable.").

128. Am. Hosp. Ass'n v. Burwell, No. 14-cv-851 (JEB), 2016 WL 7076983, at *3 (D.D.C. Dec. 5, 2016), *vacated*, 867 F.3d 160 (D.C. Cir. 2017).

129. This, as the Fourth Circuit notes, is not a certainty, but is assumed in this paragraph *arguendo*. *See Cumberland Cty. Hosp. Sys.*, 816 F.3d at 54–57.

130. Am. Hosp. Ass'n v. Burwell, 76 F. Supp. 3d 43, 53 (D.D.C. 2014) (explaining that equitable relief does not automatically follow a finding of a statutory violation, but that "respect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of priorities" (quoting *In re* Barr Labs., Inc., 930 F.2d 72, 74 (D.C. Cir. 1991))), *rev'd*, 812 F.3d 183 (D.C. Cir. 2016).

131. *See, e.g.*, Suzanna Sherry, *Why We Need More Judicial Activism*, *in* CONSTITUTIONALISM, EXECUTIVE POWER, AND THE SPIRIT OF MODERATION 11 (Giorgi Areshidze et al. eds., 2016) (calling for more judicial activism); *cf.* Norm Ornstein, *How Activist Judges Undermine the Constitution*, ATLANTIC (Sept. 18, 2014), https://www.theatlantic.com/politics/archive/2014/09/how-activist-judges-undermine-the-constitution/380413/ [https://perma.cc/ JL6M-9WHL] (arguing against judicial activism).

132. *See Cumberland Cty. Hosp. Sys.*, 816 F.3d at 56 ("[I]f the backlog were attributable to Congress' failure to fund the program more fully or otherwise to provide a legislative solution, it would likewise be a problem for Congress, not the courts, to address.").

as written through the legislative process.[133] Both courts went to great lengths to discuss whether mandamus jurisdiction was appropriate, based on canons of statutory interpretation and precedent, and both courts considered whether judicial action would improperly interfere with the role of the legislature.[134] This task is particularly difficult in the administrative law context,[135] and it is clear that both courts understood the importance of considering all relevant factors.

However, understanding the cause of a problem is central to creating an adequate solution. Administrative agencies are in a unique position to develop and demand a comprehensive record that should allow for rational decision-making to both enforce congressional policy and avoid drift.[136] In reviewing the agency's failure to act, neither court showed an appreciation for the need to identify the cause of the problem before deciding whether the court could or should act with any degree of authority. The courts' approach to crafting a remedy in situations of agency delay should be careful and narrow, speaking to the source of dysfunction in the facts presented. If the backlog was primarily attributable to inefficient management of agency resources, or even a willful refusal to obey the statutory requirements, then the courts' contempt power may well have proven a powerful tool to fight institutional inertia. However, if the backlog was caused by factors outside of the agency's control, such as inadequate funding, what would have been the next step? Was the court willing to hold the Secretary in contempt for the lack of congressional action? Without knowing the cause of the backlog, a writ of mandamus could be classified as anything from a risky gamble trying to provide a well-intentioned nudge in the right direction to an unsubstantiated bluff that encroaches on a role properly left to the Secretary or the Legislature.

---

133. *See Am. Hosp. Ass'n*, 812 F.3d at 191 ("'[H]owever many priorities the agency may have, and however modest its personnel and budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction in the face of' a statutory deadline." (alteration in original) (quoting *In re* United Mine Workers of Am. Int'l Union, 190 F.3d 545, 554 (D.C. Cir. 1999))).

134. *See Cumberland Cty. Hosp. Sys.*, 816 F.3d at 56; *Am. Hosp. Ass'n*, 812 F.3d at 192.

135. *See generally Now What? Some Thoughts on Judicial Remedies in Administrative Law*, YALE J. ON REG.: NOTICE & COMMENT, https://www.americanbar.org/content/dam/aba/events/administrative_law/2017/10/011_now_what.authcheckdam.pdf [https://perma.cc/KX5L-Q8W8] (discussing the difficulties inherent in balancing judicial review of administrative decisions with the need for executive deference).

136. *See generally* Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (discussing the difficulties inherent in balancing agency efficiency while adhering to congressional mandate).

C. *A "Possible" Solution*

The foregoing discussion leaves more questions than answers. How can the courts enforce required agency actions without risking overstepping into legislative policy-setting? Is there ever a "safe" situation to intervene, without implicating concerns about separation of powers? Yes, and the D.C. Circuit, on a second appeal, provided a pathway forward.

The courts may intervene by incorporating an explicit factual finding of possibility before issuing a writ of mandamus. It is a simple but important idea: the courts should not order an agency to do the impossible.[137] Therefore, before ordering an agency to act, a court should make an explicit factual finding that it is *possible* for the agency to act in a way that solves the problem. If the court finds that the agency's inaction is due to mismanagement of resources or agency drift, mandamus can and should issue against the administrative agency to correct its failure to effectuate its duties. If, however, the court finds that the agency's inaction is due to inadequate resources—a legislative matter—mandamus should not issue. This finding of possibility will help the court distinguish between situations that can guide administrative agencies to fulfill their mandate compared to those that would, ultimately, dictate legislative priorities.

Contrary to *American Hospital Association v. Price*,[138] this finding of fact should be incorporated into the initial jurisdictional or equitable considerations the court analyzes before issuing mandamus against an administrative agency in cases of delay or inaction. In *American Hospital Association v. Price*, this finding of fact was deemed to be a critical piece of the puzzle only on a second appeal to the D.C. Circuit.[139] By incorporating the finding as an initial criterion, the courts can get it right the first time and avoid excessive and unnecessary litigation where the appellant is forced to plead against being held in contempt for failing to do the impossible.

Furthermore, a finding of possibility can help the courts avoid legislating from the bench by inadvertently—or purposefully—ordering congressional action through judicial fiat. "[L]egislating from the bench" started as a political slogan but has become something of an unspoken and accepted reality.[140] The courts are simply not designed to make

137. Am. Hosp. Ass'n v. Price, 867 F.3d 160, 161 (D.C. Cir. 2017) (stating that "[*o*]*ught* implies *can*" when issuing a writ of mandamus).

138. 867 F.3d 160 (D.C. Cir. 2017).

139. *See id.* at 161.

140. *See* Linda Greenhouse, Opinion, *Let's Legislate from the Supreme Court Bench*, N.Y. TIMES (Oct. 13, 2016), https://www.nytimes.com/2016/10/13/opinion/lets-legislate-from-the-supreme-court-bench.html [https://perma.cc/UL9Y-M3KK].

complex policy decisions that undergird the appropriations process and should not make the attempt.[141] The funding power has long been recognized as the quintessential legislative power.[142] While the funding power is typically discussed at the intersection of legislative and executive power,[143] this Note argues that the impact of the judiciary ordering administrative action must be examined as well. The judiciary can implement a safeguard against infringing on this power by determining, from the outset, whether it is possible for the agency to comply with the order sought without receiving additional resources from Congress.

CONCLUSION

When the judiciary can order the legislature to legislate, the fundamental structure of the American system of government is at risk. The courts' failure to identify the cause of the problem does not absolve them of the resulting overreach into the realm of making policy decisions. Though mandamus was issued to an administrative agency, the writ evidently and eventually required legislative action for the administrative agency to comply.[144] By not making a factual determination as to the cause of OMHA backlog, the D.C. Circuit purposefully disregarded the very real chance (which, this Note has argued, was actualized) that the judiciary would usurp the role of the legislature by, in effect, dictating the allocation of funding. By incorporating an explicit factual finding of possibility before issuing a writ of mandamus against an administrative agency for inaction or delay, the courts can avoid overreach and still mandate agency action when appropriate.

141. *See* Richard S. Wells & Joel B. Grossman, *The Concept of Judicial Policy-Making: A Critique*, 15 J. PUB. L. 286, 289 (1966).

142. *See* Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 357 (2018).

143. *See, e.g.*, *id.* at 382.

144. *See* LaPointe, *supra* note 104.