ADMINISTRATIVE LAW — MANDAMUS — D.C. CIRCUIT COMPELS NUCLEAR REGULATORY COMMISSION TO FOLLOW STATUTORY MANDATE. — *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), *reh'g en banc denied*, No. 11-1271, 2013 U.S. App. LEXIS 22003 (D.C. Cir. Oct. 28, 2013).

The dispute over nuclear waste storage at Yucca Mountain in Nevada has been raging for decades.[1] Despite general agreement on the need for a permanent nuclear waste repository,[2] the authorization process has been drawn out as a result of fierce opposition by the local community[3] and, more recently, by the Obama Administration.[4] The latest stage in the long-running dispute is the refusal by the Nuclear Regulatory Commission (NRC) to consider a license application by the Department of Energy (DOE) to authorize the construction of the Yucca Mountain nuclear waste repository. Recently, in *In re Aiken County*,[5] the D.C. Circuit granted a petition for a writ of mandamus to compel NRC to evaluate DOE's application, holding that NRC was statutorily mandated to approve or disapprove the application by a fixed deadline.[6] The court's decision to grant mandamus must have rested on the long history of judicial concession and agency inaction specific to the case. Rather than drawing on those facts in its opinion, however, the court opted for broad and sweeping language about congressional authority. The language in the court's opinion muddles the mandamus inquiry and potentially opens the door to expansion of the judicial power of mandamus in subsequent cases.

The Nuclear Waste Policy Act of 1982[7] (NWPA) was passed by Congress and signed into law by President Reagan to create a "definite Federal policy" for the disposal of high-level radioactive waste, including a process for the siting of nuclear waste repositories.[8] NWPA

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[1] *See In re* Aiken Cnty., 645 F.3d 428, 430–31 (D.C. Cir. 2011) (reviewing prior litigation over the Yucca Mountain repository).

[2] *See* H.R. REP. NO. 97-491, pt. 1, at 26–29 (1982) (describing need for federal legislation providing for a permanent high-level nuclear waste repository).

[3] *See Why Does the State Oppose Yucca Mountain?*, ST. OF NEV. AGENCY FOR NUCLEAR PROJECTS (Feb. 4, 1998), http://www.state.nv.us/nucwaste/yucca/state01.htm; *Yucca Mountain*, U.S. SENATOR FOR NEV. HARRY REID, http://www.reid.senate.gov/issues/yucca.cfm (last visited Nov. 24, 2013).

[4] *See* Matthew L. Wald, *Future Dim for Nuclear Waste Repository*, N.Y. TIMES, Mar. 6, 2009, at A15 (describing President Obama's 2008 campaign promise to stop the Yucca Mountain repository project and noting the elimination of funding for the project in his proposed budget).

[5] 725 F.3d 255 (D.C. Cir. 2013), *reh'g en banc denied*, No. 11-1271, 2013 U.S. App. LEXIS 22003 (D.C. Cir. Oct. 28, 2013).

[6] *Id.* at 258–59.

[7] 42 U.S.C. §§ 10101–10270 (2006).

[8] *Id.* § 10131(b). In 1987, Congress short-circuited the site selection process by amending NWPA to designate Yucca Mountain as the only possible site for a repository. *Id.* § 10172.

mandates that upon the designation of a site, NRC "shall consider" an application for construction authorization by DOE and "shall issue a final decision approving or disapproving" the application within three years of its submission.[9] In June 2008, DOE submitted its construction authorization application to NRC.[10]

In 2010, DOE filed a motion to withdraw its application.[11] State and local governments sued to challenge DOE's withdrawal as a violation of NWPA, but the D.C. Circuit dismissed the claim as unripe because NRC was still processing its Licensing Board's denial of DOE's motion and was also still considering the underlying application.[12] In finding that NRC's future actions could moot the claim, the court noted that NRC was statutorily mandated to accept or reject the application soon and warned that "[s]hould the Commission fail to act within the deadline specified in the NWPA, Petitioners would have a new cause of action": a petition for mandamus relief.[13] Subsequently, NRC suspended its review of DOE's application.[14]

Petitioners[15] then filed in the D.C. Circuit[16] for a writ of mandamus requiring NRC to resume processing DOE's permit application.[17] Recognizing NRC's argument that Congress did not want the project to continue, the D.C. Circuit issued an order holding the case in abeyance pending Congress's Fiscal Year 2013 appropriations to allow Congress the chance to indicate whether it intended to fund the proj-

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[9] *Id.* § 10134(d). NWPA allows the deadline to be extended by no more than one year. *Id.*

[10] Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008).

[11] U.S. Department of Energy's Motion to Withdraw, U.S. Dep't of Energy (High-Level Waste Repository), 71 N.R.C. 609 (2010) (No. 63-001-HLW); *see also* DEP'T OF ENERGY, FY 2011 CONGRESSIONAL BUDGET REQUEST: BUDGET HIGHLIGHTS 8 (2010) ("The [Obama] Administration has determined that developing a repository at Yucca Mountain, Nevada, is not a workable option and has decided to terminate [work on the project].").

[12] *In re* Aiken Cnty., 645 F.3d 428, 433–35 (D.C. Cir. 2011).

[13] *Id.* at 436.

[14] U.S. Dep't of Energy (High-Level Waste Repository), 74 N.R.C. 368 (2011) (suspending the adjudicatory process); *Aiken Cnty.*, 725 F.3d at 258. NRC's justification for its suspension was that because Congress had declined to appropriate sufficient funds over the past three years for NRC to complete the project, its remaining appropriated funds were best used for an "orderly closure" that preserved the work it had completed so that review of the application could resume if Congress ever resumed funding. U.S. NUCLEAR REGULATORY COMM'N, CONGRESSIONAL BUDGET JUSTIFICATION FOR FY 2011, at 95 (2010).

[15] The petition was filed by the states of South Carolina and Washington, local municipalities, and local residents, who argued that without the repository they would be indefinitely exposed to the nuclear waste temporarily stored within their jurisdictions. *Aiken Cnty.*, 725 F.3d at 258.

[16] The D.C. Circuit exercised original jurisdiction over the petition pursuant to NWPA, 42 U.S.C. § 10139(a)(1)(B) (2006).

[17] *Aiken Cnty.*, 725 F.3d at 258; Petition for Writ of Mandamus (Agency Action Unreasonably Withheld), *Aiken Cnty.*, 725 F.3d 255 (No. 11-1271).

ect going forward.[18] Congress, however, took no action either to fund NRC's consideration of the application or to indicate that the process should not continue.[19]

On August 13, 2013, the D.C. Circuit granted the writ of mandamus. Writing for the court, Judge Kavanaugh[20] first noted that the court was not intervening in the underlying policy debate but restraining itself to the "more modest task" of "ensur[ing] . . . that agencies comply with the law as it has been set by Congress."[21] Having framed the issue as a separation of powers question about "the scope of the Executive's authority to disregard federal statutes,"[22] the court began with a "settled, bedrock principl[e] of constitutional law": the President, as well as agencies such as NRC, generally must follow statutory mandates.[23]

The court proceeded to reject NRC's justifications for not complying with the NWPA mandate. First, the fact that Congress had not yet appropriated the full amount of funding necessary for the completion of the process did not justify NRC's suspension of the licensing proceedings because "Congress often appropriates money on a step-by-step basis."[24] Second, the court rejected NRC's claim that Congress had made clear its intention not to appropriate additional funds in the future, explaining that to allow such "political guesswork" to be a basis for violating statutory mandates would upset the balance of powers between branches by allowing the Executive to override any congressional dictate based on pure speculation.[25] Third, the court rejected NRC's argument that Congress had demonstrated its desire to shut down the licensing process by not appropriating funds for the last three years, holding that courts should not infer implicit repeals of statutory mandates based on the amount of money Congress has allocated.[26] Fourth, NRC's policy disagreement with the project was not a valid justification for ignoring the statutory mandate.[27]

Then, writing for himself only, Judge Kavanaugh reviewed conditions under which the Executive could legitimately defy a statutory mandate and found that those conditions were not present here. First, while the President has significant independent authority to decline to follow a statutory mandate that he finds unconstitutional, there was no

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[18] *In re* Aiken Cnty., No. 11-1271, 2012 WL 3140360, at *1 (D.C. Cir. Aug. 3, 2012); *id.* (Kavanaugh, J., concurring).

[19] *Aiken Cnty.*, 725 F.3d at 259.

[20] Judge Randolph joined Judge Kavanaugh's opinion in all but Part III.

[21] *Aiken Cnty.*, 725 F.3d at 257.

[22] *Id.*

[23] *Id.* at 259.

[24] *Id.*

[25] *Id.* at 260.

[26] *Id.*

[27] *Id.*

assertion that the NWPA mandate was unconstitutional.[28] Second, while the President has significant prosecutorial discretion to decline to enforce a statute against a private party,[29] the Executive cannot disregard a statutory mandate on the executive branch itself.[30]

After concluding that NRC was not justified in ignoring the statutory mandate, Judge Kavanaugh, again writing for the majority, considered whether to employ the court's discretion to grant mandamus. While noting that mandamus is an extraordinary remedy, the court found that the case raised "serious implications for our constitutional structure."[31] Finding that the Executive's disregard of the statutory mandate disrespected the "constitutional authority of Congress,"[32] the court directed NRC to carry on with its remaining appropriated funds, but concluded by urging Congress to take action if it did not intend the licensing process to go forward so that the money would not be wasted.[33]

Judge Randolph concurred. He joined the majority opinion in all relevant parts[34] and wrote separately to add background information regarding allegations that the former NRC Chairman improperly engaged in "a systematic campaign of noncompliance" and was forced to resign — information he felt was "needed to understand what ha[d] occurred."[35]

Judge Garland dissented. Emphasizing that mandamus is an extraordinary remedy, he noted that the D.C. Circuit had previously exercised its discretion to decline to issue a writ even when it had found a clear statutory violation.[36] Arguing that the court should not issue a writ to do "a useless thing,"[37] Judge Garland argued that NRC would not be able to make any "meaningful progress" with its remaining appropriated funds.[38] He pointed out the absurdity that, "given the limited funds that remain available, issuing a writ of mandamus amounts to little more than ordering the Commission to spend part of those funds unpacking its boxes, and the remainder packing them up again,"

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[28] *Id.* at 261–62 (opinion of Kavanaugh, J.).

[29] *Id.* at 262.

[30] *Id.* at 266.

[31] *Id.* at 267 (majority opinion).

[32] *Id.* ("[O]ur constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by [NRC].").

[33] *Id.*

[34] Judge Randolph did not join Judge Kavanaugh's discussion of the Executive's power to decline statutory mandates because he felt it was unnecessary to resolve the case. *Id.* (Randolph, J., concurring).

[35] *Id.*

[36] *Id.* at 268 & n.1 (Garland, J., dissenting).

[37] *Id.* at 268 (quoting United States *ex rel.* Sierra Land & Water Co. v. Ickes, 84 F.2d 228, 232 (D.C. Cir. 1936)).

[38] *Id.* at 269.

and concluded by claiming that the court's decision would do "nothing to safeguard the separation of powers."[39]

While the court's decision to grant mandamus must have rested on narrow grounds specific to the history of the case, its opinion instead used sweeping separation of powers language that might be read to justify mandamus whenever an agency violates a statute. However, courts considering mandamus must go beyond determining whether there was a statutory violation and engage in a particularized, fact-specific inquiry to determine whether equitable considerations justify issuance of the writ. The court's language muddles the reasoning behind the decision and potentially opens the door for expanded use of mandamus in the future.

A writ of mandamus, as the majority and dissent both recognized, is an extraordinary remedy. For a writ of mandamus to issue, the minimum requirements are as follows: the plaintiff must have an indisputable right to relief; the defendant must have a clear, nondiscretionary duty to act; and there must be no other adequate remedy available to the plaintiff.[40] However, even if these minimum requirements are met, mandamus relief is discretionary, contingent upon "compelling . . . equitable grounds."[41] There is a strong presumption against issuing mandamus: mandamus relief is "a drastic remedy, to be invoked only in extraordinary circumstances"[42] and with "great caution."[43] In particular, "writs of mandamus compelling agency action are 'hardly ever granted.'"[44] As such, courts have declined to issue mandamus even after finding a violation of a statutory mandate.[45]

In deciding whether a particular situation calls for the court to exercise its discretionary power of mandamus to compel delayed agency action, courts have undertaken an individualized, context-sensitive in-

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[39] *Id.* at 270.

[40] Power v. Barnhart, 292 F.3d 781, 784 (D.C. Cir. 2002).

[41] *In re* Medicare Reimbursement Litig., 414 F.3d 7, 10 (D.C. Cir. 2005) (alteration in original) (quoting 13th Reg'l Corp. v. U.S. Dep't of Interior, 654 F.2d 758, 760 (D.C. Cir. 1980)) (internal quotation marks omitted).

[42] Banks v. Office of the Senate Sergeant-at-Arms & Doorkeeper of the U.S. Senate, 471 F.3d 1341, 1349 (D.C. Cir. 2006) (quoting Fornaro v. James, 416 F.3d 63, 69 (D.C. Cir. 2005)) (internal quotation marks omitted).

[43] *Id.* at 1350.

[44] Bond v. U.S. Dep't of Justice, 828 F. Supp. 2d 60, 75 (D.D.C. 2011) (quoting *In re* Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005)).

[45] *See, e.g.*, *In re* United Mine Workers of Am. Int'l Union, 190 F.3d 545, 551 (D.C. Cir. 1999) ("[E]quitable relief, particularly mandamus, does not necessarily follow a finding of a [statutory] violation. . . ." (second and third alterations in original) (quoting *In re* Barr Labs., Inc., 930 F.2d 72, 74 (D.C. Cir. 1991)) (internal quotation marks omitted)); *Barr Labs.*, 930 F.2d at 74 ("The issue before us, then, is not whether the FDA's sluggishness has violated a statutory mandate — it has — but whether we should exercise our equitable powers to enforce the deadline.").

quiry into the equitable grounds for granting the remedy.[46] In *Telecommunications Research & Action Center v. FCC*,[47] the D.C. Circuit articulated several relevant factors, including the reasonableness of the agency's delay as informed by any congressional timetable; the effect on other agency priorities; and the nature and extent of interests prejudiced by delay, including whether human health and welfare are at stake.[48] Courts have also seemed to consider whether agencies appear defiant or merely sluggish.[49] Applying these factors, which generally seem to examine the practical considerations behind the agency's delay, courts have declined to issue the writ even when an agency has missed a statutory deadline by more than the two years that the NRC delayed in this case.[50]

The facts here provided the court with the justification for such an extraordinary remedy. The D.C. Circuit had previously warned NRC that it might grant mandamus if the agency did not act,[51] and still the court demonstrated flexibility by bending over backward to grant an abeyance in 2012 — over a vociferous dissent by Judge Randolph.[52] However, NRC simply continued to ignore the unambiguous statutory deadline. At that point, the continued open recalcitrance became egregious enough to warrant the drastic remedy of mandamus.[53] Moreover, human health and welfare were at stake in the issue of nuclear

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[46] *Cf.* Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992) (describing the judicial inquiry in the context of discretion and flexible standards as "particularistic," *id.* at 59 n.237 (internal quotation marks omitted), and fact sensitive).

[47] 750 F.2d 70 (D.C. Cir. 1984).

[48] *See id.* at 79–80.

[49] *Compare In re* Core Commc'ns, Inc., 531 F.3d 849, 855–59 (D.C. Cir. 2008) (issuing mandamus after chastising agency's disregard of a judicial demand), *and In re* Bluewater Network, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (granting mandamus when an agency had a "clear statutory mandate" and "ha[d] admitted its continuing recalcitrance"), *with* Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 477 (D.C. Cir. 1998) (declining to issue mandamus even after delay of over five years because agency was making progress toward its goal and had not been "contumacious in ignoring court directions to expedite decision-making").

[50] In *In re United Mine Workers of America International Union*, 190 F.3d 545 (D.C. Cir. 1999), the court examined possible health impacts of further delay, other agency priorities, and agency allocation of resources and declined to issue mandamus despite finding that the agency failed to meet statutory timetables. *Id.* at 549–53. In *In re Barr Laboratories, Inc.*, 930 F.2d 72, the court employed a similar fact-specific consideration of public health impacts and agency priorities in declining to issue mandamus. *Id.* at 74–76. In *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094 (D.C. Cir. 2003), the court vacated and remanded the district court's determination that a five-year delay was unreasonable, directing the district court to consider the agency's resource constraints. *Id.* at 1100–02.

[51] *See In re* Aiken Cnty., 645 F.3d 428, 436 (D.C. Cir. 2011).

[52] *In re* Aiken Cnty., No. 11-1271, 2012 WL 3140360 (D.C. Cir. Aug. 3, 2012) (Randolph, J., dissenting) (noting NRC's recent history of "wilfully defying" the law, *id.* at *1, and urging mandamus so that "the Commission's next chapter begins with adherence to the law," *id.* at *2).

[53] *See* sources cited *supra* note 49 (providing examples in which an agency's attitude seems relevant to the mandamus inquiry).

waste disposal, and mandamus would not negatively impact NRC's other priorities because it had dedicated funding for the program.[54]

Instead of focusing on those facts, the court's opinion employed bold constitutional rhetoric about the need to restore the proper division of powers.[55] Rather than narrowly considering the facts at hand, the opinion emphasized the "serious implications for our constitutional structure," raising concerns that "our constitutional system . . . would be significantly altered" by a decision to the contrary.[56] The opinion even veered off into an extended tangent on the Executive's power to decline statutory mandates,[57] which was neither necessary to decide the case nor even a line of argumentation raised by any of the parties. The fact that Judge Randolph felt it necessary to write a separate opinion focusing on factual background[58] further suggests that the court's opinion underplayed those facts.

And yet, the specific factual considerations must have been the basis for the court's decision to issue mandamus because the separation of powers concerns raised by Judge Kavanaugh are present *every* time an agency fails to meet a statutory mandate. The court did recognize factual considerations specific to the case, but relegated them to a footnote responding to Judge Garland's dissent.[59] Whereas Judge Randolph's concurrence and Judge Garland's dissent closely focused on the actual situation at hand,[60] suggesting that those facts should have been emphasized in the majority opinion, the court framed its opinion with separation of powers rhetoric that obfuscates the narrow basis for its holding.

The narrow, fact-sensitive basis for the decision, which the court buried in a footnote, respects the restrained judicial inquiry of mandamus by explaining what particular considerations — beyond the mere fact of an agency's technical violation of a statutory mandate — justify judicial intervention. But by allowing future courts to falsely

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[54] *See* Brief of Petitioners at 49–51, *Aiken Cnty.*, 725 F.3d 255 (No. 11-1271).

[55] *See Aiken Cnty.*, 725 F.3d at 267 ("Our decision today rests on the constitutional authority of Congress, and the respect that the Executive and the Judiciary properly owe to Congress in the circumstances here.").

[56] *Id.*

[57] *See id.* at 261–66 (opinion of Kavanaugh, J.).

[58] *Id.* at 267–68 (Randolph, J., concurring).

[59] *Id.* at 266 & n.12 (majority opinion) (explaining that the court "ha[d] no good choice but to grant the petition," *id.* at 266, because the court had taken a "cautious and incremental approach in prior iterations of this litigation" and declined to issue mandamus against NRC earlier, yet NRC continued to respond with "deliberate and continued agency disregard of a statutory mandate . . . to the point where mandamus appropriately must be granted," *id.* at 267 n.12).

[60] *See id.* at 267 (Randolph, J., concurring) (suggesting that the majority failed to describe certain background facts of importance to the decision); *id.* at 268–70 (Garland, J., dissenting) (criticizing the court for focusing on separation of powers principles rather than the consequences of mandamus in this particular factual situation).

equate the fact of an agency's statutory violation with the extraordinary factual circumstances required for a writ of mandamus, the court's rhetoric opens the door to a muddling of mandamus doctrine. By shifting the focus to the separation of powers concerns related to an agency's disregard of a congressional mandate, the opinion *itself* creates a separation of powers problem with respect to the judicial role in policing agencies, where the judiciary has generally been reluctant to force action out of deference to agencies' superior understanding of the practicalities of a situation. Shifting the focus in this way has the potential to expand the judicial role in second-guessing an agency's discretionary choices. Such rhetoric has significance beyond this current case because the words with which a court justifies its decision may gain precedential significance beyond the decision itself.[61] The court's broadly worded separation of powers language deemphasizes judicial restraint and could make mandamus a "loaded weapon" for future courts to expand the scope of judicial control over agency decisions.[62] Far from raising only an insignificant doctrinal friction, the court's opinion actually acts upon and enables an impulse toward greater judicial assertiveness over agency action that appears across recent D.C. Circuit decisions.[63]

In conclusion, the court went well beyond what was needed to resolve the case and exceeded the limited nature of the judicial inquiry regarding mandamus to make a sweeping separation of powers claim that creates the potential for a greater judicial role in policing agency action. Such a result would run counter to the traditionally limited scope of mandamus and to traditional judicial deference to agency decisionmaking.

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[61] *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 573 (1987) ("Dealing with the use of past precedents thus requires dealing with the presence of the previous decisionmaker's *words*. These words may themselves have authoritative force . . . and thus we often find it difficult to disentangle the effect of a past *decision* from the effect caused by its accompanying words. . . . So long as the words of the past tell us how to view the deeds of the past, it remains difficult to isolate how much of the effect of a past decision is attributable to what a past court has *done* rather than to what it has *said*." (footnote omitted)).

[62] Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (warning of the potential ill effects of precedent justifying wartime internment, which "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need"); *see also* United States v. Rabinowitz, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting) (explaining the "progressive distortion" where "a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision"). While this argument might be dismissed as a "slippery slope" argument, the concern is real. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1090–92 (2003) (listing examples of how language in judicial opinions is seized by later judges to expand the reach of cases beyond their actual holdings).

[63] *See* Doug Kendall & Simon Lazarus, *Broken Circuit: Obstructionism in the Environment's Most Important Court*, 30 ENVTL. F. 36 (2013) (commenting on the D.C. Circuit's recent anti-regulatory stance).