# Essay

# Way Off *TRAC*: Judicial Approaches to Claims of Unreasonable Delay for Visa Applications in Administrative Processing

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## Abstract

*Visa applicants who bring claims of unreasonable delay after having their applications placed in administrative processing face varied and disparate approaches within judicial districts and between circuits. Three approaches have developed: Some courts have declined to review on the grounds of consular nonreviewability, some have ruled that consular officers have no duty to further review an application placed in administrative processing, and others have reviewed these cases under the general standard set forth for reviewing claims of unreasonable delay against agencies.*

*This Essay makes three main arguments. First, it argues that consular nonreviewability does not apply to visa applications placed in administrative processing because such placement does not constitute a final decision. Second, this Essay explains that consular officers have a nondiscretionary duty to adjudicate a visa to a final decision after it has been placed in administrative processing. Finally, this Essay argues that the factors used to evaluate claims of unreasonable delay for visa applications that have been placed in administrative processing have shifted far from their original meaning and intent—and now weigh too heavily in the government's favor. This Essay proposes that the factors be interpreted according to their original meaning and intent, which did not favor the government so heavily.*

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## Introduction

Iranian graduate students, an Iranian couple, and a Nigerian family all filed suits in the U.S. District Court for the District of Columbia alleging that their visa applications had been unreasonably delayed.[1] In each case, the plaintiffs sought judicial action to compel the consular officers to adjudicate their visa applications.[2] Three different district court judges dismissed their lawsuits with distinct and separate justifications.[3] These are not outlier cases.[4] Competing legal theories and case interpretations have muddied the waters and left courts with a vexing

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1 *See* Yaghoubnezhad v. Stufft, 734 F. Supp. 3d 87, 93 (D.D.C. 2024); Giza v. Blinken, No. 23-cv-1641, 2024 WL 3967284, at *1 (D.D.C. Aug. 27, 2024); Hemmat v. Blinken, No. 23-2085, 2024 WL 4210658, at *1, *4 (D.D.C. Sep. 17, 2024) (citing Karimova v. Abate, No. 23-5178, 2024 WL 3517852 (D.C. Cir. July 24, 2024)).

2 *See, e.g.*, *Yaghoubnezhad*, 734 F. Supp. 3d at 93.

3 *See id.* at 104; *Giza*, 2024 WL 3967284, at *5; *Hemmat*, 2024 WL 4210658, at *2.

4 *See, e.g.*, Khan v. U.S. Dep't of State, 722 F. Supp. 3d 92, 97 (D. Conn. 2024) (dismissing on the same grounds as *Yaghoubnezhad*, 734 F. Supp. 3d 87); Emad v. U.S. Dep't of State, No. 23-1789, 2024 WL 3509485, at *1 (D.D.C. July 23, 2024) (dismissing on the same grounds as *Giza*, 2024 WL 3967284); Gonzalez v. Garland, No. 23-24695-civ, 2024 WL 4894389, at *8 (S.D. Fla. Oct. 21, 2024) (recommending dismissal on the same grounds as *Hemmat*, 2024 WL 4210658).

problem: What to do about the various approaches to claims of unreasonable delay when a visa application has been placed in administrative processing?

The United States's labyrinthine immigration system is notoriously difficult to navigate.[5] With numerous routes to citizenship and permanent residency, and a myriad of factors that render visa applicants inadmissible,[6] the U.S. "immigration system is a complex network of visas, humanitarian relief," and "pathways to . . . temporary status for people facing specific crises in their home country."[7] And even for those who manage to navigate the U.S. immigration system, another problem awaits: a backlog of visa applications.[8] This backlog causes major delays, which can have massive personal and financial implications. "Would-be migrants . . . may remain separated from U.S.-based family members, lose out on job offers, or miss chances to enroll in educational institutions."[9] The lack of a cohesive approach to claims of unreasonable delay has only added to the confusion that a visa applicant faces.

This Essay focuses on the three current approaches to claims of unreasonable delay when a visa application has been placed in administrative processing. Courts, even within the same district, have dismissed cases on the grounds that either (1) consular nonreviewability bars review,[10] (2) there is no nondiscretionary duty of consular officers to further adjudicate the visa application,[11] or (3) the District of Columbia Circuit's factors from *Telecommunications Research & Action Center v. Federal Communications Commission* ("*TRAC*")[12] mean that courts must evaluate claims of unreasonable delay under the Mandamus Act[13] and the Administrative Procedure Act ("APA").[14]

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5 *See* Russell Contreras, *Axios Explains: Why It's So Hard to Come to the U.S. Legally*, Axios (Apr. 6, 2023), https://www.axios.com/2023/04/06/legal-us-immigration-process-explained [https://perma.cc/LB8D-57R8].

6 *See How the United States Immigration System Works*, Am. Immigr. Council (June 23, 2024), https://www.americanimmigrationcouncil.org/fact-sheet/how-united-states-immigration-system-works-fact-sheet/ [https://perma.cc/FC7X-R5U3]; 8 U.S.C. § 1182.

7 Am. Immigr. Council, *supra* note 6.

8 *See, e.g.*, Ryan J. Fennell, *Stuck on the Backburner: An Analysis of USCIS's Backlog of Immigration Applications and Potential Reforms*, 37 Geo. Immigr. L.J. 87, 88 (2022).

9 Muzaffar Chishti & Julia Gelatt, *Mounting Backlogs Undermine U.S. Immigration System and Impede Biden Policy Changes*, Migration Pol'y Inst. (Feb. 23, 2022), https://www.migrationpolicy.org/article/us-immigration-backlogs-mounting-undermine-biden [https://perma.cc/89GL-TMJ8].

10 Yaghoubnezhad v. Stufft, 734 F. Supp. 3d 87, 104 (D.D.C. 2024).

11 Hemmat v. Blinken, No. 23-2085, 2024 WL 4210658, at *4 (D.D.C. Sep. 17, 2024).

12 750 F.2d 70 (D.C. Cir. 1984).

13 28 U.S.C. § 1361.

14 5 U.S.C. §§ 551–559, 701–706; Giza v. Blinken, No. 23-cv-1641, 2024 WL 3967284, at *5 (D.D.C. Aug. 27, 2024).

Each of these approaches gives rise to significant legal issues. Consular nonreviewability extends only to final decisions, not to a lack of a final decision.[15] The no-nondiscretionary-duty approach relies on the erroneous determination that placing a visa application in administrative processing is a final decision.[16] Finally, although the *TRAC* factors were originally well-suited to adjudicate claims of unreasonable delay concerning visa processing, these factors have now been misinterpreted to weigh heavily in the government's favor—contrary to their original meaning and intent.[17]

This Essay evaluates the soundness of the current approaches to claims of unreasonable delay for visa applications placed in administrative processing. Ultimately, this Essay concludes that courts should not follow either the consular nonreviewability approach or the no-nondiscretionary-duty approach, and that *TRAC* is the right test—but courts are applying it incorrectly. Consular nonreviewability should not apply to these cases because placing a visa application in administrative processing is not a final decision. Further, consular officers have a duty to adjudicate a visa application placed in administrative processing to a final decision within a reasonable time frame. Finally, although the *TRAC* factors are the proper way to review these claims, judges should interpret two of the most important *TRAC* factors according to their original meaning and intent. Doing so will mean that plaintiffs must prevail if a delay is not governed by a rule of reason and that, absent strong evidence, ordering the State Department to process a visa application generally does not seriously disrupt competing agency priorities.

## I. Background

### *A. Basics of Consular Nonreviewability*

Under consular nonreviewability, federal courts cannot review a consular officer's denial of a visa.[18] Consular nonreviewability is a judge-made doctrine that the Supreme Court has justified by stating that a nation's ability to admit or exclude foreigners is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers," and that this power is exclusively the province of "the political branches of government."[19]

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15 *See* P.K. v. Tillerson, 302 F. Supp. 3d 1, 11 (D.D.C. 2017) ("[T]he doctrine of consular non-reviewability does not apply where the government has not made a final visa decision.").

16 *See infra* Section II.C.

17 *See infra* Section II.D.

18 *See* Dep't of State v. Muñoz, 602 U.S. 899, 908 (2024).

19 Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (quoting Brief for Appellants at 20, *Kleindienst*, 408 U.S. 753 (No. 71-16)).

Only a few exceedingly narrow exceptions to consular nonreviewability exist.[20] Cases alleging an unreasonable delay by the State Department do not fall under an established exception, but courts have reviewed these claims on the grounds that consular nonreviewability only applies to "a consular official's *decision* to issue or withhold a visa."[21] Plaintiffs in unreasonable delay cases claim that they are challenging the *lack* of a decision by the State Department, and thus their claims may be reviewable.

Consular nonreviewability is based on the plenary power doctrine and Congress's ability to delegate some of its powers to the executive branch.[22] The plenary power doctrine refers to the courts' grant of "nearly unlimited" power to Congress over immigration.[23] Congress's authority to delegate some of its powers to the executive branch is well established.[24] In delegating the power to admit or deny visa applicants, Congress also transfers its plenary power to the consular officer—an executive branch official—which grants the officer "broad discretion" that is "generally not reviewable by any court."[25] Although Congress could pass a statute "expressly authorizing judicial review of consular officers' actions,"[26] Congress has expressed effectively zero interest in such an action.[27] In fact, Congress's general tenor has been in favor of strengthening and expanding consular nonreviewability.[28]

### *B. Statutory Background*

In the United States, the issuance of visas is governed in part by section 221 of the Immigration and Nationality Act ("INA"),[29] codified at 8 U.S.C. § 1201. The INA authorizes consular officers to issue both immigrant and nonimmigrant visas so long as the applicants have met

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20 "[A] narrow exception to this bar exists 'when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.'" *Muñoz*, 602 U.S. at 908 (quoting Trump v. Hawaii, 585 U.S. 667, 703 (2018)).

21 Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (emphasis added).

22 *See* Desirée C. Schmitt, *The Doctrine of Consular Nonreviewability in the Travel Ban Cases:* Kerry v. Din *Revisited*, 33 Geo. Immigr. L.J. 55, 58–59 (2018).

23 Brian G. Slocum, *Canons, The Plenary Power Doctrine, and Immigration Law*, 34 Fla. State U. L. Rev. 363, 365 (2007).

24 *See* Schmitt, *supra* note 22, at 59 (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928)).

25 *Id.*

26 *Saavedra Bruno*, 197 F.3d at 1159.

27 *Id.*; *see* Schmitt, *supra* note 22, at 60.

28 *See, e.g.*, H.R. 3767, 106th Cong. § 203(b) (2000); 153 Cong. Rec. S2854 (daily ed. Mar. 8, 2007) (statement of Sen. John Cornyn); H.R. Rep. No. 109-345, pt. 1, at 76–77 (2005) (noting that a proposed provision "would . . . undermine the consular nonreviewability doctrine, and allow courts to second-guess all visa denial decisions").

29 Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

the requirements for their specific visa and have properly applied.[30] The INA also prohibits consular officers from issuing visas for a variety of reasons.[31] For example, visas must be denied if it appears to the consular officer that the applicant is an "inadmissible alien[]" or if the consular officer knows or has reason to believe that the applicant is considered an "inadmissible alien[]" under 8 U.S.C. § 1182.[32]

If a consular officer determines that an applicant is ineligible under 8 U.S.C. § 1201(g),[33] their "visa application will be denied (refused), and [the applicant] will be provided a reason for the denial."[34] The State Department refers to the reasons for denials as "ineligibilities" and states that the visa applicant can overcome "[s]ome ineligibilities."[35] The State Department highlights that one reason for a refusal under section 221 of the INA is that the visa applicant "[d]id not fully complete the visa application and/or provide all required supporting documentation."[36] If a consular officer cannot conclude whether a visa applicant is eligible for the requested visa, however, the consular officer will place the visa application in administrative processing.[37] In these cases, "a consular officer may determine that additional information from sources other than the applicant may help establish an applicant's eligibility for a visa."[38]

The State Department's Foreign Affairs Manual provides detailed instructions regarding how a visa applicant can overcome a denial for insufficient information.[39] The section on administrative processing, however, merely instructs that a visa application placed in administrative processing "may be overcome once [the consular officer] can determine administrative processing is completed."[40] The consular officer must also receive any required responses or other information.[41] Once the officer receives the additional information, the Foreign Affairs Manual instructs that the consular officer "should find that an . . . applicant has overcome a refusal . . . when additional evidence is presented, or

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30 8 U.S.C. § 1201(a).

31 *See id.* § 1182.

32 *Id.*

33 *Id.* § 1201(g).

34 *Visa Denials*, Bureau of Consular Affs., https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visa-denials.html [https://perma.cc/LUG8-SEM4] (last visited July 10, 2026).

35 *Id.*

36 *Id.*

37 *Id.*

38 *Administrative Processing Information*, U.S. Dep't of State, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/administrative-processing-information.html [https://perma.cc/LET4-H46P] (last visited July 10, 2026).

39 *See* U.S. Dep't of State, 9 Foreign Affairs Manual § 306.2-2(A)(a)(1) (2024).

40 *Id.* § 306.2-2(A)(a)(2).

41 *Id.*

administrative processing is completed."[42] Long waits for processing are often associated with these brief instructions.[43] These delays cause visa applicants to bring the claims of unreasonable delay that have sparked such divergent approaches in the courts.

### *C. Judicial Approaches to Claims of Unreasonable Delay*

In deciding claims of unreasonable delay in the adjudication of a visa application placed in administrative processing, judges have taken divergent approaches.[44] Three separate approaches have emerged: a denial of review due to consular nonreviewability,[45] a denial of review due to a lack of a nondiscretionary duty of the consular officer to act,[46] and review under the APA and Mandamus Act.[47] A sizable plurality of these cases are decided in the U.S. District Court for the District of Columbia,[48] but this is a nationwide issue that comes up across circuits.[49]

#### *1. Consular Nonreviewability*

A common approach to administrative processing cases is finding that consular nonreviewability applies and thus bars review of the claims because "a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise."[50] Consular nonreviewability has only been extended to final decisions of consular officers, and not to the entire decision-making process.[51]

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42 *Id.* § 306.2-2(A)(a).

43 *See Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year*, U.S. Citizenship & Immigr. Servs., https://egov.uscis.gov/processing-times/historic-pt [https://perma.cc/9U6E-BQWT] (last visited July 10, 2026).

44 *See supra* Introduction.

45 *See, e.g.*, Yaghoubnezhad v. Stufft, 734 F. Supp. 3d 87, 103 (D.D.C. 2024).

46 *See* Hemmat v. Blinken, No. 23-2085, 2024 WL 4210658, at *2 (D.D.C. Sep. 17, 2024).

47 *See, e.g.*, Emad v. U.S. Dep't of State, No. 23-1789, 2024 WL 3509485, at *4 (D.D.C. July 23, 2024).

48 Westlaw, +"administrative processing" +"unreasonable delay", 126 results (Oct. 5, 2026) (on file with The George Washington Law Review) (search results filtered from January 1, 2023, to November 1, 2024, and showing that fifty-seven of the 126 cases that met the search criteria were decided in the District of Columbia, and the second most common jurisdiction for these cases was the Central District of California, with fifteen cases).

49 *See id.* (search results showing that twenty-six different district courts decided at least one administrative processing case between January 1, 2023, and November 1, 2024).

50 Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999).

51 *See, e.g.*, *Yaghoubnezhad*, 734 F. Supp. 3d at 104 ("[C]onsular nonreviewability 'does not bar judicial review of a consular officer's delay when a visa application has been provisionally refused pending a final decision.'" (quoting Al-Gharawy v. Dep't of Homeland Sec., 617 F. Supp. 3d 1, 11 (D.D.C. 2022))).

In *Yaghoubnezhad v. Stufft*,[52] Judge Trevor McFadden of the U.S. District Court for the District of Columbia found that consular nonreviewability barred the plaintiffs' claims.[53] Breaking away from the rest of the district—as well as districts around the country[54]—the *Yaghoubnezhad* court dismissed the plaintiffs' claims and held that placing a visa application in administrative processing triggered consular nonreviewability.[55] The court reasoned that, "[b]ecause consular officers ha[d] validly refused" the plaintiffs' visas, the court could not "order further review or adjudication of those refusals without requiring consular officers to examine their substance."[56] Although the plaintiffs merely sought expedited processing, the court held that "[e]ven if such an order does not expressly mandate [the State Department] to reach a specific outcome on [the] [p]laintiffs' visas, it still affects the substance of [the State Department's] initial refusals by requiring their reexamination."[57]

### *2. No-Nondiscretionary-Duty Approach*

Some judges have held that section 555(b) of the APA[58] does not create a nondiscretionary duty of a consular officer to conclude administrative processing.[59] In *Karimova v. Abate*,[60] an unpublished opinion, the D.C. Circuit held that "[u]nless and until" a visa application is reopened and readjudicated following its placement in administrative processing, it "remains officially refused."[61] *Karimova*'s status as an unpublished opinion has only resulted in more confusion in the U.S. District Court for the District of Columbia, and the district's judges have grappled with the proper weight of authority to give the opinion.[62]

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52 734 F. Supp. 3d 87 (D.D.C. 2024).

53 *Id.*

54 *See* Jahangiri v. Blinken, No. 23-2722, 2024 WL 1656269, at *6 (D. Md. Apr. 17, 2024) ("[T]he doctrine of consular nonreviewability does not bar claims to compel adjudication of a visa petition undergoing administrative processing."); Taherian v. Blinken, No. SACV 23-01927, 2024 WL 1652625, at *3–4 (C.D. Cal. Jan. 16, 2024) (holding that consular nonreviewability "d[id] not preclude [the p]laintiffs from challenging the [g]overnment's failure to decide" because the plaintiffs' visa applications were "still pending necessary administrative processing" (quoting Nine Iraqi Allies Under Serious Threat v. Kerry, 168 F. Supp. 3d 268, 292 (D.D.C. 2016))); Ebrahimi v. Blinken, No. 23 C 2867, 2024 WL 2020038, at *7 (N.D. Ill. May 3, 2024) ("[O]ngoing adjudication [in administrative processing] means that no final decision has been made that would implicate the doctrine of consular nonreviewability.").

55 *Yaghoubnezhad*, 734 F. Supp. 3d at 104.

56 *Id.* (emphasis omitted).

57 *Id.*

58 5 U.S.C. §§ 551–559, 701–706.

59 *See*, *e.g.*, Deylami v. Kvien, No. 23-1393, 2025 WL 219064, at *5 (D.D.C. Jan. 16, 2025).

60 No. 23-5178, 2024 WL 3517852 (D.C. Cir. July 24, 2024).

61 *Id.* at *2.

62 *See, e.g.*, Sharifishourabi v. Blinken, No. 23-3382, 2024 WL 3566226, at *5 (D.D.C. July 29, 2024); Hajizadeh v. Blinken, No. 23-1766, 2024 WL 3638336, at *3 n.3 (D.D.C. Aug. 2, 2024).

Judge Tanya Chutkan of the U.S. District Court for the District of Columbia has taken the no-nondiscretionary-duty approach post-*Karimova*, holding in *Hemmat v. Blinken*[63] that the plaintiffs had not sufficiently alleged "that an agency failed to take a discrete agency action that it is required to take."[64] The plaintiffs in *Hemmat* relied on the requirement of APA section 555(b) that "each agency shall proceed to conclude a matter presented to it," and do so "with due regard for the convenience and necessity of the parties or their representatives and within a reasonable time."[65] Given that *Karimova* held that the State Department's placement of a visa application in administrative processing was a final decision, Judge Chutkan found that *Karimova* was "fatal" to plaintiffs' claims and that section 555(b) of the APA did not establish any further duty of the consular officer to further adjudicate the visa.[66] Judge Chutkan based this ruling on the premise that, "[b]ecause refusal concludes the matter presented by a visa application," section 555(b) of the APA did not "establish a duty to take the action that" the plaintiffs claimed had "been unreasonably delayed—further adjudicating the refused visa applications."[67] She also relied on *Karimova*'s holding that placing a visa application in administrative processing constitutes a final decision.[68]

In *Sereshti v. Gaudiosi*,[69] however, Judge Beryl A. Howell indicated that *Karimova* had not foreclosed the existence of a clear nondiscretionary duty—besides section 555(b) of the APA—that obligates consular officers to adjudicate visa applications placed in administrative processing within a reasonable time.[70] Although *Karimova* was "confined" to section 555(b) of the APA,[71] plaintiff Mehrdad Sereshti also based his complaint on 8 U.S.C. § 1202(b),[72] which states in relevant part that "[a]ll immigrant visa applications shall be reviewed and adjudicated by a consular officer."[73] The *Sereshti* court, however, limited itself to "[a]ssuming, without deciding, that a mandatory nondiscretionary agency

63 No. 23-2085, 2024 WL 4210658 (D.D.C. Sep. 17, 2024).

64 *Id.* at *2 (quoting Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004)).

65 *Id.* at *4 (quoting 5 U.S.C. § 555(b)).

66 *Id.*

67 *Id.*

68 *Id.* (citing Karimova v. Abate, No. 23-5178, 2024 WL 3517852, at *4 (D.C. Cir. July 24, 2024)); *see also* Sakhi v. Blinken, No. 24-1376, 2025 WL 904141, at *7 (D. Md. Mar. 25, 2025) ("A consular officer refused [the plaintiff's] visa application. Any nondiscretionary duty has been discharged . . . [b]ecause the defendants did not fail to take a discrete action they were required to take . . . .").

69 No. 24-1288, 2024 WL 4625802 (D.D.C. Oct. 30, 2024).

70 *Id.* at *6.

71 *Id.* (quoting Baygan v. Blinken, No. 23-2840, 2024 WL 3723714, at *5 n.1 (D.D.C. Aug. 8, 2024)).

72 *Id.* at *5.

73 *Id.* (quoting 8 U.S.C. § 1202(b)).

action applies"[74] to the claims of unreasonable delay because the plaintiff failed "to state a plausible claim for relief,"[75] and thus the court dismissed the claim based on the *TRAC* factors analysis.[76] Other judges in the U.S. District Court for the District of Columbia have also punted on this issue.[77]

### *3. Review Under the APA and Mandamus Act*

Lawsuits demanding judicial action on a visa application placed in administrative processing usually bring claims under the APA and the Mandamus Act.[78] Pursuant to the APA, courts are authorized to "compel agency action unlawfully withheld or unreasonably delayed."[79] Under the Mandamus Act, courts may "compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[80]

The D.C. Circuit established a six-factor test, called the *TRAC* factors, to review claims of unreasonable delay against agencies:

(1) the time agencies take to make decisions must be governed by a "rule of reason";

(2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;

(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;

(4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;

(5) the court should also take into account the nature and extent of the interests prejudiced by delay; and

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74 *Id.* at *6.

75 *Id.* at *7.

76 *Id.* at *10–11.

77 *See, e.g.*, Baygan v. Blinken, No. 23-2840, 2024 WL 3723714, at *5 (D.D.C. Aug. 8, 2024) (explaining how the *TRAC* factors analysis ultimately doomed the plaintiff's claims because the court would "assume, without deciding, that the State Department ha[d] a non-discretionary, discrete duty to adjudicate [the plaintiff's] visa application").

78 28 U.S.C. § 1361; *see, e.g.*, Khan v. Blinken, No. 23-3474, 2024 WL 2880426, at *1 (D.D.C. June 7, 2024) (filing actions under both the APA and the Mandamus Act).

79 5 U.S.C. § 706(1).

80 28 U.S.C. § 1361.

(6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"[81]

The D.C. Circuit has used these factors to "guide [its] unreasonable-delay analysis" in immigration cases.[82] The State Department almost always seeks to have claims of unreasonable delay thrown out at the motion to dismiss stage, so review under the *TRAC* factors in a motion to dismiss is often a visa applicant's only chance to prove unreasonable delay.[83] Even assuming that the allegations in their complaints are true,[84] plaintiffs often face an uphill battle to convince a judge that an unreasonable delay exists because judges give certain factors that favor the government great weight.[85]

## II. Analysis and Solution

Courts around the country have diverged on the most pertinent issues in administrative processing cases, creating unnecessary confusion and splits in the law. This Part suggests implementing three solutions to end the disparate approaches to administrative processing cases. First, courts should determine that consular nonreviewability does not apply in unreasonable delay cases. Second, courts should determine that placing a visa application in administrative processing is not a final decision by using the Supreme Court's test, laid out in *Bennett v. Spear*,[86] to determine whether an agency's action is final.[87] Finally, courts should find that consular officers have a nondiscretionary duty to process a visa application placed in administrative processing.

Having implemented these suggestions, courts should return to the original meaning and intent of the *TRAC* factors and find that the fourth factor does not bar the reordering of the visa processing queue

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81 Telecomms. Rsch. & Action Ctr. v. FCC (*TRAC*), 750 F.2d 70, 80 (D.C. Cir. 1984) (citations omitted) (first quoting Potomac Elec. Power Co. v. Interstate Com. Comm'n, 702 F.2d 1026, 1034 (D.C. Cir. 1983); and then quoting Pub. Citizen Health Rsch. Grp. v. Auchter, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (per curiam)).

82 Da Costa v. Immigr. Inv. Program Off., 80 F.4th 330, 340 (D.C. Cir. 2023).

83 *See* Nat'l Immigr. Litig. All., Recent Trends in Immigration Delay Cases 6–7 (2024), https://immigrationlitigation.org/wp-content/uploads/2024/05/2024.5.17-Recent-Trends-in-Immigration-Delay-Cases.pdf [https://perma.cc/HXC6-MRGT].

84 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

85 *See infra* Section II.D; *e.g.*, Emad v. U.S. Dep't of State, No. 23-1789, 2024 WL 3509485, at *4–5 (D.D.C. July 23, 2024) ("In this case, taken together, the *TRAC* factors weigh strongly in the State Department's favor. Thus, even accepting [the p]laintiffs' allegations as true, they do not state a claim for unreasonable delay . . . ."); *In re* Barr Lab'ys, 930 F.2d 72, 75 (D.C. Cir. 1991) (denying relief and favoring the agency based on factor four, even though all of the other *TRAC* factors favored the plaintiffs).

86 520 U.S. 154 (1997).

87 *Id.* at 177–78.

and that the first *TRAC* factor—whether the delay is governed by a rule of reason—is dispositive if it favors the plaintiffs.

### *A. Consular Nonreviewability in Cases Without a Final Decision*

Courts should rule that consular nonreviewability is inapplicable in unreasonable delay cases. The justifications for consular nonreviewability are unconvincing in cases of unreasonable delay, and the Supreme Court has only referred to consular nonreviewability as applying to *actual decisions* by the State Department, as opposed to the *lack* of a decision.[88] Additionally, past justifications for the application of consular nonreviewability to administrative processing cases erroneously conflate an order to simply make a decision with an order to re-adjudicate an already-decided visa.[89]

Consular nonreviewability has been based on sovereignty and national security from its start. Regarding sovereignty, the Supreme Court said in *Chae Chan Ping v. United States*[90] that "[t]he power of exclusion of foreigners being an incident of sovereignty . . . cannot be granted away or restrained on behalf of any one."[91] But ordering a faster adjudication of a visa application does not take away the Executive's ability to grant or deny visas; it simply instructs the Executive to do so more quickly.

Beyond sovereignty, consular nonreviewability's main underpinning has been national security concerns. The Supreme Court described the Executive's power to admit or deny visa applications as "necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers."[92] An order to process a visa adjudication faster, however, does not implicate national security concerns because it does not prevent the State Department from denying the visa application. An order to process a visa simply ensures that the State Department applies its decision-making process, and this analysis aligns with the D.C. Circuit's belief that the benefits of agency expertise "will not be realized if the agency never takes action."[93]

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88 *See* Dep't of State v. Muñoz, 602 U.S. 899, 906 (2024) ("Visa denials are insulated from judicial review by the doctrine of consular nonreviewability."); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("[T]he decision to admit or to exclude an alien . . . is final and conclusive.").

89 *See* Yaghoubnezhad v. Stufft, 734 F. Supp. 3d 87, 104 (D.D.C. 2024) ("It is not as if State took no adjudicatory action, and [the p]laintiffs are asking the Court to order it to do so. In this case, State has already taken definitive action, and [the p]laintiffs want the Court to order it to engage in discretionary re-adjudication of that action more quickly.").

90 130 U.S. 581 (1889).

91 *Id.* at 609.

92 Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).

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

In *TRAC*, the D.C. Circuit said that litigants must clear a high bar to "obtain judicial review of ongoing agency proceedings,"[94] but that "[c]laims of unreasonable agency delay clearly fall into that narrow class of interlocutory appeals from agency action over which [courts] appropriately should exercise [their] jurisdiction."[95] The D.C. Circuit based its allowance of claims of unreasonable delay on three factors, which were (1) "5 U.S.C. § 555(b)'s mandate that agencies decide matters in a reasonable time," (2) the lack of a "need for the court to consider the merits of the issue before the agency," and (3) that "Congress has instructed statutory review courts to compel agency action that has been unreasonably delayed."[96] None of these reasons for reviewing claims of unreasonable delay—which all apply to the State Department—implicate or impede the State Department's ability to make national security decisions.

Although the INA "bars the Secretary of State from directing a particular outcome with respect to a visa application,"[97] nothing prevents the Secretary of State "from directing consular officers 'to conclude matters presented to them' 'within a reasonable time.'"[98] A reasonable time to adjudicate visas can and should build in enough time to allow the State Department to fully weigh all of the national security considerations of a visa application. Given that courts generally have found that "immigration delays in excess of five . . . years" are unreasonable,[99] this time frame still gives the State Department ample time to make any relevant national security determinations. Further, the reviewing court does not review the merits of the case—which might usurp the State Department's role—because the court only instructs the State Department to review the merits of a visa application more quickly.[100] Finally, much of the foundation for consular nonreviewability is that Congress has fully delegated the power to control visa decisions to the executive branch.[101] Congress, however, has also explicitly instructed courts to compel unreasonably delayed agency action.[102] These two aspects of the law must be harmonized, and that alignment can be done by applying

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94 *Id.*

95 *Id.*

96 *Id.*

97 Asadi v. Dep't of State, No. 23-1953, 2024 WL 3835409, at *3 (D.D.C. Aug. 15, 2024).

98 *Id.* (quoting Al-Gharawy v. Dep't of Homeland Sec., 617 F. Supp. 3d 1, 10 (D.D.C. 2022)).

99 Bonsi v. Bitter, No. 23-3740, 2025 WL 275610, at *3 (D.D.C. Jan. 23, 2025) (quoting Sarlak v. Pompeo, No. 20-cv-35, 2020 WL 3082018, at *6 (D.D.C. June 10, 2020)).

100 Supporters of consular nonreviewability may argue that an order to expedite processing necessarily implicates national security concerns by stripping away resources from other aspects of the State Department. That argument, however, is not persuasive because courts have long been capable evaluators of competing agency priorities. *See TRAC*, 750 F.2d at 80.

101 *See* Schmitt, *supra* note 22, at 59.

102 *TRAC*, 750 F.2d at 79.

consular nonreviewability to final decisions, but not to claims of unreasonable delay.

The first case in the U.S. District Court for the District of Columbia to find that consular nonreviewability applied in cases of unreasonable delay, *Yaghoubnezhad v. Stufft*, rejected the plaintiffs' argument that consular nonreviewability did not apply to "procedural considerations," such as the speed with which applications are processed.[103] The court rejected the "distinction between substance and procedure" but mischaracterized the plaintiffs' request.[104] The plaintiffs' applications were placed in administrative processing; the court characterized an order to adjudicate their applications as "no different from ordering the State Department to reopen a dispositive adjudication," and then the court characterized that result as impossible to do "without requiring consular officers to examine [the refusals'] substance."[105] Even the State Department does not take such a view as to how administrative processing works, stating that a visa application may be placed in administrative processing when "the consular officer did not have all of the information required to conclude" that the applicant was eligible.[106] An order to speed up administrative processing does not necessarily require a fresh look at already-reviewed information, as the *Yaghoubnezhad* court said;[107] instead, it simply instructs the State Department to more rapidly review new information and either maintain or change its prior decision.

Consular nonreviewability should not apply to claims of unreasonable delay if no final decision has occurred. The underlying theories of consular nonreviewability are unconvincing when the judiciary is merely reviewing decision speed—not substance—and a judicial order would not require the State Department to review its past logic, but to instead progress more quickly through new information.

### *B. Determining When a Final Decision Has Been Made*

Having concluded that consular nonreviewability should not apply to claims of unreasonable delay, courts should next determine that placing a visa application in administrative processing is not a final decision. Ruling that placing a visa application in administrative processing is a final decision is not aligned with the Supreme Court's test to determine the finality of agency action. Additionally, the current legal landscape

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103 Yaghoubnezhad v. Stufft, 734 F. Supp. 3d 87, 104 (D.D.C. 2024).

104 *Id.*

105 *Id.* (emphasis omitted).

106 *Visa Denials*, *supra* note 34.

107 *Yaghoubnezhad*, 734 F. Supp. 3d at 104.

creates perverse incentives for the State Department by allowing it to prevent review of any delay.

Though most courts have not relied on it in visa administrative processing cases, the Supreme Court established a test in *Bennett v. Spear* to determine the finality of an agency's action: "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[108]

The *Bennett* test favors finding that placing a visa in administrative processing is not a final decision. The *Bennett* test first asks if the agency's action "mark[s] the 'consummation' of the agency's decisionmaking process."[109] Although *Karimova* stated that "[n]othing in federal law speaks to the ability of a consul, after [refusing a visa application], to hold onto the application" if "case circumstances later change in the applicant's favor,"[110] the State Department's Foreign Affairs Manual speaks directly to that ability and assumes that its consular officers do have such a power.[111] Although the Foreign Affairs Manual is not binding, consular officers are instructed to reopen and re-adjudicate visa applications to determine whether applicants are "eligible for a visa" when applicants present additional information after their applications are placed in administrative processing.[112] Under these guidelines, placing the application in administrative processing appears "tentative or interlocutory"[113] because the State Department leaves open the possibility of changing its determination.[114] Furthermore, the State Department itself has explained that placing a visa application in administrative processing is not a decision at all,[115] stating that "[s]ometimes a consular officer is unable to make a decision on a visa application because . . . the case requires further administrative processing."[116]

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108 Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (citations omitted) (first quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948); and then quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)). The second element of the *Bennett* test likely favors the government in administrative processing cases because placing a visa application in administrative processing does, at least temporarily, determine rights and obligations, because the applicant could not legally enter the United States without a visa.

109 *Id.* at 178 (quoting *Chicago & S. Air Lines, Inc.*, 333 U.S. at 113).

110 Karimova v. Abate, No. 23-5178, 2024 WL 3517852, at *4 (D.C. Cir. July 24, 2024).

111 *See* U.S. Dep't of State, *supra* note 39, § 306.2-2(B)(1).

112 *Id.* § 306.2-2(A)(a)(1).

113 *Bennett*, 520 U.S. at 178.

114 U.S. Dep't of State, *supra* note 39, §§ 306.2-1, .2-2(A)(a)(2).

115 *See U.S. Embassy Lusaka, Zambia—LUS*, U.S. Dep't of State, https://travel.state.gov/content/travel/en/us-visas/Supplements/Supplements_by_Post/LUS-Lusaka.html [https://perma.cc/Y3BY-7CPL] (last visited May 27, 2026).

116 *Id.*

In *Sackett v. Environmental Protection Agency*,[117] the Supreme Court revisited *Bennett* and said that "[t]he mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal."[118] Although *Sackett* allowed for "informal discussion" between the plaintiffs and the Agency without rendering a decision nonfinal, visa application procedures are highly regimented.[119] The Foreign Affairs Manual provides formal guidance for consular officers in the visa-issuing process, which includes the instruction that visa applications placed in administrative processing may be reconsidered.[120]

In *Karimova*, the D.C. Circuit stated that the plaintiff's "'matter' [had] already been 'conclude[d]'" when the consular officer refused her application and placed it in administrative processing, relying solely on 5 U.S.C. § 555(b) without any analysis of the statute's text.[121] The *Karimova* court overlooked the need to apply the *Bennett* test.[122] Other courts have applied *Bennett* and found that placing visa applications in administrative processing is not a final decision[123] and have explicitly rejected *Karimova* as unpersuasive.[124]

*Karimova*'s conclusion ignores the perverse incentives that it creates by allowing the State Department to abuse the administrative processing system to avoid judicial review of any delay.[125] If the *Karimova* holding became the law of the land, there would appear to be nothing—other than congressional action—to prevent the State Department from immediately placing every application that it receives in administrative processing. Under *Karimova*, even a decades-long delay would not be reviewable because placing an application in administrative processing would be considered a final decision and trigger consular

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117 566 U.S. 120 (2012).

118 *Id.* at 127.

119 *See* Am. Immigr. Council, *supra* note 6.

120 *See, e.g.*, U.S. Dep't of State, *supra* note 39, § 306.2-2(A)(a)(2)(a).

121 Karimova v. Abate, No. 23-5178, 2024 WL 3517852, at *4 (D.C. Cir. July 24, 2024) (alteration in original) (quoting 5 U.S.C. § 555(b)).

122 The D.C. Circuit has applied the *Bennett* test before, but not to its visa cases. *See, e.g.*, Nat'l Treasury Emps. Union v. Fed. Lab. Rels. Auth., 754 F.3d 1031, 1039 (D.C. Cir. 2014) (applying the *Bennett* test to see if the Federal Labor Relations Authority's decision was final and reviewable); Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 13 (D.C. Cir. 2005) (using the *Bennett* test to see if the Fish and Wildlife Service's action was final and reviewable).

123 *See, e.g.*, Canaza v. Platek, No. 25-303, 2026 WL 811234, at *7–8 (D. Md. Mar. 24, 2026); Soroush v. Rubio, No. 24-cv-06490, 2026 WL 253452, at *3–4 (C.D. Cal. Jan. 30, 2026).

124 *Soroush*, 2026 WL 253452, at *4.

125 *See* Farahani v. Laitinen, No. 23-cv-922, 2024 WL 2785043, at *4 (M.D.N.C. May 30, 2024) ("Defendants' position that a refusal at the consular interview is final contradicts the persuasive reasoning of numerous courts and would, in effect, permit administrative processing to carry on indefinitely without judicial review.").

nonreviewability.[126] Taken to its logical endpoint, *Karimova* would allow the executive branch to potentially avoid the legal challenges associated with, for example, the first Trump administration's "Muslim ban"[127] by simply placing all applications from "undesired" countries in administrative processing. The result would be a de facto recreation of the restrictions from the first Trump term.

Courts should find that placing a visa application in administrative processing is not a final decision based on the test for agency action finality from *Bennett v. Spear* and the incentive that *Karimova* created for the State Department to place visa applications in administrative processing and insulate itself from judicial review.

### *C. Determining the Duty of a Consular Officer to Process a Visa Application*

Finally, courts should find that consular officers still have a duty to issue a final decision within a reasonable time frame, even after placing a visa application in administrative processing. Some courts have held that, even if consular nonreviewability does not apply, section 555(b) of the APA does not place a nondiscretionary duty on a consular officer to process an application placed in administrative processing within a reasonable time frame.[128] District courts that have adopted this reasoning rely on *Karimova*'s holding that a visa application placed in administrative processing "has already been 'conclude[d],'"[129] and thus the APA does not require any further action.

As discussed above, however, a visa application being placed in administrative processing should not be considered a final decision, and such a finding is not aligned with the Supreme Court's instructions regarding the finality of agency action.[130] When courts do not view placing an application in administrative processing as a final decision, they have found that review is available under section 555(b) of the APA.[131]

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126 *See Karimova*, 2024 WL 3517852, at *2.

127 *See* Annalisa Merelli, *Federal Judges Have Refused to Reinstate the US Travel Ban, Asserting Their Authority over Trump*, Quartz (July 20, 2022), https://qz.com/907254/federal-judges-have-refused-to-reinstate-the-us-travel-ban-asserting-their-authority-over-trump [https://perma.cc/CH8C-XTHG].

128 *See*, *e.g.*, Hemmat v. Blinken, No. 23-2085, 2024 WL 4210658, at *4 (D.D.C. Sep. 17, 2024).

129 *Karimova*, 2024 WL 3517852, at *4 (alteration in original) (quoting 5 U.S.C. § 555(b)); *see also Hemmat*, 2024 WL 4210658, at *4 ("The *Karimova* decision is fatal to [the p]laintiffs' claim of unreasonable delay.").

130 *See supra* Sections II.A–.B.

131 *See, e.g.*, Azadani v. Gaudiosi, No. 24-cv-00825, 2025 WL 35597, at *4 (D. Colo. Jan. 6, 2025) (agreeing that placing a visa application in administrative processing is not a final decision and finding "[t]his reasoning similarly preserves APA review"); Haeri Mehneh v. Blinken, No. 24-cv-1374, 2024 WL 5116521, at *5 (D.D.C. Dec. 16, 2024) (declining to follow *Karimova* and allowing review under section 555(b) of the APA).

Courts have dedicated few words to explaining why section 555(b) of the APA does create a duty to act,[132] likely because it is so plainly obvious from the statutory language: "[W]ithin a reasonable time, each agency shall proceed to conclude a matter presented to it."[133] Once courts have course-corrected and found that placing a visa application in administrative processing does not count as a final decision and that consular officers still have a duty to further process those visas, courts should return to the *TRAC* factors' fact-based inquiry as to "whether the agency's delay is so egregious as to warrant mandamus."[134]

### *D. Returning the* TRAC *Factors to Their Original Meaning and Intent*

The application of the *TRAC* factors in administrative processing cases has changed significantly from the factors' original meaning and application, and now their application leans heavily in the government's favor. Accordingly, this Essay proposes that the *TRAC* factors be understood and applied according to their original intent.

The *TRAC* factors are now interpreted in two distinct ways that present difficulties for visa applicants. The fourth factor—"the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority"[135]—has been given so much power that it almost completely bars visa applicants from prevailing. The first factor—"the time agencies take to make decisions must be governed by a 'rule of reason'"[136]—used to be capable of being dispositive, but courts now allow the fourth factor to outweigh it. These shifts have dramatically decreased visa applicants' chances of success by weighing heavily in the government's favor and shrinking visa applicants' paths to relief.

#### *1. Factor Four*

The fourth factor—"the court should consider the effect of expediting delayed action on agency activities of a higher or competing

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132 *See, e.g.*, Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1099 (D.C. Cir. 2003) (stating, without explaining why, that plaintiff's APA claims impose a duty upon the administrative agency to act under section 555(b) of the APA).

133 5 U.S.C. § 555(b).

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

135 *Id.* at 80.

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

priority"[137]—in practice is the "largest axe to plaintiffs' claims."[138] Courts have given it so much weight that some have not granted relief "even [when] all the other factors considered in *TRAC* favored it."[139] This has, however, not always been the case. In the opinion that became the basis for the fourth *TRAC* factor, *Public Citizen Health Research Group v. Auchter*,[140] the D.C. Circuit wrote that it "would hesitate to require [an agency] to expedite [a] rulemaking if such a command would *seriously disrupt* other rulemakings of higher or competing priority."[141] Despite the focus on *serious* disruptions, some courts have become almost averse to the evidence when evaluating the fourth factor, with some going as far as to say that they "need not unearth the details of the visa-adjudication process," and the fact that any reordering occurs is "obvious" and thus bars granting relief.[142]

Such a rigid view of the fourth factor is not aligned with how agencies work or how the fourth factor was meant to be applied. Agency actions can effectively be divided into three different categories: deciding which policy areas to prioritize, prioritizing topics within those areas, and deciding how to enforce those decisions.[143] Agency decisions in the first two categories "will often involve the most important resource allocation decisions."[144] Judicial orders regarding these types of agency decisions often "have significant effects on the agency's resources."[145]

On the other hand, decisions like adjudicating one single visa application are "unlikely to greatly affect the agency's resource allocation decisions" because "[t]he agency has already committed significant amounts of resources to the overall process, and the one particular case is often only a fraction of the overall workload."[146] Although the fourth factor has been refashioned as a get-out-of-jail-free card for agencies in that it almost always favors them and courts give it the most weight, that application is not aligned with the original intent of the test—to avoid

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137 *Id.*

138 Youssef Mohamed, *Here's Your Number, Now Please Wait in Line: The Asylum Backlog, Federal Court Litigation, and Artificial Intelligence in Agency Adjudication*, 89 U. CHI. L. REV. 2013, 2030 (2022).

139 Emad v. U.S. Dep't of State, No. 23-1789, 2024 WL 3509485, at *5 (D.D.C. July 23, 2024) (alteration in original) (quoting Milligan v. Pompeo, 502 F. Supp. 3d 302, 319 (D.D.C. 2020)).

140 702 F.2d 1150 (D.C. Cir. 1983).

141 *Id.* at 1158 (emphasis added).

142 Rashidi v. U.S. Dep't of State, No. 23-1569, 2023 WL 6460030, at *6 (D.D.C. Oct. 4, 2023).

143 *See* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 22–23 (2008).

144 *Id.* at 22.

145 *Id.*

146 *Id.* at 23.

seriously disrupting high-priority agency actions[147]—which merely adjudicating individual, egregiously delayed visas does not do.

The D.C. Circuit has taken a strong stance against reordering the visa application queue. One of the earliest D.C. Circuit cases to take an anti-reordering stance stated that the agency officials who were not working on the matter at issue in the case "presumably have not just been 'twiddl[ing] their thumbs.'"[148] There are two problems with that assertion: It relied on a case that involved a higher level of agency priority, and it deferred massively to the agency instead of requiring an actual investigation into whether the agency's competing priorities would be seriously disrupted. In the Seventh Circuit case that the D.C. Circuit cited, *Board of Trade of Chicago v. Securities & Exchange Commission*,[149] the Securities and Exchange Commission declined to take an enforcement action,[150] which is a distinctly different type of agency action than processing visas. "Refusal to prosecute is a classic illustration of a decision committed to agency discretion"[151] and one that "would require enormous amounts of resources for that particular task, and likely will only begin if the agency has committed to making that particular area a priority."[152] On the other hand, the State Department has committed itself to adjudicating visas, and each individual visa adjudication is a minuscule "fraction of the overall workload."[153] Accordingly, district judges should allow reordering if the other *TRAC* factors warrant it.

Faced with the prospect of courts becoming more friendly to reordering, the State Department would likely argue that, because of the visa backlog, any reordering would seriously disrupt its priorities.[154] These arguments should be unavailing. First, only three American embassies or consulates have an average visa backlog of more than one year.[155] Considering that courts usually find that immigration delays

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147 *See* Pub. Citizen Health Rsch. Grp. v. Auchter, 702 F.2d 1150, 1158 (D.C. Cir. 1983) (cited in Telecomms. Rsch. & Action Ctr. v. FCC (*TRAC*), 750 F.2d 70, 80 (D.C. Cir. 1984)).

148 *In re* Barr Lab'ys, 930 F.2d 72, 75 (D.C. Cir. 1991) (alteration in original) (quoting Bd. of Trade of Chicago v. SEC, 883 F.2d 525, 531 (7th Cir. 1989)).

149 883 F.2d 525 (7th Cir. 1989).

150 *Id.* at 528–29.

151 *Id.* at 530.

152 *See* Biber, *supra* note 143, at 22.

153 *Id.* at 23.

154 *See*, *e.g.*, Tate v. Pompeo, 513 F. Supp. 3d 132, 150 (D.D.C. 2021) ("Given this backlog and the continued suspension of routine operations around the world due to the pandemic, [the] defendants correctly posit that deference to the State Department's priority-setting and prioritization of 'mission critical' functions is necessary.").

155 The three embassies with backlogs exceeding one year are in Abu Dhabi, Dhaka, and Accra. *See New Data Shows Immigrant Visa Interview Backlogs at U.S. Consular Offices Around the World*, Int'l Refugee Assistance Project, https://refugeerights.org/news-resources/new-data-shows-visa-interview-backlogs-at-u-s-consular-offices-around-the-world [https://perma.cc/Y8RS-JRUP] (last visited July 10, 2026); *List of U.S. Embassies and Consulates that Process Immigrant*

"between three to five years are often not unreasonable,"[156] the average visa applicant would be disinclined to file an unreasonable delay suit after waiting just 275 days in Cairo or 200 days in Ciudad Juárez.[157] Second, visa applicants who bring unreasonable delay suits make up a small percentage of total visa applicants. As of November 1, 2023, there were almost four million family-sponsored visa applicants and more than a quarter of a million employment-based applicants waiting in line.[158] From 2022 to 2024, there were only 242 administrative processing cases decided in federal court.[159] Allowing reordering for the small number of egregiously delayed visa applicants would not overwhelm the State Department. Instead, it would provide a path to a quicker resolution for those most impacted by the visa backlog without seriously disrupting the State Department's competing priorities.

Further, the anti-reordering courts repeatedly presume—without any proof—that reordering the visa application queue would impact agency priorities. The D.C. Circuit said that the Food and Drug Administration officials in *In re Barr Laboratories*[160] "presumably have not just been 'twiddl[ing] their thumbs.'"[161] Other judges have, without evidence, stated that compelling a visa adjudication "would presumably delay other adjudications."[162] These presumptions are not aligned with the original goal of *TRAC*: to investigate whether an order would "seriously disrupt" competing agency priorities. In *Public Citizen Health Research Group*, the D.C. Circuit "asked the parties to address the status of other ongoing [Occupational Safety and Health Administration] rulemakings and the feasibility of expediting . . . proceedings" absent an emergency temporary standard.[163] The Occupational Safety and Health Administration responded with a list of proceedings that it believed would be impacted by a mandamus order.[164] At least one D.C. district judge has

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*Visas*, Bureau of Consular Affs., https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/list-of-posts.html [https://perma.cc/V2LM-TNRU] (last visited May 27, 2026).

156 Lee v. Blinken, No. 23-cv-1783, 2024 WL 639635, at *5 (D.D.C. Feb. 15, 2024) (quoting Rahman v. Blinken, No. 22-cv-2732, 2023 WL 196428, at *4 (D.D.C. Jan. 17, 2023)).

157 *See* sources cited *supra* note 155.

158 *See Annual Report of Immigrant Visa Applicants in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of November 1, 2023*, Bureau of Consular Affs., https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2023_vF.pdf [https://perma.cc/NMM9-MGCY] (last visited May 27, 2026).

159 Westlaw, "administrative processing" & visa, 242 results (Feb. 7, 2026) (on file with The George Washington Law Review) (filtered from January 1, 2022, to December 31, 2024).

160 930 F.2d 72 (D.C. Cir. 1991).

161 *Id.* at 75 (alteration in original) (quoting Bd. of Trade of Chicago v. SEC, 883 F.2d 525, 531 (7th Cir. 1989)).

162 Skalka v. Kelly, 246 F. Supp. 3d 147, 154 (D.D.C. 2017).

163 Pub. Citizen Health Rsch. Grp. v. Auchter, 702 F.2d 1150, 1158 (D.C. Cir. 1983).

164 *Id.*

required a similarly searching review in an administrative processing case.[165]

The *TRAC* factors inquiry is "fact-intensive"[166] and "[w]hat constitutes an unreasonable delay in the context of immigration applications depends to a great extent on the facts of the particular case."[167] Courts should recognize this and only weigh the fourth factor in the government's favor after a fact-based inquiry proves that an order to process a visa application would seriously disrupt the State Department's priorities.

### 2. *Factor One*

The first *TRAC* factor—"the time agencies take to make decisions must be governed by a 'rule of reason'"[168]—was written as the most important factor, yet some courts have minimized the first factor and allowed the fourth factor to dwarf it in importance.[169] The first *TRAC* factor should be the most important because it is the only factor that issues an imperative command: "*must* be governed by a 'rule of reason.'"[170] In contrast, the five other factors are merely advisory: The second factor says that a "statutory scheme may supply content," the third says that some delays are "less tolerable," the fourth says that courts "should consider" other agency priorities, the fifth says that courts "should also

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165 *See* Al-Gharawy v. Dep't of Homeland Sec., 617 F. Supp. 3d 1, 19 (D.D.C. 2022) ("[T]he Court does not have before it any evidence indicating whether such a reordering would occur here. Defendants point to a series of decisions from within this circuit that have involved more detailed factual showings describing the queue of applications, their backlogs, and thus the challenges of granting relief. Several of these decisions rely on government declarations to establish the complexities of moving an applicant to the front of the application queue." (citations omitted)).

166 Ji v. U.S. Citizenship & Immigr. Servs., No. 24-cv-4815, 2026 WL 171879, at *4 n.3 (E.D.N.Y. Jan. 22, 2026).

167 Kolluri v. U.S. Citizenship & Immigr. Servs., No. 20-cv-02897-N, 2021 WL 183316, at *4 (N.D. Tex. Jan. 17, 2021) (alteration in original) (quoting Ahmadi v. Chertoff, 522 F. Supp. 2d 816, 822 (N.D. Tex. 2007)); *see also* Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1110 (D.C. Cir. 2003) ("Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court.").

168 Telecomms. Rsch. & Action Ctr. v. FCC (*TRAC*), 750 F.2d 70, 80 (D.C. Cir. 1984) (quoting Potomac Elec. Power Co. v. Interstate Com. Comm'n, 702 F.2d 1026, 1034 (D.C. Cir. 1983)).

169 *See, e.g.*, Emad v. U.S. Dep't of State, No. 23-1789, 2024 WL 3509485, at *5 (D.D.C. July 23, 2024). Courts have given the fourth factor so much weight that some have not granted relief "even [when] all the other factors considered in *TRAC* favored it." *See id.* (alteration in original) (quoting Milligan v. Pompeo, 502 F. Supp. 3d 302, 319 (D.D.C. 2020)).

170 *TRAC*, 750 F.2d at 80 (emphasis added) (quoting *Potomac Elec. Power Co.*, 702 F.2d at 1034). Courts have interpreted the rule of reason standard as requiring "an inquiry into whether there is any rhyme or reason for the Government's delay—in other words, whether the agency's response time . . . is governed by an identifiable rationale." Pham v. Scott, 787 F. Supp. 3d 1124, 1142 (S.D. Cal. 2025) (alteration in original) (quoting Poursohi v. Blinken, No. 21-cv-01960, 2021 WL 5331446, at *4 (N.D. Cal. Nov. 16, 2021)).

take into account" any "interests prejudiced by delay," and the sixth merely says that the court does not need to find agency impropriety to hold that an action was unreasonably delayed.[171] Today, however, courts no longer respect the first factor's imperative language and have made the fourth factor by far the most important.[172]

The Ninth Circuit has provided a roadmap as to how courts can still give the first factor the necessary weight required by *TRAC*. In *In re Pesticide Action Network North America*,[173] the Ninth Circuit found that the first factor "tipped sharply in favor of" the plaintiffs because the Environmental Protection Agency ("EPA") had delayed action for eight years and could not provide a definitive timeline as to when it would issue a "final ruling."[174] Two years prior, the court had ruled in favor of the EPA in an earlier iteration of this lawsuit, involving the same issues, and based its ruling on assurances that the EPA would resolve the issue by a set time.[175] In doing so, the court satisfied the requirements of the first *TRAC* factor and deferred to competing agency priorities.[176]

Once the EPA no longer used a rule of reason to determine when it would make a decision, however, the analysis shifted to focusing predominantly on the first factor.[177] On the Ninth Circuit's second look, it afforded no discussion to the competing agency priorities or any other factors that could have supported the government.[178] Instead, the court based its grant of mandamus relief on its view that the delay was "egregious"[179] and that the EPA had "stretched the 'rule of reason' beyond its limits."[180] This is the correct view of the first factor as written: "[T]he time agencies take to make decisions *must* be governed by a 'rule of reason.'"[181] If an agency's delay is not governed by a rule of reason, the court must grant relief.

Even the D.C. Circuit—which has especially emphasized the fourth factor—has previously found the first factor to be dispositive without even considering the fourth factor. In *In re Core Communications,*

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171 *TRAC*, 750 F.2d at 80.

172 *See supra* Section II.D.1.

173 798 F.3d 809 (9th Cir. 2015).

174 *Id.* at 814.

175 *In re* Pesticide Action Network N. Am., 532 F. App'x 649, 651 (9th Cir. 2013) (holding that the "EPA must make registration decisions on pesticide applications on time frames running from three months to two years; and EPA has received 1,500 such annual applications over the last three years," which "weigh[ed] against granting the petition").

176 *Id.*

177 *See In re Pesticide Action Network N. Am.*, 798 F.3d at 814.

178 *Id.*

179 *Id.* at 811.

180 *Id.* at 814.

181 Telecomms. Rsch. & Action Ctr. v. FCC (*TRAC*), 750 F.2d 70, 80 (D.C. Cir. 1984) (emphasis added) (quoting Potomac Elec. Power Co. v. Interstate Com. Comm'n, 702 F.2d 1026, 1034 (D.C. Cir. 1983)).

*Inc.*,[182] the court stated that it was "clear that the [Federal Communications Commission's] delay in responding to [the court's prior order] is anything but reasonable, and that factor is decisive here."[183] The D.C. Circuit again ascribed particular importance to the first factor in *In re Public Employees for Environmental Responsibility*,[184] and it found that a nineteen-year delay was egregious and granted relief—even though the fourth factor favored the agency.[185] Elsewhere, the Sixth Circuit in *Barrios Garcia v. U.S. Department of Homeland Security*[186] was not troubled by concerns of reordering and ruled in favor of visa applicants who had suffered great hardship and an extended wait.[187]

Today, the fourth factor is given so much weight that it can act as a complete bar to relief in administrative processing cases. This bar is not aligned with the original meaning and intent of the fourth factor or with the correct reading of the *TRAC* factors as a whole. The first factor was meant to be dispositive if it favors plaintiffs, and it is written to reflect this principle. Courts should recognize this and stop allowing the fourth factor to overpower the first factor.

## Conclusion

In courts across the country, flawed logic has led to the proliferation of different approaches to cases of unreasonable delay in visa applications, causing uncertainty and unpredictability. These courts should get back on track by finding that consular nonreviewability does not apply in cases without a final decision, that placing a visa application in administrative processing is not a final decision, and that consular officers have a nondiscretionary duty to fully process visa applications within a reasonable time. Additionally, judges should undo decades of misinterpretation and return the *TRAC* factors to their original meaning and intent. Without such action, The New Colossus may come to describe the bureaucracy that visa applicants have to contend with, rather than the Statue of Liberty's poem and promise.[188]

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182 531 F.3d 849 (D.C. Cir. 2008).

183 *Id.* at 857.

184 957 F.3d 267 (D.C. Cir. 2020).

185 *See id.* at 274–75.

186 25 F.4th 430 (6th Cir. 2022).

187 *Id.* at 452–55.

188 Emma Lazarus, *The New Colossus* (1883), *reprinted by* Poets.org, https://poets.org/poem/new-colossus [https://perma.cc/AB63-2QNR] ("Give me your tired, your poor, Your huddled masses yearning to breathe free . . . .").