NEGOTIATING THE FEDERAL GOVERNMENT'S COMPLIANCE WITH COURT ORDERS: AN INITIAL EXPLORATION*

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Judicial review of federal agencies rests on the premise that if a court gives an order to an agency, the agency will obey. Yet the federal government's compliance with court orders is far from automatic, especially with orders telling an agency to act affirmatively, which may strain limited agency resources, interfere with the agency's other legally required tasks, or force the agency to act on deficient information. An agency may invoke these difficulties to convince a judge that it should be cut more slack—that is, given more latitude (especially more time) to comply. Judges often find the agency's difficulties to be quite real and hold back from demanding strict and rapid compliance. Thus, whether an agency must actually do what a court has ordered, and on what terms, entails a delicate negotiation between agency, judge, and plaintiff. These compliance negotiations, despite their great practical importance, are little analyzed or understood in the academic literature, for it is difficult to learn about them through traditional sources like appellate case law. This Essay, drawing upon a large cache of dockets from district court cases in which compliance troubles arose, provides an initial exploration of this unexplored subject. This Essay finds that the central problem in these cases is the judge's access (or lack of access) to information about why the agency is falling short and whether it could do more. On this theme, this Essay discusses (1) the kind of information that an agency can provide about its own internal management so as to

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convince the judge that it is trying hard enough to comply; (2) the imperfect and even crude methods that judges use to discern whether an agency is trying hard enough; and (3) the ways in which judges can employ information-gathering techniques, such as requiring testimony by high agency officials, as quasi sanctions to force the agency to pay more attention to what the court has ordered.

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INTRODUCTION

Administrative law as a field focuses mainly on judicial review of agency action. Such review rests on the premise that if a court gives an order to an agency, the agency will obey. Yet the federal government's compliance with court orders is far from automatic. Compliance can become a problem when a court holds agency action unlawful and sets it aside, for example, when district judges found that the Obama Administration disobeyed injunctions against prohibiting offshore oil drilling[1] and against shielding aliens from deportation.[2] But compliance problems are even more common when the challenge is to agency *inaction*, that is, when the court is telling the agency to act affirmatively—something we see not uncommonly in areas like environmental law, natural resource management, and freedom of information. When a judicial order tells an agency to act affirmatively, it can strain limited agency funding and personnel,

1. Hornbeck Offshore Servs., LLC v. Salazar, No. 10-1663, 2011 WL 454802, at *3 (E.D. La. Feb. 2, 2011), *rev'd*, 713 F.3d 787 (5th Cir. 2013).

2. Order at 1–2, Texas v. United States, No. 1:14-cv-00254 (S.D. Tex. July 7, 2015), ECF No. 281.

disrupt the agency's ordering of its priorities (potentially interfering with other tasks the agency is legally required to carry out), or force the agency to act on technical or scientific knowledge that is deficient.

There is substantial literature on how a court, in deciding whether to issue an order compelling agency action in the first place, should anticipate and weigh these problems,[3] but the decision to issue such an order is often just the beginning of the story. The court, exercising its equitable discretion, has to decide the terms of the injunction. Should it simply order the required action all in one piece, letting the agency decide the details, or should it break the action into steps and order them individually, effectively micromanaging the agency? Should the court attach deadlines to the action, to the steps that constitute the action, or both, or should it instead trust the agency to get everything done in a more or less "reasonable" time? And there's more: even when the order spells out specifics and is sharpened by deadlines, agencies have been known to come back to court asking for extensions, warning that, unless the judge cuts the agency some slack, the action will be rushed and therefore dangerously ill-conceived or the agency's other tasks will be dangerously neglected. A judge must then ask herself: does the bureaucracy really deserve more latitude on this, or am I being suckered into excusing the agency's incompetence, or worse, its political aversion to doing what the law requires?[4] Thus, a plaintiff may "win" a suit to compel agency action only to find that victory opens up a fraught and complex negotiation over the terms and timing of obedience that may go on for years.

We know far too little about how these compliance negotiations work. Despite their significance for the efficacy of judicial review,

3. This literature includes Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1 (2008); Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004); Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923 (2008); 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); Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369 (2009); and Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157 (2014).

4. For commentary on the legitimate role of a judge's equitable discretion in deciding the terms and timing on which federal agencies must carry out statutorily required actions, see the classic statement in *Natural Resource Defense Council, Inc. v. Train*, 510 F.2d 692, 711–14 (D.C. Cir. 1975).

there is very little academic literature on them.[5] A major reason for this inattention, I believe, is that while compliance negotiations are bound by doctrine in certain ways, there is not a doctrine of compliance negotiations per se. To learn about these negotiations, one cannot rely mainly on traditional sources like appellate case law. The negotiations are a matter of case management and the evidence of them (if they leave any accessible written record at all) is in orders and various party filings—usually of district courts—that never get enshrined in published reports.

In a recent article,[6] I sought to address one key question about compliance negotiations: what is the endgame? That is, if the judge

5. Admittedly, there are a few specific case studies of individual agency initiatives that shed light on compliance negotiations. *See generally* MARC K. LANDY, MARC J. ROBERTS & STEPHEN R. THOMAS, THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON 89–132 (expanded ed. 1994) (describing EPA rulemaking under the Resource Conservation and Recovery Act); ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 23–46, 95–116 (1993) (detailing instances of EPA rulemaking under the Clean Water and Clean Air Acts); Richard J. Pierce, Jr., *Judge Lamberth's Reign of Terror at the Department of Interior*, 56 ADMIN. L. REV. 235 (2004) (describing the challenge to Interior Department management of Native American trust accounts); David C. Vladeck, *Unreasonable Delay, Unreasonable Intervention: The Battle to Force Regulation of Ethylene Oxide*, *in* ADMINISTRATIVE LAW STORIES 191 (Peter L. Strauss ed., 2006) (reviewing OSHA rulemaking related to ethylene oxide). It should also be noted that, although the question of remedies in administrative law has long been neglected, there has been a welcome proliferation of scholarship on the question very recently, albeit focused on what remedies to grant in the first place, not how to obtain compliance with remedies that have been granted. *See generally* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253 (2017) (contending that courts should use context-specific remedies instead of invalidating agency actions automatically); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (advocating against the use of nationwide injunctions to restrain the enforcement of administrative action); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018) (defending the use of nationwide injunctions in at least some cases); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017) (discussing the scope of a district court's power to issue a nationwide injunction and outlining situations when such an injunction might be appropriate); Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 ADMIN. L. REV. 361 (2018) (arguing that courts should be much more reluctant to grant voluntary remands); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017) (exploring when courts issue nationwide injunctions and when such relief is appropriate); Christopher J. Walker, Response, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106 (2017) (suggesting that the ordinary remand rule currently in place is preferable to a more context-specific remedial approach); Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553 (2014) (exploring how the ordinary remand rule works in practice and the degree to which it promotes the separation of powers doctrine it was meant to uphold).

6. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685 (2018).

refuses to credit the agency's assertion that resource limitations or technical-knowledge deficiencies make compliance infeasible and slack necessary, what happens? Can the judge *make* the agency swallow its objections and forge ahead? In litigation against private parties, the answer would be yes: the judge can find a disobedient defendant in contempt and impose sanctions of fines or imprisonment to force action.[7] But does contempt work against federal agencies? Because there is very little appellate doctrine on this point, my research team and I conducted broad searches of the Westlaw database for relevant judicial opinions, including especially those of district courts, and of the Bloomberg Law database for relevant dockets.[8] We located about eighty suits in which a federal agency was held in contempt, plus another 150 judicial opinions with discussion of interest, plus over one thousand other dockets in which a contempt motion against an agency was made but denied. From this source base, my conclusion was that contempt *mostly does* work against federal agencies, but in a different way than it works against private defendants. Judges certainly do issue contempt findings against agencies—as they do against private defendants—but sanctions against agencies involve far greater legal and prudential complications than against private defendants. Several judges think they can impose sanctions on agencies and have tried to do so, but the higher courts have demonstrated near-complete unwillingness to allow sanctions, even as they bend over backward to avoid making pronouncements that sanctions are categorically unavailable against the government.[9] Crucially, however, contempt findings in themselves—despite the judiciary's evident unwillingness to couple them with sanctions—have a shaming effect on agency officials and their counsel that gives them very substantial, if imperfect, deterrent power.[10] A finding of contempt is damaging to the reputations of federal agencies and officials, and the historical norm has been for them to work hard to avoid such a finding.[11]

Whereas my previous article focuses on extreme cases in which litigation reaches a finding of contempt, this Essay aims to explore the more common and ordinary compliance negotiations that occur in the

7. *See, e.g.*, 18 U.S.C. § 401 (2012) (codifying the contempt power of the federal courts).

8. For a complete description of the research, see generally *Appendix: Methodology for Locating Cases*, 131 HARV. L. REV. 685 app. (2018), https://harvardlawreview.org/wp-content/uploads/2018/01/685appendix.pdf [https://perma.cc/9E99-TVZA].

9. Parrillo, *supra* note 6, at 704–64.

10. *Id.* at 770–89.

11. *Id.*

shadow of a judge's power to threaten contempt. I draw upon orders, briefs, and other filings from the assembly of suits that my team and I previously collected for the article on contempt, but this time focus more on the suits in which a contempt finding was sought by the plaintiff and/or considered by the judge but *not* actually made.[12] This is the result in a large majority of cases. Admittedly, a full examination of the subject of compliance negotiations would have to take account of court-party and interparty interactions that are never recorded in filings—a kind of research that would likely require interviews with practitioners, litigants, and judges. That is a worthy endeavor for future research. For now, I believe there is much to be learned from the large cache of documentary sources that my team and I examined.

Drawing upon those sources, this Essay provides an initial exploration of how compliance negotiations work. A major theme, on which I focus, is the judge's access to information. By threatening a contempt finding with its attendant reputational damage, a judge knows that she can cause agency officials to act even though they say they lack the technical knowledge or resources to do so. But *should* the judge do this? This largely turns on what she knows. How does the court tell the difference between an agency whose delay is a

12. Specifically, this Essay is largely based on a body of approximately 1400 docket sheets in the Bloomberg Law database of U.S. district court actions from about 1990 to 2015. In each of these actions, a plaintiff moved for contempt against a federal agency, or a contempt proceeding was initiated by the judge, but no contempt finding was ultimately made. On the process by which this body of approximately 1400 docket sheets was originally assembled for the earlier article, see *Appendix: Methodology for Locating Cases*, *supra* note 8, at 5–10 (describing two major searches of the Bloomberg Law database, resulting respectively in 440 and 997 docket sheets involving contempt proceedings against the federal government, which together—minus the small number in which contempt findings were actually made—comprise the body of cases examined for the present Essay). For this Essay, my research assistants went over the approximately 1400 docket sheets to find those in which the possibility of contempt received serious attention from the agency and/or the judge. They focused especially on those in which the judge asked for, or the agency furnished, new information about the agency's compliance, or efforts at compliance, or in which the judge and agency communicated about timelines or deadlines for compliance. For cases involving such attention, the research assistants forwarded to me PDFs of the filings most relevant to the compliance issues. While the Bloomberg Law database has PDFs of virtually all filings going back to about 2005, it has PDFs for only some filings going back to about 2000, and almost none from before 2000. Therefore, the research assistants were able to find and forward PDFs only for cases from about 2000 to 2015. Ultimately, they forwarded to me PDFs from approximately 200 docket sheets, all of which I examined. (In the course of the research, I decided not to include in my analysis suits by federal inmates because I believe such suits usually present a distinct set of issues; midway through the research, I asked the research assistants to stop forwarding filings from such cases. This exclusion did not apply to civil immigration detainees.)

reasonable reaction to technical-knowledge deficiencies or resource limitations, on the one hand, and an agency that is unreasonably lazy, inefficient, or politically recalcitrant, on the other? This judgment requires knowing something about (1) the agency's internal management and capacities, (2) the many tasks competing for the agency's attention, (3) the political pressures that bear upon the agency, and (4) the level of technical knowledge that is requisite for the agency to make sound decisions. For the most part, these are not the types of information that judges are traditionally suited to acquire and process.[13] Indeed, they are even different from the types of information that judges must process when they engage in a "hard look" review of the merits of a technical agency decision.[14] Types (1), (2), and (3) are in the nature of *organizational and political* information—less analogous to the paradigm of hard look review and more analogous to the paradigm of "structural reform litigation" that is more familiar in the history of civil rights suits against states and localities than in federal administrative law.[15] And while type (4) is

13. *Cf.* R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 388 (1983) (arguing that measures to increase the technical and scientific expertise of judges are "misguided" because "what the courts need most is a better understanding of *administrative* issues, not technical ones," mainly because better administrative understanding would lead to more efficacious remedies). For a discussion on the peculiar nature of the information necessary to decide a challenge to federal agency inaction, see RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 12.3, at 1068–69 (5th ed. 2010) ("[I]n deciding whether to grant relief [for agency delay] a court must focus not on the detail of the agency's method of proceeding with respect to the particular matter, but rather on a broad assessment of the temporal urgency of that matter in comparison with the temporal urgency of the scores, hundreds, or even thousands of other matters for which the agency has decisionmaking responsibility. . . . It is often easy to paint a picture of apparent irresponsible delay by focusing only on the manner in which an agency has handled a particular matter. It is much more difficult to demonstrate that delay of a particular matter is 'unreasonable' when the inquiry focuses instead on the agency's total workload and its scarce resources available to accomplish all of the important tasks it has been assigned.").

14. *See, e.g.*, Nat'l Lime Ass'n v. EPA, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980).

15. For some major treatments of structural reform litigation from diverse perspectives, see generally MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998) (exploring the courts' role in reforming the prison system and arguing that the modern administrative state requires an active judiciary); ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003) (arguing for limits on the availability, scope, and duration of judicial decrees against the government); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (explaining the nature, importance, and risks of structural reform litigation); Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617 (2003) (arguing that judges have succeeded as policymakers and that judicial policymaking is subject to effective self-imposed restraints); Charles F. Sabel & William

related to technical knowledge, it really goes to the metaquestion of when the acquisition of knowledge ceases to be cost justified, which is not purely a technical inquiry but also a prudential and managerial one.[16]

This Essay explores several aspects of the judge's informational challenge. Part I explains that litigation over compliance is a world apart from garden-variety judicial review of agency action in that judges in garden-variety suits are accustomed to relying upon the record compiled by the agency itself, whereas in compliance disputes the court itself often needs to find facts in the first instance. And while discovery against the agency is a possibility for extreme cases, courts much more typically employ methods that fall short of full-blown adversary testing, such as sworn statements submitted by officials on a formally voluntary basis or required status reports. Part II analyzes a typical example of an official's sworn statement explaining the agency's noncompliance. Usually the official can satisfy the judge with a facially plausible description of the agency's operations and challenges, even if the official asks the judge to take much on faith. Given that these sworn statements and status reports are the judge's usual sources of information, Part III asks how judges practically decide whether an agency is making sufficient efforts or must be forced to do more. The methods that judges use in this inquiry are often fairly crude, for example, demanding that the agency keep up its current pace of work without interrogating whether that pace is unreasonably slow to begin with, or using as a benchmark the agency's time to complete some prior action without much inquiry into whether the present action is comparable. Crude as they are, these methods may be the best courts can devise. Part IV explains that judges—knowing they are dependent on officials for information about what efforts agencies are making and whether they practically could do more—consider it crucial that officials act and communicate in good faith. Thus, what most disturbs judges—and

H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004) (describing a trend toward experimentalist approaches in public litigation and reframing such litigation as involving "destabilization rights"); Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006) (suggesting that court orders governing prison and jail conditions have not decreased and offering suggestions for further research); and David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015 (2004) (exploring the ways in which institutional reform lawsuits spread uniform practices across the country).

16. *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1389–91 (2016).

what most reliably spurs them to attack the agency with threats like contempt—is if the agency appears to manipulate information in a way that is opportunistic or misleading. Agencies that give this appearance, even inadvertently, need to win back the judge's trust. To do so, they may need to increase their transparency beyond ordinary expectations. Finally, Part V considers how courts' more aggressive and unusual means of gathering facts about agency compliance efforts, such as allowing top officials to be deposed or forcing them to attend judicial proceedings in person, can serve not only to inform the court but also to get the attention of the agency's top management, acting as a quasi sanction akin to a contempt threat.

I. HOW JUDGES GET INFORMATION ABOUT AGENCY COMPLIANCE EFFORTS

At the outset, we must recognize that litigation over an agency's failure to comply with an affirmative court order—consisting of motions to modify the order, to enforce the judgment, for contempt, etc.—fits uneasily with judges' usual approach to getting information when reviewing federal agencies. In this part, I review the usual approach judges use to gather information from agencies in cases involving the judicial review of agency action and explain why this particular kind of litigation fits awkwardly into that usual approach.

A "general rule of administrative law," known as the "record rule," says that "a court can engage in judicial review of an agency action based only on consideration of the record amassed at the agency."[17] The "record" that an agency amasses regarding its own action (assuming the action did not result from a formal proceeding that produces an obvious record) consists of "all materials considered by responsible agency staff members,"[18] which the agency assembles and certifies to the court.[19] If the record produced by the agency is

17. PIERCE, *supra* note 13, § 11.6, at 1047.

18. Michael Asimow & Yoav Dotan, *Open and Closed Judicial Review of Agency Action: The Conflicting U.S. and Israeli Approaches*, 64 AM. J. COMP. L. 521, 527 (2016). Asimow and Dotan are referring to informal adjudications rather than informal rulemakings, *see id.*, but their language is an apt statement of the thinking for both kinds of action, *see* Daniel J. Rohlf, *Avoiding the 'Bare Record': Safeguarding Meaningful Judicial Review of Federal Agency Action*, 35 OHIO N.U. L. REV. 575, 583 (2009) (stating that, for all types of informal action, "a complete administrative record includes information that was directly or indirectly considered by the relevant agency," even if the information did not actually pass before the eyes of the agency's *final* decisionmaking official).

19. Exactly what materials the agency should include in the record and forward to the court in the case of informal action—particularly when large numbers of personnel and amounts of material are involved—is a question that is often unclear in the case law,

insufficient for the court to conduct a meaningful review, the appropriate course is for the matter to "be remanded to the agency to reconsider the case."[20] It is *not* for the court to inquire de novo into how the agency made its decision. "The focal point for judicial review [of agency action] should be the administrative record already in existence, not some new record made initially in the reviewing court."[21] Because the agency record is "virtually the sole evidence a court will consider," "plaintiffs in almost all cases cannot take advantage of traditional discovery tools to seek additional documents or information, including the testimony of officials involved in the decision at issue."[22] To be sure, the case law has recognized circumstances in which a court can allow the agency record to be completed or supplemented,[23] including if the challengers make "a strong showing of bad faith or improper behavior" on the part of the agency.[24] When new evidence is allowed, the court can obtain it by "allow[ing] discovery by plaintiffs" or by directly "order[ing] agencies to add materials to the record."[25] But these circumstances are

disputed in litigation, and subject to numerous judgment calls that depend on practices that vary by agency and are sometimes quite ad hoc (e.g., whether or when officials' personal notes should be included). *See* Rohlf, *supra* note 18, at 582–602; *see also* Asimow & Dotan, *supra* note 18, at 529–31; Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 KAN. L. REV. 1, 8–14 (2018); James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. L. 1301, 1311–14 (2008). To a large degree, agencies are on their honor. *See* Rohlf, *supra* note 18, at 602–08. Some but not all of the confusion over the boundaries of the record arises from questions about the deliberative process privilege (though material subject to this privilege should arguably be placed *within* the record but then withheld while being noted in an index). Gavoor & Platt, *supra*, at 35–39 (noting a circuit split on whether deliberative process material is part of the record to begin with); *see also* Rohlf, *supra* note 18, at 584, 591–97; Saul, *supra*, at 1323–29. On the EPA's internal policy regarding what goes in the record, see Carrie Wehling, *EPA's Administrative Records Guidance*, ADMIN. & REG. L. NEWS, Summer 2017, at 16, 16. The Administrative Conference of the United States recently adopted a recommendation regarding compilation of records for informal rulemaking. Administrative Conference Recommendation 2013–4: The Administrative Record in Informal Rulemaking, 78 Fed. Reg. 41,352, 41,358–59 (July 10, 2013); *see also* LELAND E. BECK, AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING 80–82 (2013), https://www.acus.gov/sites/default/files/documents/Agency%20Practices%20and%20Judicial%20Review%20of%20Administrative%20Records%20in%20Informal%20Rulemaking.pdf [https://perma.cc/C3G9-JLD5] (outlining recommendations for compiling records based on a survey of agency practices).

20. Asimow & Dotan, *supra* note 18, at 533.

21. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985) (alteration in original) (quoting Camp v. Pitts, 411 U.S. 138, 142 (1973)).

22. Rohlf, *supra* note 18, at 578.

23. *Id.* at 587–91; Saul, *supra* note 19, at 1319–23.

24. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

25. Rohlf, *supra* note 18, at 586.

exceptional; courts "typically reject" any attempt to introduce evidence beyond the record submitted by the agency.[26]

With this background in mind, the unique challenges of litigation over agency compliance are evident. Such litigation is, to a large degree, a fact-gathering exercise, and potentially a daunting one. If the agency is claiming that its noncompliance is excusable or that it deserves more slack, the court may want to find out what progress the agency has made toward compliance, what resources the agency has allocated to compliance, whether those resources could be used more efficiently, what other priorities are competing for those resources, how much additional agency effort would increase the soundness of the decision, whether the agency has ulterior (e.g., political) motives for noncompliance, and what the consequences of delay are for the challengers and the public. The documents potentially relevant to these inquiries range widely; they are potentially more diverse and dispersed than those that would relate to a discrete agency rulemaking or adjudication. Further, the most relevant information might not be documentary at all but instead lie in officials' unwritten deliberations on, for example, how to staff various projects.

Faced with these fact-gathering challenges, the court may find there is no agency record at all, or at least not an adequate one. Though the point is not very clearly articulated in the case law, a few commentators have briefly noted that challenges to agency inaction exist in a world apart from the record rule.[27] When the agency has not acted, there often is no agency record, or if there is a record (e.g., if the agency seriously considered taking action but then demurred), it is often incomplete.[28] In these situations the court may end up doing fact gathering of its own since it may seem futile to remand to the agency to compile or complete a record of the agency's own inaction.[29] Postjudgment noncompliance is a type of inaction, and, as we shall see, it is not unusual for courts in that context to gather facts

26. Asimow & Dotan, *supra* note 18, at 534; *see also* Rohlf, *supra* note 18, at 585.

27. *See* Thomas O. Sargentich, *The Jurisdiction of Federal Courts in Administrative Cases: Developments*, 41 ADMIN. L. REV. 201, 239–42, 242 n.156 (1989); Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 350–51 (1984); Debmallo Shayon Ghosh, Note, *"Inquiries That We Are Ill-Equipped to Judge": Factfinding in Appellate Court Review of Agency Rulemaking*, 90 N.Y.U. L. REV. 1269, 1282–83 (2015) (noting that, especially in cases of agency inaction, the court has no record to examine and so must look to other circumstances and facts).

28. *See* Sargentich, *supra* note 27, at 239–42, 242 n.156; Stark & Wald, *supra* note 27, at 350–51; Ghosh, *supra* note 27, at 1282–83.

29. Sargentich, *supra* note 27, at 239–42, 242 n.156; Stark & Wald, *supra* note 27, at 350–51, 353–54; Ghosh, *supra* note 27, at 1282–83.

beyond any record submitted by the agency. This can go as far as allowing discovery[30] but it can also be something less formal, such as the judge ordering periodic status reports or the agency submitting declarations from officials on a formally voluntary basis.

But while first-instance fact gathering and even discovery can occur in compliance litigation, fact gathering against the federal government nonetheless remains a comparatively exceptional and unfamiliar enterprise for federal judges.[31] That may well color judges' sense of how aggressive they ought to be in doing it. And even if a federal agency is subjected to discovery, there are formal limits on it that the federal government uniquely enjoys, most notably the deliberative process privilege that protects communications among federal officials about how to make decisions—a privilege not enjoyed by state or local government litigants in federal court.[32] While judges evaluating compliance by federal agencies face a task similar to structural reform litigation against state or local entities, they do not have the same visibility into the institutions they are trying to influence.

II. HOW AGENCIES PRESENT FACTS TO EXCUSE THEIR NONCOMPLIANCE: AN EXAMPLE

With this context in mind, we can now consider the kinds of facts that an agency presents to a judge about its compliance efforts in the

30. Discovery in a challenge to inaction can be made without any prior showing about bad faith, *see, e.g.*, Vladeck, *supra* note 5, at 199 & n.24 (describing discovery in the 1981 challenge to OSHA's inaction in regulating ethylene oxide), although one can find cases in which discovery is allowed only after a showing of bad faith, *see, e.g.*, Tummino v. Von Eschenbach, 427 F. Supp. 2d 212, 230–32 (E.D.N.Y. 2006).

31. I should qualify this by acknowledging that litigation to redress unlawful official action under the Federal Tort Claims Act ("FTCA") or under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is not confined to an administrative record in the way judicial review under the Administrative Procedure Act ("APA") model normally is. But FTCA and *Bivens* suits serve a distinct function: they are largely confined to careless or rogue behavior by lower-level officials, as distinct from the more policy-laden judgments that are made by agencies as institutions. These policy-laden judgments are the province of APA-type review, which is the focus of this Essay. The distinct function of the FTCA is evident from its exception for "discretionary" functions. *See* 28 U.S.C. § 2680(a) (2012); PIERCE, *supra* note 13, § 19.4, at 1818–41. The distinct function of *Bivens* is evident from the Supreme Court's vehement refusal to allow it to be used to challenge agency policy formulation. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1859–61 (2017).

32. *See* 2 DAVID M. GREENWALD, ROBERT R. STAUFER & ERIN R. SCHRANTZ, TESTIMONIAL PRIVILEGES § 9:13, at 612–13 (2012 ed. 2012). On the increasing importance of this privilege, see Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 ST. LOUIS U. L.J. 349, 393–96 (2009).

hope of getting its noncompliance excused. For a sense of these kinds of facts, take an example from an environmentalists' suit under the Endangered Species Act ("ESA"). The Fish and Wildlife Service ("FWS") had listed five plant species as threatened or endangered but determined that it was "not prudent" to make the otherwise-required designations of critical habitat for those species.[33] Environmentalists challenged these determinations, and a district judge found them unlawful.[34] Questions then arose as to (1) how long the agency should have to reconsider the determinations and (2) in the event the agency found designations to be prudent (which was likely), how long it should have to actually make the designations.[35] For these tasks, the agency asked for sixteen and twelve months, respectively, while the plaintiffs asked for two and four.[36] The judge roughly split the difference with only brief discussion of agency capacities, granting the agency nine months to reconsider the determinations and eight months to make the designations, should it find them prudent.[37] After the agency departed from its earlier determinations and did indeed find it prudent to designate habitats, its eight months to make the designations began ticking down. With one week left on the clock, the agency rushed back to court, announced it would not meet the deadline, and asked for an extension of another eight months.[38] The agency said the delay was due mainly to its decision to acquiesce in the recent opinion of another circuit calling for more elaborate methods of economic analysis, plus some unexpected information arising from public comments on the proposed designations.[39] Plaintiff opposed the eight-month extension request but said it was okay to let the agency have another three months.[40] It moved for contempt, seeking a tighter injunction in the interim that would operate much like a series of

33. Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment and Voluntary Remand at 3–4, Cal. Native Plant Soc'y v. Berg, No. 3:00-cv-01207-L-LSP (S.D. Cal. May 1, 2001), ECF No. 27.

34. *Id.* at 4–5.

35. *See id.* at 6–8.

36. *Id.* at 6.

37. *Id.* at 6–8.

38. Memorandum in Support of Defendants' Motion to Partially Amend Order Pursuant to Fed. R. Civ. P. 60(b) at 2, *Berg*, No. 3:00-cv-01207-L-LSP, ECF No. 41.

39. Second Declaration of Gary Frazer at 2–5, *Berg*, No. 3:00-cv-01207-L-LSP, ECF No. 42.

40. Memorandum of Points and Authorities in Opposition to Defendants' Motion to Amend Judgment and in Support of Plaintiff's Motion for Contempt at 1, *Berg*, No. 3:00-cv-01207-L-LSP, ECF No. 44.

instantaneous critical-habitat designations.[41] In response, the agency said it could speed things up; it projected it could meet the three-month timeline, though it opposed a tighter injunction.[42]

In opposing the contempt motion and defending its lateness, the agency submitted a declaration from Gary Frazer, the FWS's Assistant Director for Endangered Species, explaining that the agency was going as fast as a court could reasonably ask.[43] The agency had not been ordered to submit this declaration, nor had any discovery been allowed. But it was in the agency's best interest to submit the document to ward off a contempt finding for missing the deadline. It is worth examining excerpts from this declaration as an example of how an agency presents itself as doing triage between competing legal mandates and balancing speed with decisional soundness:

> The Service has struggled in recent years to complete listing and critical habitat actions within statutorily prescribed time frames, consistent with the procedural requirements of the Endangered Species Act (ESA) and the Administrative Procedure Act (APA), while laboring under continued budget shortfalls. ... The Service's priorities for completing ESA Section 4 listing activities are now most often set by Court order....
>
> The Service recognizes that the deadline for the plants' designations has elapsed, and that the Service has requested an extension of the deadline .... Therefore, the Service has undertaken extraordinary efforts to expedite completion of the final designation for these plants....
>
> The [Carlsbad Fish and Wildlife Office ("CFWO")] was able to review, categorize, and analyze all of the public comment letters received during the second comment period [on the designations], draft responses to all 120 public comment letters received during both comment periods, and complete the rule [designating critical habitat] within three weeks. The CFWO completed this process nine to ten weeks earlier than originally estimated by reassigning a number of ongoing projects within the CFWO, and by recruiting help from senior staff within

41. *Id.*

42. Defendants' Opposition to Plaintiff's Motion for Contempt at 1, 10, *Berg*, No. 3:00-cv-01207-L-LSP, ECF No. 50.

43. Third Declaration of Gary Frazer ¶ 2, *Berg*, No. 3:00-cv-01207-L-LSP, ECF No. 50.

> CFWO, the Washington, DC office, and economic consultants to respond to public comments. This assistance cut into the supervisory duties of the senior staff biologist as well as the time he has had to devote to coordinating and writing several other rules with imminent court-ordered deadlines. This redirection of duties has resulted in internal delays for completing these other rules. Further, both primary staff and the senior staff were required to put in a significant number of overtime hours to complete this task. The Service did not arrive at the decision to reassign workloads easily, because the extraordinary time and effort devoted to this rule has compromised the Service's ability to meet other listing rules, and may result in the Service seeking additional time to complete other court-ordered deadlines. . . .
>
> Finally, to expedite the review process at Regional and National levels, the rule is being reviewed simultaneously at several levels [i.e., the field office, regional office, and DC office]. . . . The Service estimates that [simultaneous review] . . . trimmed approximately 2 ½ months off of the review process. It is normally not advisable nor practical to review rulemakings in this manner; the review process is made more cumbersome and difficult, it is more expensive, and by expediting the review process for the plants, internal review of several other rules were delayed.[44]

This declaration is granular enough to support a facially plausible claim that the FWS is moving as fast as it reasonably can, though it still asks the judge to accept many agency judgments on faith. The relevant tradeoffs are all identified in a qualitative way, but while elements of a few of the tradeoffs are quantified (e.g., "trimmed approximately 2 ½ months"), most are not (e.g., "*several* other rules," "*significant* number of overtime hours," "may result in the Service seeking *additional* time"). And, of course, none of the assertions and prudential judgments in the declaration were subject to adversary examination that might have forced the agency to flesh out its thinking; the judge had not allowed depositions or scheduled live-hearing testimony. This moderate level of bureaucratic self-disclosure was apparently enough to satisfy the judge.[45]

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44. *Id.* ¶¶ 2, 5, 8–9 (citations omitted).

45. The judge had scheduled hearings on the extension request and on contempt near the end of the three-month proposed extension period. He then held both motions moot when the FWS did, in fact, get the rule out within three months. *See* Order Denying As Moot Defendants' Motion to Partially Amend Order and Denying Plaintiff's Motion for

III. JUDGES' TOOLS FOR GAUGING WHAT THEY CAN REASONABLY DEMAND OF AGENCIES

Given this informational base (i.e., voluntary declarations and status reports, with a possibility of discovery), judges evaluating agency compliance have to decide what level of bureaucratic effort they think is required. In compliance proceedings, we see a good deal of dialogue and disputation over whether the agency is adhering to its promised rate of progress toward completion of the ordered task. But it is much less clear how or whether judges are deciding what rate of progress is reasonable to begin with.

For many tasks that courts order agencies to complete, progress can be easily measured, or, at least, the task can be defined in a way that allows measurement. At the outset, the court will order the agency to keep to some kind of schedule, which it often bases on a proposal from the agency. If the overall task is comprised of a large number of small acts that each require approximately the same effort (e.g., a class of claims to decide or a mass of pages to process under the Freedom of Information Act ("FOIA")), the court can issue an order, or simply set an expectation, that the agency will complete these acts at a certain rate, to be checked by periodic status reports. In this way, the court can tell if the agency is slowing down, in which case it may demand that the agency either get back on pace or explain itself.[46] Though this method can pose problems—for example, if the small individual acts are not actually uniform in the level of effort required[47]—it is often workable.

And even if the outputs of an administrative process are not easy to measure, the inputs may be.[48] If the agency has been devoting a

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Contempt at 5–6, *Berg*, No. 3:00-cv-01207-L-LSP, ECF No. 54. Were he upset about the disobedience, he easily could have scheduled an earlier contempt hearing.

46. This is what happened in a class action challenging the U.S. Department of Veterans Affairs' processing of Agent Orange disability benefit claims. Nehmer v. U.S. Dep't of Veterans Affairs, No. 3:86-cv-06160-TEH, 2007 WL 1795707, at *1–2 (N.D. Cal. June 19, 2007); Order Re CLL Claims Procedure at 1–2, *Nehmer*, No. 3:86-cv-06160-TEH, ECF No. 404. In FOIA litigation, page-per-time-period schedules are common. *See, e.g.*, Order at 3, Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., No. 1:12-cv-00333-GK (D.D.C. Oct. 16, 2012), ECF No. 25.

47. *See, e.g.*, January 2003 Status Report at 2, Loudner v. United States, No. 4:94-cv-04294-LLP (D.S.D. Jan. 2, 2003), ECF No. 245 (noting that, in the Bureau of Indian Affairs' processing of applications for distributions from the Mississippi Sioux Judgment Fund, the last set of applications were "single cases" that did "not allow the batch processing by family groups" like previous ones, slowing the pace).

48. *Performance Measurement Challenges and Strategies*, OFF. MGMT. & BUDGET (June 18, 2003), https://georgewbush-whitehouse.archives.gov/omb/performance/challenges_strategies.html [https://perma.cc/N28R-BD85]; *see also* JAMES Q. WILSON,

certain level of staffing or funding to compliance, the judge can monitor that and, if it diminishes, press the agency to restore it.[49] Relatedly, judges discussing an agency's appropriations may say that, if the agency's funding is increasing, its speed should as well.[50] While input-focused approaches to administration can be criticized for ignoring whether inputs produce bang for the buck, they are better than nothing.

Of course, an agency action subject to a court order may not break down naturally into a large number of relatively uniform small acts—for example, a complex rulemaking. But a rulemaking can be broken down into a series of unique steps, each with a mini-deadline attached, and the judge can monitor whether the agency is meeting each mini-deadline. A court may tell an agency to do a rulemaking and then, when compliance problems arise, impose a deadline for completion of the whole task, plus mini-deadlines along the way, along with more frequent progress reports.[51]

But really, all these judicial maneuvers beg further questions. A judge can tell if an agency is falling short of its promised or historical monthly rate of progress, but how does the judge know if that rate is reasonable to begin with? A judge who decides the agency should complete a rulemaking in *X* months can subdivide that time period into the various steps of rulemaking, but how does the judge know if *X* is a reasonable number of months in the first place? In my research I do not see judges interrogating these questions very aggressively. Rather, I see judges adopt a monthly claims-processing rate or a rulemaking time span based on the agency's historical practice,[52] or

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BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 154–71 (1989).

49. *See, e.g.*, Amended Order at 2, *Loudner*, No. 4:94-cv-04294-LLP, ECF No. 241 (criticizing the agency for having no plan to replace an employee working on the ordered task who is leaving).

50. *See, e.g.*, Defs. of Wildlife v. Norton, Civil Action No. 00–2996 (GK), 2004 WL 6243361, at *4 & n.5 (D.D.C. Jan. 15, 2004) (finding, conditional on the matter being remanded to the district court, that it is warranted to move from a nondeadline order to a deadline order for a rulemaking in part because the agency's appropriation for such activity has increased); Amended Order at 2, *Loudner*, No. 4:94-cv-04294-LLP, ECF No. 241 (warning agency managers they are "not far" from a contempt proceeding and criticizing them for not allocating the increased resources they enjoy to the ordered task).

51. *See, e.g.*, *Defs. of Wildlife*, 2004 WL 6243361, at *5; Order at 3, Ctr. for Biological Diversity v. Norton, No. 4:01-cv-00409-DCB (D. Ariz. Nov. 13, 2003), ECF No. 121.

52. This is what happened in the *Nehmer* litigation cited above. *See supra* note 46 and accompanying text. The historical baseline may take the form of a periodic rate of adjudications completed, as in *Nehmer*, Nehmer v. U.S. Dep't of Veterans Affairs, No. 3:86-cv-06160-TEH, 2007 WL 1795707, at *1 (N.D. Cal. June 19, 2007), or an amount of time per adjudication, as in *Minard Run Oil Co. v. U.S. Forest Service*, C.A. No. 09–125

the agency's own proposal,[53] or by splitting the difference between the agency's proposal and that of the challengers,[54] or by making comparisons to prior court orders involving the same general type of agency proceeding—with little attention to whether the prior proceedings are practically comparable to the one at bar, or whether the prior orders were optimal.[55]

In other words, judges often make no attempt to optimize; they satisfice.[56] They seek not the best answer but merely an acceptable one. Rather than directly analyze the agency's organizational capacities and competing priorities to pinpoint some reasonable level of performance, they pick a performance level in a more or less arbitrary manner, like those described above. If that arbitrarily chosen performance level does not seem obviously unreasonable, the judge adopts it and gets the agency to stick with it unless a plausible argument arises for not doing so.

This approach has its problems. For the judge to rely upon the agency's proposal may introduce pro-agency bias. For the judge to split the difference may risk an order that is likewise biased toward the agency, or, conversely, overly stringent on the agency, potentially with perverse results—not to mention that splitting the difference invites both parties to be strategic in their proposals. For the judge to rely upon a historical baseline is workable only if the ordered task is comparable to something the agency has done in the past. There may not be a comparable past action, or at least, not one the parties agree to be comparable.

One might argue that the satisficing approach, with all its problems, is inevitable given the limits of judicial competence and of

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Erie, 2012 WL 994641, at *6–7 (W.D. Pa. Mar. 23, 2012) (construing a prior order to require the Forest Service to process drilling proposals at a speed equal to a historical baseline but holding that the challengers had not yet shown the agency's current activity to be below that baseline).

53. *See, e.g.*, Pub. Citizen Health Research Grp. v. Brock, 823 F.2d 626, 629 (D.C. Cir. 1987).

54. *See, e.g.*, *supra* text accompanying notes 35–37.

55. In ordering FWS to designate a critical habitat for four species of fairy shrimp and eleven species of vernal pool plants, a court concluded that "the six-month extension proposed by plaintiff is more than reasonable" in part because "other district courts have imposed deadlines far less generous." Memorandum and Order at 16, Butte Envtl. Council v. White, No. 2:00-cv-00797-WBS-GGH (E.D. Cal. Sept. 25, 2002), ECF No. 73. To this point, the court cited other cases that imposed shorter deadlines but pertained to apparently unrelated species with no discussion of whether the time and effort necessary to designate critical habitat for those other species would be comparable. *Id.* at 16–17.

56. On the concept of satisficing, see HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 118–20 (4th ed. 1997).

the resources judges have to process information. It is often said that courts should be reticent to question agencies on the technical or scientific merits of an action, given that expertise on such matters is concentrated in the agency, not the court.[57] Information is probably *even more* concentrated in the agency when the topic is the agency's own internal organizational capabilities. Still, the agency does not have a total monopoly, and a judge can at least occasionally find alternative sources of information to serve as a basis for questioning the agency's assertions about what it can feasibly do.

One source consists of formal officials who have exited the "revolving door" from agency employment to extragovernmental advocacy. Consider a suit by environmentalists during the Reagan Administration to force the EPA to complete several rulemakings on emissions of nitrogen oxides. The EPA claimed it needed four years, submitting a declaration from the head of its Office of Air Quality Planning and Standards saying the time was necessary given the complexity of the task.[58] Plaintiffs submitted a declaration from David Hawkins, who, during the Carter Administration, had been Assistant Administrator for Air, Noise, and Radiation (i.e., the position directly above that held by the government's declarant).[59] Hawkins cited rulemakings from his own tenure that took far less than four years yet were, he said, of comparable complexity to the ones at issue.[60] The judge was persuaded, relying heavily on Hawkins's declaration in rejecting the EPA's four-year proposal in favor of two years.[61] Hawkins was not merely a credible witness on the science of air quality; he was a credible witness on the *EPA's organizational capacity to deal with various levels of complexity* within the science of air quality.[62] He was an expert not only in the EPA's subject matter but on the EPA as an institution. That said, I have not found other

57. *See, e.g.*, Del. Dep't of Nat. Res. & Envtl. Control v. EPA, 895 F.3d 90, 100–01 (D.C. Cir. 2018).

58. Sierra Club v. Thomas, 658 F. Supp. 165, 172 (N.D. Cal. 1987).

59. *Id.*

60. *Id.*

61. *Id.* at 172–75. The agency did complete the rulemaking in time. Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1770 (2011). The rule was then challenged on the grounds that it was insufficiently reasoned, held unlawful, and remanded without vacatur. *Id.* at 1770–71. The EPA then failed to fix the problems with the rule brought out by the second challenge for another fifteen years. *Id.* at 1771–72.

62. *See Sierra Club*, 658 F. Supp. at 172.

examples of onetime officials popping up to question their former agencies' assertions about what is doable.[63]

Further, the question of what an agency can do depends not only on hard-to-discern organizational capacities but also on the level of resistance it can expect from various stakeholders—a factor that may be even more obscure to judicial eyes. Consider a suit by environmentalists claiming that operators of equestrian campgrounds in the Shawnee National Forest were required to seek permits from, and submit to regulation by, the U.S. Forest Service ("USFS" or "Forest Service"). The court enjoined the USFS to complete review of pending permit applications within a certain time period.[64] But some operators were doubtful that the law required them to apply for permits and, depending on how the negotiation of permit terms worked out, might opt to continue to do business without permits, presumably inviting enforcement and litigation.[65] Faced with this delicate situation, the USFS took longer than expected to process the applications. When plaintiffs grew impatient and moved for contempt, the agency—while contending that it was compliant with the injunction rightly read[66]—admitted that "[t]he delay in permit issuance is regrettable"[67] and that "[t]he Forest Service has encountered unexpected hurdles in permit processing, and it has taken extra time to overcome them."[68] The USFS said it felt the need to proceed deliberately in a manner that would get stakeholders to accept regulation:

> The Forest Service has struggled to maintain a positive relationship with anxious equestrian campground operators who have never before been subject to this type of regulation .... Determining which campgrounds require a permit and under what terms required careful planning and forethought, given the potential for further litigation. Under these unusual circumstances, permit issuance was more than a ministerial act.[69]

63. That such declarations, if offered, would often be from former political appointees of a prior administration of the political party opposing the one in power might diminish their credibility.

64. Order and Injunction at 2, Glisson v. U.S. Forest Serv., No. 4:99-cv-04189-JPG (S.D. Ill. Apr. 16, 2003), ECF No. 63.

65. *See* Federal Defendants' Response to Plaintiff-Intervenor Wallace's Motion for Contempt and Sanctions at 8–14, *Glisson*, No. 4:99-cv-04189-JPG, ECF No. 78.

66. *Id.* at 3–4, 3 n.3.

67. *Id.* at 16.

68. *Id.* at 14.

69. *Id.* at 12.

One might interpret the agency's approach as evidence that it was captured by the operators (as indeed the plaintiffs did),[70] but alternatively, one might view it as a sensible means for a resource-limited agency to induce regulated parties to engage in voluntary compliance with the permitting scheme and avoid the costs of adversary enforcement or litigation,[71] or even the cost of congressional retaliation.[72] Ultimately the judge denied the plaintiff's motion for contempt,[73] saying the officials faced a "difficult situation and had probably done as good a job as they could have done under the circumstances."[74] Admittedly, it is unusual for an agency to invoke stakeholder resistance so explicitly as the USFS did here, but such considerations must inform any realistic understanding of what an agency can practically do. And yet it is not clear how a court can second-guess an agency's assessment of a matter like this.

IV. THE IMPORTANCE OF MAINTAINING THE COURT'S TRUST IN THE AGENCY

We have seen that in compliance litigation the court is dependent on the government in a couple of ways. First, judges' usual means of obtaining information about the agency's progress and capabilities consist of declarations or status reports from agency officials without adversary testing built-in as it would be in a deposition or live testimony. Second, judges' sometimes-crude methods of gauging what the agency can do often depend on the agency's own proposal, either

70. *Id.* at 13–14 (noting plaintiff's allegation that campgrounds "have unduly influenced the Forest Service").

71. *See id.* at 11 ("The Forest Service has sought to maintain an amicable business relationship with the applicants and in good faith has recently met with them on a monthly basis to hear their concerns. The Forest Service is hopeful that most, if not all, applicants will quickly sign their permits. However, since some equestrian campgrounds do not believe that their operation requires a special use permit, the Forest Service is also determined to respond to equestrian campground outfitters who may ultimately refuse to sign a permit." (citations omitted)); *id.* at 13 ("The Forest Service has patiently dealt with the hesitant equestrian campground operators to alleviate their concerns and is ready to respond if permits are not signed.").

72. The agency suggested this obliquely by mentioning communications from Representative John Shimkus regarding "the permits that were sent to the campgrounds." *Id.* at 11 n.13. Representative Shimkus's district includes much of Shawnee National Forest. *See Our District*, CONGRESSMAN JOHN SHIMKUS, https://shimkus.house.gov/about/our-district [https://perma.cc/Y2FK-JY82].

73. Minutes of Court at 1, *Glisson*, No. 4:99-cv-04189-JPG, ECF No. 86.

74. Federal Defendants' Response to Plaintiff-Intervenors' Motion for Contempt and Sanctions at 4, *Glisson*, No. 4:99-cv-04189-JPG, ECF No. 131 (alterations in original) (internal citation omitted) (quoting judge's oral remarks from a prior hearing).

as the sole basis for a compliance schedule or as one half of a difference-splitting exercise.

Given these dependencies, judges consider it crucial that they be able to trust the agency, both to convey truthfully the organizational realities inside the bureaucracy and to make a good faith effort at compliance. This is especially true if the challengers have accused the agency of bad faith (i.e., political resistance to obeying the order). In that case, the agency's trustworthiness is the very crux of the litigation.

In light of this, judges react very badly if they suspect the agency is engaged in bad-faith noncompliance or is misleading them about compliance efforts. Conversely, agency lawyers are well advised to provide information in a manner that projects the agency's good faith: be candid about the agency's efforts to comply and its progress toward compliance, anticipate when those efforts may come up short and warn the court early, and be explicit about any noncompliance that does occur and provide a transparent description and explanation of it to head off any inference of bad faith or political recalcitrance.

A striking example of an agency not heeding this advice, resulting in a judicial eruption, is a lawsuit in the District of Montana by environmentalists against the USFS, claiming that the agency's use of chemical fire retardant violated the National Environmental Policy Act ("NEPA") and the ESA. District Judge Donald Molloy held that NEPA and the ESA were both applicable to the USFS's general policies regarding the use of fire retardant, and he enjoined the agency to comply with both statutes accordingly, including an obligation to engage in formal consultation regarding endangered species with the FWS.[75] The USFS asked for thirty months to comply, but Judge Molloy said eighteen was enough.[76] In doing so, he candidly recognized the inexactness of any given time frame and admitted the eighteen-month schedule might have to be adjusted; he just wanted the agency to keep the parties informed and allow reasonable time for renegotiation.[77] Addressing agency counsel, he said:

> I don't think . . . 30 months is a reasonable time. . . . I'm going to require that there be NEPA compliance within 18 months of

75. Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 397 F. Supp. 2d 1241, 1257 (D. Mont. 2005).

76. Docket Entry 100, *Forest Serv. Emps. for Envtl. Ethics*, No. 9:03-cv-00165-OWM ("USFS requests 30 months; Court will require NEPA compliance within 18 months of today's date.").

77. *See* Order at 2, *Forest Serv. Emps. for Envtl. Ethics*, No. 9:03-cv-00165-OWM, ECF No. 130.

> today's date. Now, I'll do that with the caveat that so long as there is some warning ahead of time, if, at a year [from now] or whatever is the appropriate time, you don't think you're going to be able to hit the target, you give notice to the plaintiffs. My suggestion would be that before you ask for more time, you discuss it with the plaintiffs and the interveners. And if there's a way that can be resolved without the Court involving itself, then I am happy to accept whatever you agree on. But I think you can get it done in 18 months. And if you are going to come in with a controversy, I hope it's not at 17 months and 29 days.[78]

As it turned out, the agency did find itself unable to meet the deadline and did ask for more time—exactly seventeen months and twenty-nine days later.[79] Because the failure to meet the deadline was announced suddenly and inadequately explained, Judge Molloy suspected political recalcitrance.[80] He granted a two-month extension, but he also scheduled a contempt hearing in the event that the agency was, in the judge's words, "prevented from following the law by its political masters" and thus missed the extended deadline.[81] "[I]t seems as if the government is playing a not too funny game, betting that the Court will be forced to grant the additional time and hoping the irony of the timing will be overlooked," he wrote.[82] Having been granted the extension, the agency then got itself in further trouble by missing the extended deadline.[83] The day after missing that deadline, it issued a hasty finding that no Environmental Impact Statement was required under NEPA.[84] The finding included an unusual disclaimer that the USFS's still-incomplete consultations with the FWS might alter the finding in the future.[85] Judge Molloy then scheduled a

78. *Id.* (internal citation omitted) (quoting judge's oral remarks from a prior hearing).

79. *Id.*

80. *See id.* at 3.

81. *Id.*

82. *Id.* at 2.

83. *See* FSEEE's Reply Brief in Support of Its Motion for Contempt at 1, *Forest Serv. Emps. for Envtl. Ethics*, No. 9:03-cv-00165-OWM, ECF No. 139 (noting "the Forest Service . . . failed to complete either an environmental impact statement or a finding of no significant impact (FONSI) by the Court's deadline, in violation of NEPA's required form").

84. Defendant's Opposition to Motion for Contempt at 5–6, *Forest Serv. Emps. for Envtl. Ethics*, No. 9:03-cv-00165-OWM, ECF No. 137; *see also* FSEEE's Reply Brief in Support of Its Motion for Contempt at 2, *Forest Serv. Emps. for Envtl. Ethics*, No. 9:03-cv-00165-OWM, ECF No. 139 (describing the Forest Service's filing as "hastily-prepared" and "signed . . . a day after the Court's deadline for compliance").

85. Defendant's Opposition to Motion for Contempt at 5–6 & nn.2–3, *Forest Serv. Emps. for Envtl. Ethics*, No. 9:03-cv-00165-OWM, ECF No. 137. On the fact that such disclaimers are unusual in such a finding, see Transcript of Hearing on Motion for

contempt hearing, which he said would give the agency "the opportunity to dispel the Court's inclination to hold it in contempt of court."[86] As a shot across the bow, he told the agency to brief the question of whether its top official, Undersecretary of Agriculture Mark Rey, should be incarcerated for contempt.[87]

From this low point, the agency recovered. Eight days prior to the contempt hearing, the USFS issued a revised (and much longer) finding that no Environmental Impact Statement was required, having at last completed consultation with the FWS.[88] The revised finding adopted new precautions in the use of fire retardants that the FWS was now recommending.[89] At the contempt hearing itself, the USFS and the U.S. Department of Justice ("DOJ") took the extraordinary step of bringing Undersecretary Rey and five U.S. Department of Agriculture career officials to Missoula, Montana, to testify for two afternoons, explaining in extreme detail the internal bureaucratic bungling that led to the big delay. "We take the gravity of your last order to heart," the DOJ attorney told Judge Molloy, "and we're basically an open file today and throughout the remainder of these proceedings."[90] The USFS-FWS consultation, said the witnesses, had been so drawn out because of miscommunication and misunderstanding between the two agencies regarding the fire retardant program, which caused them to grossly underestimate how many species had to be evaluated.[91] In such an operation, the role of a

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Contempt at 59, *Forest Serv. Emps. for Envtl. Ethics*, No. 9:03-cv-00165-OWM (on file with the North Carolina Law Review). I had this transcript produced using a grant from Yale Law School's Oscar M. Ruebhausen Fund. The hearing was held February 26-27, 2008, and is noted in two docket entries, ECF Nos. 155 and 156.

86. Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 530 F. Supp. 2d 1126, 1135 (D. Mont. 2008).

87. *Id.* at 1136.

88. *See* Defendant's Notice of Completion of Consultation and Further Decision Notice and Finding of No Significant Impact at 1, *Forest Serv. Emps. for Envtl. Ethics*, No. 9:03-cv-00165-OWM, ECF No. 150 (describing the revision of the initial finding and filing the revised version with the court); ABIGAIL KIMBALL, U.S. FOREST SERV., DECISION NOTICE & FINDING OF NO SIGNIFICANT IMPACT: AERIAL APPLICATION OF FIRE RETARDANT 2 (2008), https://www.fs.fed.us/sites/default/files/ media_wysiwyg/wcfs_aerial_application_of_fire_retardant.pdf [https://perma.cc/M7AX-6BR4] (noting the differences between the initial and revised findings).

89. KIMBALL, *supra* note 88, at 2–3.

90. Transcript of Hearing on Motion for Contempt at 10, *Forest Serv. Emps. for Envtl. Ethics*, No. 9:03-cv-00165-OWM.

91. *See id.* at 52–53, 63, 84–86, 88, 94, 100 (recording testimony that describes the misunderstanding); *id.* at 19, 32, 37, 88 (recording testimony noting particularly the agencies' inaccurate initial understanding of the scope of the work). One witness admitted that the USFS inadvertently failed to give the FWS certain information it needed. *Id.* at 151–52.

high official like Rey was to ensure that officials who actually formulated findings and decisions had the resources they needed, and all officials testified that they received all the resources they requested and were never discouraged from complying with the law.[92]

The agency's ultimate compliance and its openness about its mistakes mollified Judge Molloy. He acknowledged that Undersecretary Rey was "not in charge of the day-to-day activities of what goes on."[93] Further, he seemed to concede that his initial attribution of politicized bad faith to the agency had been wrong, though he made the important point that the agency invited this attribution because of its initial failure to be forthcoming with information about compliance problems:

> THE COURT: I have been doing this [i.e., judging] for 12 years, and I know the difficulties that your agencies have. I do feel you may not think that, but I do understand that.
>
> And I think that if the rule of law is to abide by what we all want it to be, I have to follow the law, I have to rely on the lawyers to tell me, when I say, "look, I think that's too much time, but I understand there might be some problems. Just don't come in here at the last minute on the last day and tell me there's a problem. Give us a heads-up."
>
> And that didn't happen. And—
>
> THE WITNESS [UNDERSECRETARY REY]: And for that, we apologize.
>
> THE COURT: ... [W]ell, maybe you should talk to your lawyers and tell them that if you're having those kinds of difficulties, *information really helps. I mean, if we practice in the dark, then we maybe draw conclusions that are not warranted.* But I anticipated that there might be some of these problems. It was why I said [at the initial hearing on the compliance schedule]: "Look, if you're having problems, let me know about it."
>
> And I didn't get any word until, ironically, when I said, "don't come in here on ... the 17 months and 29 days," and that's exactly when [the extension request] came in, was almost like,

92. *See id.* at 81, 120 (recording testimony indicating that the agency provided all the requested resources necessary for compliance); *id.* at 34, 62–63, 75, 94, 110, 121 (recording testimony by agency officials that they did not discourage compliance and by agency employees that they were not discouraged from complying).

93. *Id.* at 227.

you know, it was—one could read it to have been more than ironic.[94]

In other cases, too, we observe the importance of government lawyers disclosing information in a manner that projects agency good faith. In a major class action suit against the Interior Department for mismanaging Native American trust accounts, Judge Royce Lamberth had an extraordinary series of confrontations with the government, holding contempt trials of two successive Interior Secretaries in 1998 and 2002 and finding them both liable. The troubles began when the government failed to comply with certain discovery orders because of problems in the agency's information-management system, problems that, Judge Lamberth believed, the agency concealed from the court.[95] In a challenge to the Department of Veterans' Affairs' processing of claims related to Agent Orange, the government initially made itself vulnerable to similar trouble when it failed to explain a slowdown in the processing rate, leading the judge to suspect bad faith and issue a show-cause order.[96] The government then recovered by pinpointing the reason for the slowdown (a miscommunication between headquarters and a field office about how many employees the latter was to assign to processing), reporting it in detail to the court, and volunteering to be subjected to more fine-grained reporting requirements going forward about the rate of processing and the resources devoted thereto.[97] Again, transparency is the currency of good faith, as the Department of Veterans Affairs was able to avoid a contempt finding.[98]

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94. *Id.* at 37–38 (emphasis added). At the end of the hearing, Judge Molloy said he believed all the witnesses were sincere, but he criticized the agency, its personnel, and its lawyers for their level of competence and for not taking responsibility. *Id.* at 226, 229.

95. This is noted in the order and opinion at the end of the first contempt trial. Cobell v. Babbitt, 37 F. Supp. 2d 6, 13 (D.D.C. 1999). For the second contempt finding, see *Cobell v. Norton*, 226 F. Supp. 2d 1 (D.D.C. 2002), *rev'd*, 334 F.3d 1128 (D.C. Cir. 2003). The D.C. Circuit later removed Judge Lamberth from the case on the ground that he had become so biased against the government that he could no longer be impartial—a remarkable finding that normally occurs only if a judge engages in "improper outside communications," of which Lamberth never made any. Cobell v. Kempthorne, 455 F.3d 317, 331, 335 (D.C. Cir. 2006).

96. *See* Nehmer v. U.S. Dep't of Veterans Affairs, No. 3:86-cv-06160-TEH, 2007 WL 1795707, at *1–2 (N.D. Cal. June 19, 2007).

97. Defendants' Response to the Court's Order to Show Cause Why Defendants Should Not Be Held in Contempt at 10–12, *Nehmer*, No. 3:86-cv-06160-TEH, ECF No. 408.

98. *See* Order Vacating Hearing and Status Conference and Discharging the Order to Show Cause, *Nehmer*, No. 3:86-cv-06160-TEH, ECF No. 442. Another example of how agencies benefit from being transparent can be seen in a suit against the Department of Defense ("DOD") for unlawful inoculations of service members against anthrax. The case

V. INFORMATION GATHERING AS A QUASI SANCTION TO GET THE AGENCY'S ATTENTION

So far, we have focused on information as the basis for courts' decisions about what to order the agency to do. Once the court has decided the agency should do a certain thing, the official "stick" to incentivize the agency to do that thing is the threat of a contempt finding, with its attendant reputational damage. It is the contempt threat, often directed at the head of the agency, that grabs the attention of that official and, therefore, of the official's subordinates.

But information gathering itself can serve a purpose similar to that of contempt, operating unofficially as a quasi sanction—an unpleasant thing that grabs the attention of officials. For example, reporting requirements, if they become frequent and burdensome enough, can serve this purpose. In one instance, a court made an agency report to the plaintiff on its progress *every day* for an eight-month period.[99] Another example is the appointment of a special master, which, though rare against federal defendants,[100] can make officials' lives much more difficult, taking away their autonomy and privacy.

Perhaps the most striking example is a judicial attempt to allow a high agency official to be deposed or to force such an official to testify in court. Any high official is busy, and having to testify is disruptive because of the time necessary to attend the deposition or court proceeding, to travel (if it is a court proceeding outside Washington, D.C.), and, most importantly, to prepare—the official almost certainly knows nothing about the case except perhaps short briefings, so

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resulted in a worldwide injunction against the inoculations, which had been given at the rate of thousands per day. Defendant's Response to Order to Show Cause at 4–6, John Doe #1 v. Rumsfeld, No. 1:03-cv-00707-EGS (D.D.C. Feb. 28, 2005), ECF No. 69; *see also* Lee Black, *Informed Consent in the Military: The Anthrax Vaccination Case*, 9 VIRTUAL MENTOR 698, 700–01 (2007) (recounting the history of the vaccination program and the resulting case). Upon learning that some inoculations had occurred after the injunction had issued, the DOD rapidly disclosed this fact. Response to the Court's Minute Order at 1–3, *John Doe #1*, No. 1:03-cv-00707-EGS, ECF No. 65. When the court nonetheless issued an order to show cause, the DOD gave a detailed narrative (based on two declarations and several exhibits from the director of the Military Vaccine Agency) of how it had communicated the court's order to all parts of the military, how it was tracking any inoculations that still occurred, and what it was doing to stop them (plus plans to send letters of apology to all persons erroneously inoculated). Defendant's Response to Order to Show Cause at 4–22, *John Doe #1*, No. 1:03-cv-00707-EGS, ECF No. 69.

99. Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. U.S. Dep't of the Interior, 100 F.3d 837, 839, 841 (10th Cir. 1996) (noting the trial court's action).

100. *See, e.g.*, Trentadue v. CIA, No. 2:08–CV–0788, 2015 WL 1968263, at *5 (D. Utah Apr. 30, 2015) (appointing a special master to monitor agency noncompliance).

getting up to speed takes hours or days. And there is the risk of embarrassment and adverse consequences if the official, questioned by the challenger or judge, is caught saying something ignorant or makes some unwarranted concession. Given all this, the threat of being deposed or made to appear in court can be an effective attention-getting device. The effect may be to get the high official to do what is within his or her power to appease the judge into backing off, such as allocating more agency resources to the court-ordered task. At the same time, the threat has incentive effects on the lower-level officials and attorneys who have more direct involvement with compliance: they do not want to be the ones held responsible for subjecting the boss to inconvenience and embarrassment.

But while making high officials testify might be effective in getting the agency's attention, appellate courts have been extremely averse to the idea (just as they are averse to contempt sanctions). The prudential concern is obvious: such demands for testimony, if multiplied, could rapidly take up huge amounts of high officials' time, crippling agency management.[101] Further, appellate judges have a ready theory for why high officials need not testify. The conceit of demanding such testimony is that the court needs *information* from the target official, but high officials usually do not know much about compliance with any particular court order, so there is almost always some lower-level official who could give better information.[102] In recent decades, the federal courts of appeals have repeatedly granted writs of mandamus to stop district courts from allowing depositions of, or subpoenas to, high federal agency officials.[103] Indeed, my

101. *See, e.g.*, *In re* United States, 624 F.3d 1368, 1373–74 (11th Cir. 2010).

102. *See, e.g.*, *In re* Cheney, 544 F.3d 311, 314 (D.C. Cir. 2008) (finding that plaintiffs had "shown no need" to depose the Vice President's Chief of Staff when there was a lower-level official that could be deposed and that was "more logically suited to clearing up the lingering questions regarding" the information plaintiffs sought).

103. *In re* McCarthy, 636 F. App'x 142, 142 (4th Cir. 2015) (granting a writ of mandamus to block the deposition of the EPA Administrator); Order, *In re* United States, No. 14-5146, 2014 BL 398967 (D.C. Cir. July 24, 2014) (granting a writ of mandamus to block the deposition of the USDA Secretary); *In re* United States, 542 F. App'x. 944, 949 (Fed. Cir. 2013) (granting a writ of mandamus to block the deposition of the Federal Reserve Chair); *In re Cheney*, 544 F.3d at 314 (granting a writ of mandamus to block the deposition of Vice President Cheney's Chief of Staff while allowing depositions of lower-level staffers); *In re* United States, 197 F.3d 310, 316 (8th Cir. 1999) (granting a writ of mandamus to block subpoenas directing the Attorney General and Deputy Attorney General to testify); *In re* FDIC, 58 F.3d 1055, 1057, 1062–63 (5th Cir. 1995) (granting a writ of mandamus to block the deposition of three board members of the FDIC); *In re* United States, 985 F.2d 510, 511, 513 (11th Cir. 1993) (per curiam) (granting a writ of mandamus to block a subpoena directing the FDA Commissioner to testify for a half-hour by phone).

research turns up no court of appeals case that denies such a petition for mandamus.

A good illustration of how district judges may come near to making high officials testify only to be reversed upstairs is *Miccosukee Tribe of Indians of Florida v. United States*,[104] a challenge by a Florida Native American tribe and environmentalists to the EPA's failure to stop Florida from backing off its plan to protect the Everglades (particularly from phosphorus pollution by the sugar industry) under the Clean Water Act.[105] In the 1990s, Florida sought and obtained EPA approval for a delay of its Clean Water Act plans, promising to bring phosphorus in the Everglades down to its natural level by an extended deadline of 2006.[106] But between 2003 and 2005, the state, by legislation and state agency action, put off the date further to 2016.[107] The EPA concluded that Florida's action did not alter water quality standards and therefore did not require EPA review.[108] Plaintiffs sued both the state and the EPA. In 2008, District Judge Alan Gold granted summary judgment for the plaintiffs, holding that parts of Florida's action were unlawful and that it did require EPA review, consistent with his opinion.[109] The EPA then took no action for fifteen months.[110] On plaintiffs' motion, Judge Gold issued a show-cause order,[111] which prompted the EPA to quickly conduct a review and disapprove some aspects of Florida's action.[112] But Judge Gold found that the EPA's disapproval did not go far enough and that it contravened his prior ruling about what Florida needed to do.[113] Given the ongoing injury to the Everglades, as well as the EPA's delayed and inadequate response, Judge Gold imposed a new, more specific injunction on the EPA to review Florida's plans yet again with a five-month deadline.[114] He also ordered EPA Administrator Lisa Jackson to "*personally appear*" in his courtroom on a set date six months hence, "to report to the Court on compliance with this

104. 706 F. Supp. 2d 1296 (S.D. Fla. 2010).

105. *Miccosukee Tribe*, 2008 WL 2967654, at *1–2. For an excellent discussion of the background and origins of the case, see generally Dexter Filkins, *Swamped: Jeb Bush's Fight Over the Everglades*, NEW YORKER, Jan. 4, 2016, at 32.

106. *Miccosukee Tribe*, 2008 WL 2967654, at *11.

107. *Id.* at *14–16.

108. *Id.* at *1.

109. *Id.* at *42–43.

110. *See* Miccosukee Tribe of Indians of Fla. v. United States, 706 F. Supp. 2d 1296, 1305 (S.D. Fla. 2010).

111. Order to Show Cause, *Miccosukee Tribe*, No. 1:04-cv-21448-WJZ, ECF No. 358.

112. *Miccosukee Tribe*, 706 F. Supp. 2d at 1305–06.

113. *Id.* at 1305.

114. *Id.* at 1323–25.

Order."[115] The EPA did meet the five-month deadline, and then moved to have the Assistant Administrator for the Office of Water, Peter Silva, who was one rung below Jackson, appear at the upcoming compliance hearing instead of Jackson.[116]

Judge Gold refused, insisting he had "a right to pose direct questions" to Jackson "regarding whether the [water protection] strategies outlined" in the EPA's recent review of Florida's plans "are a sincere commitment or merely an empty shell,"[117] especially given the major increases in funding that would be necessary to fulfill those plans,[118] presumably from both state and federal coffers. It seems Judge Gold was not interested in technical or scientific information about water quality but in questions about the political willingness of the EPA to allocate and lobby for billions of dollars in funding—a sufficiently high-level question about which the Administrator arguably *was* an appropriate person to testify. Clearly, though, the order to testify was not purely informational in purpose: it was an effort, after years of agency resistance, to force the Everglades into a higher place on EPA management's agenda and perhaps to put the Administrator in a box where she had to make some public commitment to the Everglades' preservation.

The government then sought a writ of mandamus from the Eleventh Circuit, which stayed Jackson's appearance and then within weeks issued an opinion granting the writ.[119] Judge William Pryor, writing for a two-to-one majority, framed the question strictly in terms of technical informational needs.[120] The question was whether the EPA's review of Florida's Clean Water Act compliance plan was lawful, and Assistant Administrator Silva—not Administrator Jackson—was the person officially responsible for the review's preparation.[121] This made Silva "the most knowledgeable official"

115. *Id.* at 1324.

116. Docket Entry 460, *Miccosukee Tribe*, No. 1:04-cv-21448-WJZ.

117. *Miccosukee Tribe*, 2010 WL 3860712, at *4, *mandamus granted sub nom. In re* United States, 624 F.3d 1368 (11th Cir. 2010).

118. *See id.* (noting that the "protection of the Everglades is of considerable national importance," finding that the case presented "extraordinary circumstances" necessitating the "Administrator's attendance at the hearing," and citing to a previous order describing the financial implications of compliance); *see also* Sua Sponte Order of the Court at 2, *Miccosukee Tribe*, No. 1:04-cv-21448-WJZ, ECF No. 470 (projecting compliance costs in the billions of dollars and describing the EPA's need for a "meaningful financing plan").

119. *In re* United States, 624 F.3d 1368, 1372, 1377 (11th Cir. 2010).

120. *See id.* at 1373.

121. *Id.*

about the agency action at issue and negated any need for Jackson to testify instead.[122]

In dissent, Judge Beverly Martin, a former district judge, argued that the case met the high standard for calling a high official to testify because of "the extensive disobedience displayed by the EPA."[123] In her view, the district court's maneuver should be evaluated not in light of its need for scientific or technical information but in light of its need for compliance after a long period of resistance.[124] The forced appearance was less a matter of information gathering than enforcement: "[f]aced with such recalcitrance, the [district] court properly relied upon the long recognized inherent authority of district courts to enforce their mandates."[125]

Martin's view, conceiving of the forced appearance more as an enforcement weapon than an informational device, was rejected by the majority. The EPA's "alleged noncompliance" was simply irrelevant to the permissibility of calling the Administrator to testify: "[o]ur decision is not about that issue," the majority wrote.[126] If the district judge meant to force the Everglades into a higher place on the EPA's agenda, that was wrong. It was improper for a judge to seek "to determine the priorities for a high-level executive official," an act that "clearly encroached on the discretion vested in the executive branch."[127] "[I]t cannot be said that the Everglades is the only matter of national importance demanding the Administrator's attention."[128]

Appellate courts' willingness to shield high officials from a demand to testify—exemplified by cases like *Miccosukee Tribe*—may suggest that this is not an effective weapon. But the truth is more nuanced. For one thing, the EPA did offer up Assistant Administrator Peter Silva to testify in *Miccosukee Tribe*.[129] Silva was still quite a high-ranking official—Senate confirmed, with a vast jurisdiction.[130] The appellate opinions blocking high-official testimony generally pertain to agency heads,[131] and it is not clear how frequently

122. *Id.*
123. *Id.* at 1380 (Martin, J., dissenting).
124. *Id.* at 1379.
125. *Id.*
126. *Id.* at 1376 (majority opinion).
127. *Id.* at 1375.
128. *Id.*
129. *Id.* at 1371.
130. *Id.* Silva did participate in the compliance hearing when it eventually happened—the day after breaking his wrist!—though, by then, Judge Gold had converted it to a conference call, and Silva said little. Oral Argument at 81–84, Miccosukee Tribe of Indians of Fla. v. United States, No. 1:04-cv-21448-WJZ (S.D. Fla. Dec. 17, 2010), ECF No. 545.
131. *See supra* notes 102–03 and accompanying text.

officials below that rank but still with substantial agenda-setting power are subject to these demands.[132]

Agency heads themselves do not always escape demands to testify. Though the DOJ seems to be universally successful when it seeks mandamus on this issue, it is also famously restrained in going to the courts of appeals, and there are some striking cases in which it did not try to get a court of appeals to block high-official testimony. One was the contempt trial of Interior Secretary Gale Norton in the Native American trust account litigation in 2002, in which Norton took the stand for three-and-a-half hours, repeatedly answering "I don't know" to questions from the plaintiffs' attorney about the trust accounts.[133] Another was the litigation on USFS use of fire retardants discussed above, in which Agriculture Undersecretary Rey traveled to Missoula, Montana, for two days to testify before Judge Molloy, saying "[w]e're sorry" for the mistakes that led to his agency's delay and "we dropped the ball."[134] Besides Rey, testifying must also have been burdensome and anxiety provoking for the five career officials who had to speak at length about their agency's mistakes and miscommunications at their boss's contempt hearing. Indeed, one faced a dressing down from Judge Molloy for the agency's "systemic disregard of the rule of law,"[135] and another was forced to say he could not recall why he failed to keep agency counsel and the court informed about the delay.[136]

It is interesting to speculate on why DOJ opted against seeking mandamus in these cases. Within any given case, the government must pick its battles, especially with an angry district judge. Regarding the Native American trust account litigation, the *Wall Street Journal* had written, "Justice Department lawyers defending"

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132. *Cf.* Order at 1–2, Razeq v. Gonzalez, No. 3:07-cv-02652-JZ (N.D. Ohio Apr. 10, 2008), ECF. No. 28 (threatening to make Karyn Zarlenga, acting director of the U.S. Citizenship and Immigration Services Cleveland Field Office, show up at a show-cause hearing if action was not taken before date certain); Order at 6, Leybinsky v. Immigration & Naturalization Serv., No. 4:00-cv-01314-MM (M.D. Pa. June 12, 2001), ECF No. 61 (ordering an Immigration and Naturalization Service ("INS") district director and INS supervisory detention and deportation officer to "appear in person" at a show-cause hearing).

133. Neely Tucker, *Norton Admits Some Indian Trust Records "No Longer Exist,"* WASH. POST (Feb. 14, 2002), https://www.washingtonpost.com/archive/politics/2002/02/14/norton-admits-some-indian-trust-records-no-longer-exist//f10d5af4-3db2-4833-bc47-630b069b8005 [http://perma.cc/3M4Q-4NCY].

134. Transcript of Hearing on Motion for Contempt at 38, Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., No. 9:03-cv-00165 (D. Mont. Feb. 26–27, 2008) (on file with the North Carolina Law Review).

135. *See id.* at 129–31.

136. *Id.* at 200–05.

the Interior Department "have been treading gingerly," as Judge Lamberth "has become the legal equivalent of volcanic Mount Pinatubo."[137]

Consistent with the idea that threats to force high-ranking officials to show up are credible, at least sometimes, judges view such threats as having incentive effects on official behavior in some instances. When a district court preliminarily enjoined some of the Obama Administration's antideportation initiatives in 2015, the Department of Homeland Security ("DHS") subsequently issued deferred action status to a few thousand applicants in violation of the injunction.[138] When the judge learned of this, he ordered the named-defendant high officials (including the DHS Secretary) to attend a show-cause hearing in person, six weeks hence.[139] Before the scheduled date of the hearing, the government submitted a brief detailing its painstaking efforts to redress the noncompliance, some of which had been undertaken after the court's announcement that the officials would have to show up in court in person.[140] After receiving this brief, the judge backed off his order that the high-ranking officials show up,[141] but he later said the government "did not implement effective corrective measures until this Court ordered [the agency and its officials] to *actually appear in Court to explain* their inaction."[142]

137. John J. Fialka, *Babbitt and Rubin Face Fiery Judge on Native American Trust-Fund Case*, WALL ST. J. (Jan. 28, 1999), https://www.wsj.com/articles/SB917484374874372500 [http://perma.cc/QU2B-7XBJ]. By the time Norton testified in February 2002, Judge Lamberth had shown the ability to disrupt Interior Department operations in a variety of ways, including cutting off parts of the agency from the internet. Shane Harris, *Court-Ordered Blackout Leaves Interior Employees Without Internet, E-mail*, GOV'T EXECUTIVE (Dec. 14, 2001), https://www.govexec.com/technology/2001/12/court-ordered-blackout-leaves-interior-employees-without-internet-e-mail/10678 [http://perma.cc/UX9N-7AF3] ("Lamberth's order . . . has left most Interior employees unable to use the Internet or send and receive e-mail to addresses outside the agency.").

138. Order at 1–2, Texas v. United States, No. 1:14-cv-00254 (S.D. Tex. July 7, 2015), ECF No. 281.

139. *Id.*

140. *See* Defendants' Expedited, Unopposed Motion to Cancel August 19 Hearing or, in the Alternative, to Excuse Secretary Johnson and Other Defendants and to Substitute Witnesses, and Memorandum in Support at 5–21, *Texas*, No. 1:14-cv-00254, ECF No. 287. The "unprecedented residential site visit program" was "initiated" on July 16, *id.* at 14, which was several days after the court's July 7 announcement of the August 19 show-cause hearing, *id.* at 1.

141. Order at 1, *Texas*, No. 1:14-cv-00254, ECF No. 289.

142. *Texas*, 2016 WL 3211803, at *12 n.13 (emphasis added).

CONCLUSION

My aims in this Essay have been to identify compliance litigation as an important factor determining the efficacy of judicial review of agency action generally, to show that the judge's access to information is the defining problem for such litigation, and to explore how judges and litigants grapple with that problem. There is a great deal more fruitful work that scholars can do on this subject, particularly on the last of these three points. The research will need to draw upon sources besides the published appellate cases that are the traditional focus of legal scholarship. A great deal could be learned from unpublished orders and filings gathered purposely to analyze this topic (whereas the sources for this Essay, as noted earlier, were gathered for a related but distinct topic, i.e., contempt, and shed light on compliance negotiations incidentally). And yet more can be learned from interviews with veterans of this kind of litigation in order to understand aspects of the negotiations that leave no trace in the official court record.