PRESIDENTIAL ADMINISTRATIVE DISCRETION

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The Supreme Court has amplified Article II appointments and removal power over formal administrative adjudication. Both those in favor of and against this trend share assumptions about presidential influence over administrative power. For instance, both assume administrative discretion is at odds with political control. More specifically, unitary executive theorists view presidentialism as a way to limit agencies' discretionary power, while those in favor of an autonomous administrative state believe that the civil service exercises expansive discretion because it is generally insulated from political control. In addition, this conversation overlooks the large expanse of informal administrative adjudication and enforcement decisions, which are neither conditioned by constitutional requirements nor anchored by consistent procedural requirements specified by the Administrative Procedure Act.

Building on these observations, this Article explores and demonstrates how administrative discretion, particularly within informal administrative contexts, is a significant mechanism for advancing presidential influence and control over agency action. It refers to this mechanism as the exercise of presidential administrative discretion. This paradigm is illustrated by case studies arising in regulatory areas including education, food safety, and immigration. Sometimes, informal administrative adjudication is shaped by presidential administration. Other times, White House directives to agencies, or pressure from an overarching presidential agenda, can result in particularized prosecutorial and enforcement discretion.

This Article argues that these examples shed light on under-valued aspects of the relationship between presidential and administrative authority. First, these dynamics show that unitary executive theory and anti-administrativism are, in fact, at odds, because presidents leverage administrative authority and "autonomy" to meet their goals. Second, these dynamics suggest that the civil service is less insulated from the president than is generally assumed. The result of all this, put simply, is that the bureaucracy may be more of a force-multiplier for presidential goals rather than an impediment to them. In theory, this ensures the professional implementation of lawful policies that also reflect the priorities of different presidential administrations over time. Sometimes, this leads to administration that supports the interests of a vulnerable public. More recently, presidential administrative discretion has reduced access to fair process and lawful administrative outcomes.

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Lastly, this Article suggests alterations in longstanding, conventional frameworks of political control over agency action to shape and contain presidential administrative discretion. First, agencies might counterbalance presidential administrative discretion by democratizing administrative procedure. This could be accomplished by engaging the internal separation of powers to leverage a dissenting civil service, ramping up quality assurance within agencies, and controversially—involving public stakeholders in administrative adjudication. Second, the co-equal branches could check the executive. Indeed, the legislature could define informal procedure with greater nuance, through oversight and legislation, to ensure it is not wholly at the mercy of presidential administrative discretion. Also, the Court's skepticism toward administrative discretion and its role in preserving due process could serve to constrain problematic forms of presidential administrative discretion. The judiciary could also stave off executive infringement on legislative and judicial authority resulting from presidential administrative discretion.

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INTRODUCTION

During its first 100 days, the second Trump Administration engaged the administrative state in many controversies. For example, President Trump has taken control of civil servants involved in national security and immigration enforcement, pushing them to act beyond the authority they have been granted by statute.[1] But the exercise of presidential control over the exercise of bureaucratic discretion, or "presidential

[1] *See infra* notes 214–29 and accompanying text.

administrative discretion," is not a brand new phenomenon. Agency adjudicators and front-line officials, whom may be collectively referred to as administrative "decisionmakers" due to the fact that they exercise discretion to make incremental adjudicatory or enforcement decisions, have had their discretion co-opted by presidents for at least the past fifteen years.

Regarding administrative adjudication, during his first term, President Trump changed the process that the Department of Education implemented to determine whether educational institutions had committed fraud[2] and imposed policies on immigration adjudicators to force the denial of valid claims for immigration status.[3] Regarding administrative enforcement discretion, President Biden directed the Food and Drug Administration to set aside the enforcement of infant formula standards,[4] while President Obama guided immigration enforcement officials to delay enforcement of statutory deportation requirements.[5]

At first blush, discretion exercised within these administrative contexts would seem to be autonomous, because it has escaped the political attention and oversight garnered by rulemaking and formal adjudication. Accordingly, those insisting on a zealous model of presidential control subscribe to a caricaturized assessment of federal agencies as independently focused on goals that run counter to the interests of the electorate, while those defending ever-expanding administrative discretion draw on an idealized vision of the administrative state as independently implementing expertise.[6] But neither is truly the case, and a possible result of subscribing to either perspective is an elision of the different forms of accountability, or the lack thereof, encouraged by presidential administration, bureaucratic politicization, and administrative democratization.

To take a step back, political accountability and administrative expertise, competing instruments of legitimacy in administrative procedure, frame the fundamental tension at the heart of the controversial Article II doctrine enhancing political control over

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2 *See infra* Section I.A.1.

3 *See infra* Section I.A.2.

4 *See infra* Section I.B.1.

5 *See infra* notes 192–205 and accompanying text.

6 *See* Noah A. Rosenblum, *Toward a Realist Defense of the Civil Service*, 13 REGUL. REV. IN DEPTH 7, 7–8 (2024) ("Career civil servants are demonized on Capitol Hill, while Republican candidates for high office promise to dismantle the 'Deep State.' . . . Defenders of the civil service . . . . talk about the benefits of expertise and the value of political independence.").

administrative decisionmaking.[7] The Supreme Court has expanded Article II power to ensure that the president and political appointees have control over administrative adjudicators,[8] a position that is consistent with prior Court opinions that both reinforced that the "political branches of government can exercise policy-based control of all agency decisionmaking, including adjudication" and "decline[d] to invalidate agency decisions challenged on grounds of bias."[9] Scholars observe that "the Roberts Court appears bent on championing what one might call presidential adjudication, at least for the vast majority of agency tribunals."[10] Arguably, these decisions are just as, if not more, important than the doctrinal demise of judicial deference to administrative statutory interpretation.[11]

Those who oppose the Court's recent moves believe that political influence will compromise administrative decisional independence, which is understood to maintain high-quality and unbiased decisionmaking.[12] Accordingly, procedure dictated by the Administrative Procedure Act (APA)[13] is an unyielding cornerstone

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7 *See* Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. Chi. L. Rev. 481, 481 (1990) ("Our government is designed so that policy decisions will be made by politically accountable officials. At the same time, the right to an unbiased decisionmaker is one of the most important guarantees of our judicial system.").

8 *See, e.g.*, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (letting stand the Fifth Circuit's decision that, among other matters, the text of Article II of the Constitution does not allow for-cause removal protections for administrative law judges whose agency heads are also protected by for-cause removal provisions); United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) (holding that appointment by the Secretary of Commerce of administrative patent judges with final decisionmaking authority violates the separation of powers); Lucia v. SEC, 138 S. Ct. 2044 (2018) (holding that Securities and Exchange Commission administrative law judges are "officers of the United States," subject to the Constitution's appointments clause).

9 Pierce, *supra* note 7, at 488.

10 Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 Yale L.J. 1769, 1773 (2023).

11 *See* Richard J. Pierce, Jr., *A Quartet of Decisions that Cripple Agencies*, 1 ICF Antitrust Chron., Oct. 2024, at 3 ("The Court's opinion in *Jarkesy* will have far more impact on agencies than its opinion in *Loper Bright*.").

12 Bijal Shah, *The President's Fourth Branch?*, 92 Fordham L. Rev. 499, 526 (2023) [hereinafter Shah, *The President's Fourth Branch?*] ("[A]dministrative independence from political involvement in administration—including, but not limited to, constraints on the presidential power to appoint and remove agency officials—is both consistent with Congress's constitutional authority to form the government and important to the quality of both administrative adjudication and policymaking."). This view reinforces concerns about whether a functional administrative state can exist in the face of increasing politicization. *See, e.g.*, Blake Emerson, *The Existential Challenge to the Administrative State*, 113 Geo. L.J. 1263 (2025) (arguing that the rejection of agencies' legal power and the deterioration of their insulation from the president poses an "existential challenge" to the administrative state).

13 *See, e.g.*, 5 U.S.C. §§ 554, 556, 557 (requiring formal adjudication procedures to include, among other criteria, oral hearings, notice to interested parties, and the opportunity to present evidence and arguments).

of administrative accountability. This view, in turn, undergirds widespread support for an extensive system of administrative discretion exercised within formal adjudication that is independent and politically insulated.

From this perspective, administrative procedure is so reliable that it has become overwrought. Some liberal scholars have decried its "fetishization"[14] and "ossification."[15] Likewise, claims that administrative law is overly trans-substantive and insufficiently context-dependent assume regularity in administrative procedure across diverse areas of regulation.[16] Another truism in this vein: administrative procedure is so plentiful that has become "time-consuming, costly, and cumbersome," which has led to longstanding and recent "calls for more flexible and efficient procedure."[17] This all is consistent with the progressive argument that allowing federal judges to limit political control over administrative adjudication improves the benefits and quality of agency policymaking.[18] For some in favor of expansive administrative discretion, the essential trustworthiness of administrative behavior is now so certain that one might champion an administrative apparatus that establishes a system of public rights and entitlements with only minimal constraints on the bureaucracy,[19] or even hold out administrative agencies as the failsafe

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[14] Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345, 400 (2019) (identifying and criticizing the "false" dogma that "strict procedural rules are both essential to agency legitimacy and necessary to guarantee public accountability").

[15] Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85, 85 (2018) (describing the downsides and benefits of the "ossification" of procedures that "slow administrative action and sometimes thwart it altogether"); *see also* Donald P. Moynihan, *Rescuing State Capacity: Proceduralism, the New Politicization, and Public Policy*, J. Pol. Analysis & Mgmt. 364, 374 (2025) ("Proceduralism is the enemy of any change, not just ideologically motivated change.").

[16] *See, e.g.*, Noah A. Rosenblum, Lev Menand & Ash Ahmed, Beyond Neoliberal Administrative Law: Towards a Political Economy Approach (unpublished conference paper) (on file with author).

[17] Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258, 260 (1978). *See generally* Ezra Klein & Derek Thompson, Abundance (2025); Bagley, *supra* note 14 (revisiting this view).

[18] *See generally* Pierce, *supra* note 7.

[19] Blake Emerson, *Vindicating Public Rights*, 26 U. Pa. J. Const. L. 1424, 1434 (2024) (arguing that "administrative law is grounded in substantive rights" to "healthy, safe, and egalitarian terms of political association" and "flows from the legislative duty to vindicate public rights," which is undermined by the Supreme Court's "anti-administrative principles of statutory interpretation"); *see also* K. Sabeel Rahman, *After* Chevron*: Political Economy and the Future of the Administrative State*, LPE Project (July 23, 2024), https://lpeproject.org/blog/after-chevron-political-economy-and-the-future-of-the-administrative-state [https://perma.cc/3565-JVWT] (suggesting that administrative agencies have an inherent capacity to further a democratic political economy that has otherwise been undercut by the Court's recent "power grab" vis-à-vis the administrative agencies).

for revolutionary change, such as eradicating the Supreme Court, in service of progressive values.[20]

Despite their contrasting views on the benefits of political control and the trustworthiness of administrative discretion, both those who espouse strong presidential control over the civil service and those who promote a powerful administrative state support a vigorous model of administrative adjudication. Indeed, the supposedly anti-administrativist "Roberts Court protects and depends upon a vast system of administrative courts to resolve millions of legal claims outside of Article III."[21] Even as the Court has meaningfully narrowed the kinds of claims that may be heard in administrative courts, as opposed to Article III courts,[22] and recognized the unfairness inherent in the lack of separation of functions within federal agencies,[23] it nonetheless continues to support administrative adjudication for the vast number of cases dealing in "public rights" (including "the collection of revenue, customs enforcement, immigration, and the grant of public benefits").[24] Of course, those supporting a robust administrative state have long championed insulated administrative adjudication.

Furthermore, while anti- and pro-administrativists have different views on the benefits of presidential control, both envision only a few, particularized avenues of political control over the administrative

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[20] *See generally* Ryan D. Doerfler & Samuel Moyn, *After Courts: Democratizing Statutory Law*, 123 MICH. L. REV. 867 (2025).

[21] Cox & Kaufman, *supra* note 10, at 1769; Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 785 (2001) ("Administrators perform the bulk of adjudications in modern Western governments . . . .").

[22] *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2127–28 (2024) (holding that under the Seventh Amendment, a regulated entity is entitled to civil jury trial—a trial in an Article III court—when the Securities and Exchange Commission seeks to impose civil penalties and implying that a similar right to an jury trial may be required in the face of the imposition of civil penalties by other federal agencies); Cox & Kaufman, *supra* note 10, at 1788 (noting that the Court's separation-of-powers formalism requires, in theory, "that most administrative adjudication be moved to Article III courts").

[23] *See Jarkesy*, 144 S. Ct. at 2139 ("[T]he dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. That is the very opposite of the separation of powers that the Constitution demands."); *see also* Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603, 1658 (2024) [hereinafter Shah, *Administrative Subordination*] (noting that the "coexistence" of adjudication and law enforcement within the same agency "undercuts the quality of administrative adjudication"); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 839, 880 (2015) [hereinafter Shah, *Interagency Adjudication*] (providing examples of how a lack of separation of functions has led to unfairness in administrative adjudication).

[24] *Jarkesy*, 144 S. Ct. at 2146 (Gorsuch, J., concurring); Cox & Kaufman, *supra* note 10, at 1813 (noting that "the Court wants to *preserve and empower* the administrative state as a place for millions of people to resolve their legal claims," for instance, in the immigration context).

state. Primarily, these are constitutional avenues of control, such as presidential appointments and removal.[25]

In addition, both those who are in favor of said presidential power and those who are not assume that it is in tension with administrative discretion. Majoritarianism and unitary executive theory, which suggest that control by elected officials—especially the president—ensures that administrative agencies are held accountable,[26] have led to distrust of an extensive system of administrative discretion. Those in support of expansive administrative discretion suggest that the bureaucracy adheres to procedural requirements that safeguard its legitimacy and serve as a reliable constraint on arbitrary decisionmaking.[27] These pro-administrativists believe the legitimacy of the administrative state is based on the extent to which it can develop and apply expertise, which is understood to flourish when bureaucrats are insulated from presidential influence.[28]

As a result, both positions are united in yet another way—they fail to engage with certain realities of administration. The assumption that the exercise of expansive administrative discretion could remain insulated from presidential control, for better or for worse, may be incorrect. This Article argues that the White House and political appointees constrain and influence agency decisionmaking beyond the pathways of appointment and removal—in particular, by controlling the exercise of administrative discretion in informal adjudication and enforcement decisions. Indeed, presidential control filters down to all aspects of administration, including over many agency adjudicators and administrative enforcement officials, despite the understanding that the civil service is insulated from shifting political winds.

This political, upper-level manipulation of administrative discretion curbs agencies' autonomy in order to make civil servants'

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25 *See* Pierce, *supra* note 7, at 481; *see also supra* notes 8–11 and accompanying text.

26 Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 57 (2008) (quoting scholars who believe that political control of agencies will ensure that decisionmaking is accountable to voters).

27 *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 515 (2003) (observing that procedures internal to agencies are "integral to the legitimacy of the administrative state").

28 *See* Bijal Shah, *Administrative Procedural Discretion*, CORNELL L. REV. (forthcoming) (manuscript at 5) (on file with author) [hereinafter Shah, *Administrative Procedural Discretion*] (describing the view that "political influence will compromise decisional independence . . . which is understood to maintain high-quality and unbiased decisionmaking"); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 706 (2016) (utilizing case studies from the Bush and Obama Administrations to show "that not all forms of presidential control are equal," with some forms of presidential control of agencies decreasing accountability, transparency, and accuracy of agency policymaking).

actions more consistent with presidential priorities.[29] Put another way, in contexts where presidential administrative discretion has been exercised, the *locus* of administrative discretion has shifted from the agency adjudicator or enforcement official to political higher-ups in the Executive Branch. This is a different story, for example, than the one of an agency adjudicator or enforcement official making decisions in favor of institutional priorities that transcend presidential administrations[30] or of these decisionmakers run amok due to their own biases or predispositions.[31] As a result, there are likely fewer administrative decisions based in expertise insulated from presidential influence than assumed by either pro- or anti-administrativists.

Essentially, this Article highlights how presidential administrative discretion disrupts both formalist (loosely conservative) and functionalist (loosely liberal or progressive) visions of executive power. Note that the point of this Article is not to assert that agencies are unconstitutional or otherwise that they are better off protected from political control in all instances. Rather, the goal is to recognize that agencies are political creatures, as a descriptive matter, all the way

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[29] *See* Bijal Shah, *Statute-Focused Presidential Administration*, 90 Geo. Wash. L. Rev. 1165, 1180 (2022) [hereinafter Shah, *Presidential Administration*] ("For decades, U.S. Presidents have sought to exert greater control over the apparatus of the administrative state, through strategies of centralizing power, as well as by exerting direct control over administrative initiatives." (citations and quotations omitted)).

[30] *See, e.g.*, Shah, *Administrative Subordination*, *supra* note 23 (discussing how civil servants in the immigration agencies follow Department of Homeland Security's national security priorities instead of other important immigration goals).

[31] *See* Bijal Shah, *A Critical Analysis of Separation-of-Powers Functionalism*, 85 Ohio St. L.J. 1007, 1038–45 (2024) [hereinafter Shah, *Separation-of-Powers Functionalism*] (arguing that agencies "sometimes operate in ways both that are inconsistent with . . . effective government, and that cast doubt on whether an expansive bureaucracy furthers justice" such as by exercising discriminatory or biased discretion (citations omitted)). Internal bias is not the only form of distortion; external/top-down distortion may be similarly prevalent, and may become more prominent as civil servants lose their protections and face job loss due to their lack of partisanship. *See* Exec. Order No. 14,171, 90 Fed. Reg. 8625 (Jan. 20, 2025); Erich Wagner, *OPM Proposes Rule to Formally Revive Schedule F*, Gov't Exec. (Apr. 18, 2025), https://www.govexec.com/workforce/2025/04/opm-proposes-rule-formally-revive-schedule-f/404699 [https://perma.cc/SZZ7-F8RZ]; Shah, *Presidential Administration*, *supra* note 29, at 1200–01 (discussing the possibility of a Trump-era Schedule F recategorization of civil servants and the resulting deterioration of the Pendleton Act and the Civil Service Reform Act); Eric Katz, *Trump Is Planning to Slash 107,000 Federal Jobs Next Year. See Where*, Gov't Exec. (June 3, 2025), https://www.govexec.com/workforce/2025/06/trump-planning-slash-107000-federal-jobs-next-year-see-where/405758 [https://perma.cc/7Q6F-RBQ7] (noting that the current administration is firing administrators, including those in environmental protection, public health, and education agencies, who make policy on the basis of scientific, nonpartisan expertise); Bijal Shah, *On Administration by Fiat*, Mich. L. Rev. (forthcoming) (manuscript at 19) [hereinafter Shah, *On Administration*] (arguing that presidential cooption of the bureaucracy does not eliminate arbitrary administrative discretion but instead leads to "self-serving partisanship").

down. Grappling with this reality is a key step toward identifying and securing a cohesive framework of accountability in the administrative state, particularly at a time when pathways to its continued existence and legitimacy are heavily contested.

On the one hand, this Article asserts that the president utilizes administrative discretion to accomplish their agenda. In fact, presidents harness administrative discretion to build a more unitary executive, which indicates a tension between unitary executive theory and anti-administrativism.[32] This dynamic also suggests a need to disentangle presidentialism and mechanisms of political control, which unitary executive theory conflates. In fact, bureaucrats could use their independent discretionary power in order to be *more* politically responsive, for better or for worse, which may indeed sometimes—but not always—be consistent with agencies' pursuit of the President's wishes.

It may be a mistake for a Supreme Court that espouses unitary executive theory,[33] or even for the president themself,[34] to limit (let alone seek to eliminate) discretionary administrative authority, given its potential as a tool of presidentialism. In any case, presidential administrative discretion is good news for those who fear that agencies are driven by an impulse to build a "deep state" that is increasingly independent from the president.[35] In addition, presidential administrative discretion should—and apparently, does[36]—appeal to the current Court and others who advocate for presidential adjudication.[37]

On the other hand, this Article shows that presidential administrative discretion happens within contexts—such as administrative adjudication and enforcement—that are supposed to be insulated from political influence in order to privilege fair and impartial decisionmaking. As a result, presidential administrative discretion seems to weaken the capacity of internal administrative law to serve as a stable source of administrative accountability. First, the unpredictability of presidential administrative discretion should be of concern to those

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[32] *See generally* Shah, *Separation-of-Powers Functionalism*, *supra* note 31 (arguing that unitary executive theory and anti-administrativism are in tension because the former relies on the extent to which Executive authority is maximized by presidential control over a robust bureaucracy, while the latter advocates for dismantling the administrative state and, by extension, the president's locus and source of amplified power).

[33] *See infra* notes 52–55 and accompanying text.

[34] *See infra* note 53 and accompanying text.

[35] *See* Rosenblum, *supra* note 6, at 7–8.

[36] *See infra* notes 339–42 and accompanying text.

[37] *See supra* note 10 and accompanying text.

who believe, for instance, that decisional independence encourages consistency by inoculating administrative adjudication against political interests. Arguably, "consistency in adjudication is a due process value: We want our legal system to produce like results in like cases. If all individuals in a large class are judged by the same standard, the risk that the government will unfairly single out some individuals for harsh treatment decreases."[38]

Second, presidential administrative discretion ought also to restrain recent administrativist optimism for the inclusionary and progressive possibilities of federal administration. Sometimes, presidential administrative discretion[39] and other forms of unleashed agency discretion[40] reduce undue burdens on people. But other times, the use of administrative discretion as an instrument of political control harms vulnerable people, and results in permanent damage to administration over time. Recently, presidential control of immigration discretion has eroded due process and raised important questions about the ideal limits of both presidential and administrative power.[41] As a result, presidential administrative discretion undermines functionalist, administrativist faith in the expectation that civil servants act in service of impartiality and expertise, for the public good.[42]

This Article continues as follows. Part I presents examples of presidential administrative discretion gathered from diverse regulatory contexts such as education, food safety, and immigration to emphasize that agencies exercise administrative discretion to support the president's goals, and thus in ways that undercut characterizations of the civil service as wayward or expertly independent. These examples of presidential administrative discretion fall into two categories: *procedural* discretion, which agencies use to alter adjudicative processes based on White House directives; and *prosecutorial* or *enforcement* discretion, which agencies exploit to enforce the law depending on the president's goals and priorities.

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38 Pierce, *supra* note 7, at 507.

39 *See, e.g.*, *infra* Section I.B.1, notes 192–205 and accompanying text.

40 *See* Pamela Herd, Donald Moynihan & Amy Widman, *Tackling Administrative Burdens: The Legal Framework and Innovative Practices*, 76 Admin L. Rev. 243, 316–25 (2024) (discussing recommendations for reducing unnecessary burdens on the public when they engage with administrative programs).

41 *See infra* notes 210–29 and accompanying text.

42 *See* Moynihan, *supra* note 15, at 365 (noting that "the outcome of the 2024 U.S. presidential election has made politicization the more pressing threat" compared to the challenges posed to agencies by proceduralism).

Note that administrative procedural discretion is an "administrative action that changes the nature and quality of administrative procedure—not just the outcomes, but the procedure itself—as the result of the discretionary exercise of administrative authority,"[43] while prosecutorial or enforcement discretion involves decisions by front-line enforcement officials to selectively enforce the law,[44] or even to engage in unconventionally aggressive enforcement of the law, in keeping with certain priorities. Fundamentally, procedural discretion and prosecutorial enforcement discretion are intertwined. For example, prosecutorial discretion policies may yield brand new procedures to facilitate the implementation of the stated enforcement priorities.[45]

First, Part I offers an initial foray into navigating understudied spaces where presidentialism influences how informal administrative adjudication operates, and examines the impact of political control on the stability, accessibility, and fairness of proceduralism. To make this point, it presents two case studies. In 2019, the Department of Education, under the first Trump Administration, implemented a discretionary, school-friendly approach making it more difficult for people to win administrative cases with the claim that they should not have to repay their student loans because their educational institutions engaged in fraudulent activity. In 2020 and through today, the Department of Homeland Security (DHS) U.S. Citizenship and Immigration Service (USCIS) granted its adjudicators the discretion to deny benefits regardless of applicants' eligibility, and without any justification at all. In this context, the second Trump Administration's exercise of presidential administrative discretion has climaxed to an executive order halting the administration of asylum law altogether.

Second, Part I highlights that presidentialism and enforcement discretion are sometimes interconnected, as seen in two regulatory contexts. A few years ago, President Biden led the Food and Drug Administration (FDA) to create a policy allowing it to suspend, on a discretionary basis, some requirements for the manufacture and distribution of infant formula in order to allow more of it to reach the market. Likewise, ten years prior, President Obama directed

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[43] Shah, *Administrative Procedural Discretion*, *supra* note 28, at 6. *See generally id.* (uncovering and analyzing the phenomenon of procedural discretion across various agencies and varying adjudicatory processes, based in an original dataset).

[44] *See generally* Shoba Sivaprasad Wadhia, Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases (2017) (discussing prosecutorial discretion, a mechanism by which street-level bureaucrats selectively enforce the law in keeping with certain priorities, in the immigration context).

[45] *See infra* Section I.B.

DHS to identify people who were "low priority" for immigration enforcement. Today, during President Trump's second term, rather than determining who might be spared from deportation based on politically favorable qualities, the president emphasizes "criminality" to intensify deportation.

Part II discusses what might be done to improve the exercise and outcomes of presidential administrative discretion. First, pro-administrativists and anti-administrativists alike have long agreed that agency adjudication should not include extra-governmental participation. Nonetheless, this Part proposes that setting boundaries to presidential administrative discretion—and encouraging its good possibilities—could involve doubling down on external involvement in agency decisionmaking. More specifically, the democratization of agency decisionmaking could balance the exercise of presidential administrative discretion. Leaning on the "internal" or administrative separation of powers[46] could open new avenues of administrative accountability. In this vein, quality assurance measures from within agencies, as well as public participation in agency adjudication, might provide ballast to top-down political control.

Second, there is also a role for the constitutional branches to check the excesses of presidential administrative discretion. Congress can initiate statutory reforms that provide a greater variety of procedural structures, increased insulation for bureaucrats to implement the law without overwhelming political pressure, and opportunities for public participation in adjudication and enforcement decisionmaking. In addition, courts' current skepticism toward administrative power and recent concerns about administrative due process could be leveraged to hold presidential administrative discretion more accountable. Judges have also shown a willingness to act as a bulwark against threats to the separation of powers, including the possible executive infringement on legislative and judicial authority, posed by presidential administrative discretion. Note that like any set of prescriptions, those found in this Part constitute a toolbox for use during favorable political and institutional conditions.

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[46] This scholarship advocates for "a balanced relationship among" institutional actors within the Executive Branch. *See* Bijal Shah, *Toward an Intra-Agency Separation of Powers*, 92 N.Y.U. L. Rev. 1, 2–3 (2017) [hereinafter Shah, *Intra-Agency Separation of Powers*] (first citing Jon D. Michaels, *Of Constitutional Custodians and Regulator Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. Rev., 227, 235 (2016); and then citing Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L.J. 2314 (2006)).

I
Pathways of Presidential Administrative Discretion

Administrative discretion is central to ongoing controversies concerning the nondelegation doctrine,[47] administrative policymaking and statutory interpretation,[48] and agency fact-finding in formal adjudication.[49] Overall, the exercise of discretion is justified by administrators' expertise and capacity to weigh and balance important factors, handle competing interests, and resolve ambiguity in the course of enforcing the law. Nonetheless, scholars have not fully grappled with discretion that is exercised at the outer margins of administration—for instance, discretion exercised in the context of informal adjudication or by bureaucrats enforcing the law on the ground or "on the front lines."

In these contexts, statutory law sometimes does not clarify or specify how it should be implemented by agency decisionmakers, and at other times explicitly grants authority to exercise bureaucratic discretion. Furthermore, it is to be expected that adjudicators and enforcement officials make discretionary choices regardless of how detailed the law is. These administrators may feasibly implement their mandates by taking into account political preferences, while also adhering to the law as required. Applying expertise in administration also involves incorporating value judgments and other institutional priorities.[50] Indeed, it is difficult to imagine a vast and intricate system of governance without an extensive system of discretionary administration.

The decisionmaking processes that both unitary executive theorist and functional administrativist accounts have omitted are commonly

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[47] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001) (identifying limits to agency policymaking discretion under the nondelegation doctrine); Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 Tex. L. Rev. 89, 102–03 (2022) (noting the argument that agency exercise of policymaking discretion constitutes executive encroachment on legislative power).

[48] *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984); Thomas W. Merrill, *The Demise of Deference—and the Rise of Delegation to Interpret?*, 138 Harv. L. Rev. 227, 257–58 (2024) (noting that *Loper Bright* rejected the view, under *Chevron*, that "ambiguity in a regulatory statute constitutes an implied delegation" to the agency of policymaking discretion).

[49] *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 477–78 (1951) (stressing the importance of courts relying on front-line agency factfinding); Sarah Vendzules, *Guilty After Proven Innocent: Hidden Factfinding in Immigration Decision-Making*, 112 Calif. L. Rev. 697 (2024) (noting that fact-finding discretion in immigration adjudication is so expansive that it may draw on information from criminal cases).

[50] *See generally* Shah, *Administrative Subordination*, *supra* note 23; Bijal Shah, *Acknowledging Values in Administration*, Notice & Comment (Nov. 15, 2022), https://www.yalejreg.com/nc/symposium-stiglitz-reasoning-state-03 [https://perma.cc/GZN4-KFDS] (contending that "credible reasoning" by bureaucrats and agency policymakers necessarily involves those actors making value judgments).

known as "informal" adjudication, and also manifest in decisions about how to enforce the law on the ground. The APA does not constrain informal agency action[51] and also neglects to oversee presidential administration.[52] Therefore, presidential control can be exercised over said agency decisionmaking even if constitutional appointments requirements do not apply, and both process and outcomes exist beyond the constraints of the APA or other procedural protections.

This Part explores presidential control over administrative discretion that operates outside the conventional frameworks of accountability discussed in the Introduction. More specifically, this Part demonstrates top-down political influence on informal adjudication, as well as the impact of presidential policy and punishment interests on the exercise of enforcement discretion. A blunt description of the chain of influence is that the president requires agencies to exercise what is ostensibly civil servants' independent discretion in order to further the president's interests, in the contexts of informal adjudication and enforcement.

The mechanism of presidential control over agency decisionmaking involves directives or pressure from the White House[53]—including as filtered through guidance from political appointees within agencies—leading to presidential influence over agency adjudication or enforcement.[54] Agencies might be susceptible to such control due to a combination of norms that direct them to abide by presidential directives and internal administrative law,[55] however formulated and

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51 *See* Shah, *Administrative Procedural Discretion*, *supra* note 28 (manuscript at 6) (citing Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1487–88 (1983)).

52 Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143, 2145 (2023) (hypothesizing that the president's absence from the APA is because "the President played a different role in administration at the time the APA was enacted").

53 *See* ANDREW RUDALEVIGE, BY EXECUTIVE ORDER: BUREAUCRATIC MANAGEMENT AND THE LIMITS OF PRESIDENTIAL POWER, 3–4 (2021) (noting how powerful executive orders can be).

54 There is also the possibility of politicized institutional influence originating in a broader agency mission or ethos forged by political aims, see Shah, *Administrative Subordination*, *supra* note 23, at 1648–59, but this dynamic is not included in this Part. Note, however, that both the president and large, influential agencies are driven by "national security" interests as much as law. *See id.*; Martin Baccardax, A Trump Intel Stake Could Make National Security the New 'Too Big to Fail,' BARRON'S (Aug. 15, 2025, 10:33 AM), https://www.barrons.com/articles/trump-intel-stake-too-big-fail-b66594d9 [https://perma.cc/5UQ7-XDGY].

55 *See* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1241 (2017) ("More and more, presidents and executive branch officials rely on internal issuances and internal administration to achieve policy goals and govern effectively."); *see also* Bijal Shah, *Putting Public Administration Back into Administrative Law*, JOTWELL (June 12, 2018), https://adlaw.jotwell.com/putting-public-administration-back-into-administrative-law

regardless of whether these are consistent with statutory mandates, and of pressure from political high-ups and agency supervisors to exercise discretion or implement the law in particular ways. In some agencies, a commitment to mission, fealty to consistency, interests or approaches that transcend administrations,[56] or bureaucratic resistance or defiance[57] could work as a shield against shifting presidential preferences.

Presidential administrative discretion can result in agencies exercising procedural discretion in order to alter administrative procedure in support of institutional preferences or political goals. For example, discretionary procedural shifts are sometimes directly dictated by the White House.[58] Other times, presidential aims influence agencies to exercise prosecutorial discretion, undergirded by impermanent processes for determining the selective enforcement of law.[59] Importantly, today, both sets of presidential administrative discretion are underpinned by decisionmaking processes that are opaque and variable.

Procedural discretion and enforcement discretion share similarities.[60] Neither form of decisionmaking benefits from the procedural floor that limits discretion in formal adjudication.[61] And unlike other forms of administrative discretion based in expertise, both procedural and prosecutorial discretion are exercised on the front lines, under policies granting regional administrators the discretion to reduce access to process, as opposed to within core administrative functions like rulemaking or formal adjudication. Also, like prosecutorial discretion, procedural discretion appears less rooted in technical expertise, and somewhat more concerned with the conservation of administrative resources and efforts.[62] But unlike prosecutorial discretion, which has been subject to intense scrutiny by elected officials and the public alike,[63] the extent to which procedural discretion has shaped administration and altered the expectations and values to which agency adjudicators are held accountable has gone relatively unstudied until recently.[64]

[https://perma.cc/VG4Y-KNDA] (noting that Metzger and Stack's article "ultimately attaches primary responsibility for the creation and preservation of internal administrative law to the President").

56 Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 Am. J. Pol. Sci. 873 (2007).

57 *See infra* notes 250–54 and accompanying text.

58 *See infra* Section I.A.

59 *See infra* Section I.B.

60 *See generally* Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (1969) (discussing how discretionary power functions in procedural and enforcement contexts).

61 *See supra* note 13.

62 *See generally* Shah, *Administrative Procedural Discretion*, *supra* note 28.

63 *See infra* notes 180–81 and accompanying text.

64 *See* Shah, *Administrative Procedural Discretion*, *supra* note 28.

Presidential administrative discretion has implications for both sides of an essential debate on the separation of powers and the legitimacy of the administrative state. On one side, the judicial aggrandizement of a unitary executive is happening alongside courts' erosion of administrative power and independence. Moreover, those in favor of unitary executive theory, including the current Supreme Court and president, are also committed to "dismantling" the administrative state, which is viewed as oppositional to the president's interests.

First, the Court has established jurisprudence reinforcing a unitary executive at the expense of decisional independence by expanding the category of those who engage in formal adjudication under the APA, known as administrative law judges "(ALJs)," subject to constitutional appointments, at-will removal, and presidential influence.[65] Second, anti-administrativists, including most of the current Court, are engaged in a movement to curtail agency discretion in policymaking.[66] Note that this view tends to be more consistently opposed to independent agency policymaking[67] and to decisional independence in administrative adjudication,[68] and less concerned with expansive discretion in the law and immigration enforcement contexts.[69]

In recent years, the Court has significantly constrained administrative autonomy in the execution of statutory law[70]—a move that is limited only, and at this point merely theoretically, by any potential action Congress might take to specify more expansive agency authority. These efforts are backed by the new major questions doctrine,[71] which

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65 *See supra* notes 8–11 and accompanying text.

66 Rahman, *supra* note 19 (noting "the Court's frontal assault on the scope of the administrative state's power").

67 *See* Rosenblum, *supra* note 6, at 16–17.

68 *See* Shah, *Administrative Procedural Discretion*, *supra* note 28, at 529–32.

69 *See* Bijal Shah, *Administrative Discretion in Criminal and Immigration Enforcement*, 103 Tex. L. Rev. Online 73, 73–74 (2024) (noting that those seeking "to limit administrative capacity to implement statutes flexibly and responsively" gloss "over the anxieties of those who observe the exercise of discretion outside the confines of administrative statutory interpretation that occurs while regulating"—including in immigration and criminal administration).

70 *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (overturning *Chevron* deference); Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024) (holding that an APA claim does not accrue for purposes of 28 U.S.C. § 2401(a) until the plaintiff is injured by final agency action); Ohio v. EPA, 144 S. Ct. 2040, 2053–54 (2024) (predicting that a reviewing court is likely to hold that the rule is invalid because the agency did not respond adequately to comments that criticized the rule).

71 West Virginia v. EPA, 142 S. Ct. 2587, 2612–13 (2022) (expressing skepticism that Congress assigned relatively broad authority to the agency and applying the new major question doctrine's "clear statement rule"); Biden v. Nebraska, 143 S. Ct. 2355, 2369–70 (2023) (striking down President Biden's student loan cancellation policy and characterizing his action as "abolish[ing]" and "supplant[ing]" the text of the statute).

is perhaps an attempt to revive the nondelegation doctrine,[72] and the recent decision to overrule *Chevron*, which required courts to defer to agencies' discretionary interpretations of statute.[73] Notably, President Trump issued an executive order during his previous term that limits administrative policymaking discretion, particularly as the result of agency adjudication.[74]

However, to the extent administrative discretion is a vehicle for presidentialism, including in both the regulatory and decisionmaking contexts, curbing agency "autonomy" in fact constrains presidential power, for better or worse. The argument here is similar to the contention that reducing administrative resources, a complementary goal of anti-administrativists, likewise reduces presidential power because presidents need administrative capacity to implement their agendas.[75]

As a result, thorough presidential influence over administration—which filters down to control over the exercise of discretion during agency adjudication and in the trenches of enforcement decisionmaking—arguably weakens the formalist position that the exercise of administrative discretion allows agencies to act without political accountability, as an unlawful "fourth branch" of government.[76] Put another way, an agency that is tightly constrained (for example, as the result of narrow and precise grants of statutory authority or by judicial fiat) would have no discretion for presidential administration to utilize. As a result, the recent overruling of *Chevron*[77] and subsequent constraints on administrative action arguably limit judicial acquiescence to agency decisionmaking that is saturated with presidential preferences,[78] to the detriment of majoritarianism and the unitary executive model.

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72 *See* Shah, *Separation-of-Powers Functionalism*, *supra* note 31, at 1026 (noting that "a common description of the [new major questions] doctrine is that it is a formalist attempt by the Supreme Court to impose a facsimile of a revived nondelegation doctrine" (citations omitted)).

73 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

74 Exec. Order No. 13,924, 85 Fed. Reg. 31353, 31355 (May 22, 2020) (suggesting that agencies may not make policy by adjudication, and only by notice-and-comment rulemaking); *see also* Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 496 (2021).

75 *See* Nicholas R. Bednar, *Presidential Control and Administrative Capacity*, 77 STAN. L. REV. 823 (2025) (arguing that "insufficient [administrative] capacity prevents Presidents from implementing their policy agendas"); RUDALEVIGE, *supra* note 53 (noting agencies in the Executive Branch shape executive orders).

76 *See* Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, 2033 n.332 (2019) (noting that some courts have characterized agency decisional independence as allowing undue deviation from presidential priorities).

77 *See supra* note 70 and accompanying text.

78 *See* Pierce, *supra* note 7, at 486 (describing *Chevron* as "part of an effort to reconcile the administrative state with the principles of democracy").

On the other side, those who decry the growing politicization of administration valorize administrative discretion, either implicitly or explicitly. A New Deal-era thinker asserted that "discretion within the pattern of government is no less important nor dispensable than the more fundamental aspects of political democracy."[79] Today, it is assumed that the exercise of administrative discretion is a tool of agency independence that allows administrators to apply expertise and holds space for good bureaucratic judgment.[80] This is why the recent overturning of *Chevron*[81]—perhaps the largest blow to administrative discretion since the New Deal expanded such discretion, and the administrative state as a whole, about 100 years ago—has so devastated those who believe that insulated bureaucratic decisionmakers play a key role in forward-thinking regulation.

And yet, presidential administrative discretion casts doubt on the impact—and therefore, the reliability and ultimate importance—of the structural protections to which functionalists are committed and which some take for granted,[82] including procedural requirements or expectations for administrative adjudicators and enforcement-related decisionmakers. The insulation offered by conventions of decisional independence is ostensibly reduced when administrative discretion is politicized. The possible drawbacks of presidential administrative discretion are compounded by the fact that it is effectively untethered from external mechanisms that ensure accountability and consistency, including intra-agency appeals and judicial review. In some instances, the results of presidential administrative discretion may be appealed, but politicized discretionary choices to alter the underlying decisionmaking process remain unexamined. In other cases, even the outcomes of presidential administrative discretion, like other forms of administrative discretion,[83] are unreviewable.

Finally, regarding the impact of presidential administrative discretion on public welfare, the president makes use of their influence to improve accessibility to administrative process. In others, the president seeks to exercise administrative power in ways that favor institutional preferences or even electoral or personal self-interest. Presidential administrative discretion is sometimes exercised to the

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[79] Robert M. Cooper, *Administrative Justice and the Role of Discretion*, 47 YALE L.J. 577, 577 (1938).

[80] *See supra* note 28 and accompanying text.

[81] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[82] *See supra* note 13–20 and accompanying text.

[83] *See* Bijal Shah, *Heckler v. Chaney*, in LEADING CASES IN ADMINISTRATIVE LAW (Weiner, ed., ABA Book Publishing) (forthcoming 2025) (manuscript at 92) (on file with author) (noting that agency "refusal to initiate enforcement proceedings" is unreviewable).

benefit of disempowered communities and may lead to longer-term administrative policies. However, it may also disfavor those with fewer resources and only limited political power.

A. White House Influence Over Informal Adjudication

Conventionally, both anti- and pro-administrativists have overlooked the large swath of administrative decisionmaking that is neither conditioned by political control under Article II appointments and removal requirements[84] nor anchored by the APA.[85] These processes are governed by those administrative adjudicators and personnel who are not subject to constitutional appointment requirements because they are not ALJs,[86] and who therefore escape direct political oversight. In addition, these arenas of decisionmaking, unlike the formal adjudication targeted by recent Court cases,[87] do not benefit from the procedural floor established by the APA.[88]

As a result, much of what the bureaucracy does lacks unified process.[89] For example, informal adjudication "may range from adjudications that include oral hearings, attorneys, and the introduction of substantial evidence, to one-sided decisions based only in limited paperwork review."[90] Furthermore, constitutional due process rights are hard to come by.[91] Indeed, the Court's push toward increasing presidential control over administrative adjudication[92] may render a growing number of agency tribunals more similar to the immigration courts,[93] which notoriously "depart from the promise of 'decisional independence' embedded in the APA and serve as the 'poster child' for the problems with politicized adjudication."[94]

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84 *See supra* notes 8–11 and accompanying text.

85 *See supra* notes 12–13 and accompanying text.

86 *See supra* notes 8–11 and accompanying text (illustrating that administrative law judges are transparently under presidential control more so now than ever before); *supra* note 65 and accompanying text.

87 *See supra* notes 8, 22 and accompanying text.

88 *See supra* note 13 and accompanying text.

89 *See* Shah, *Administrative Subordination*, *supra* note 23, at 1637–38; Shah, *Administrative Procedural Discretion*, *supra* note 28, at 6.

90 Shah, *Administrative Procedural Discretion*, *supra* note 28, at 6.

91 *See id.* at 19–20 ("[T]here are only a few requirements of [constitutional] process that apply to these exercises of discretion, including the guarantees of administrative due process . . . and the requirements of an unbiased decisionmaker." (citations omitted)).

92 *See supra* note 8 and accompanying text.

93 *See* Cox & Kaufman, *supra* note 10, at 1797–98.

94 *Id.* at 1808–09.

Informal adjudication, while acknowledged by the literature,[95] is arguably understudied. For example, insulated administrative process is generally understood to be an ever-present prerequisite or tool for establishing the forms of technical or scientific expertise that justifies administrative discretion. But over thirty years ago, the Administrative Conference of the United States found that a sizeable number of administrators presiding over informal adjudications felt that political pressure shaped their decisionmaking.[96] Since then, scholars have found evidence that the president in power is more likely to influence the outcomes of informal adjudication than the president whose administration appointed the adjudicator.[97] This is the case even if a disproportionate number of adjudicators, regardless of the administration that appointed them, come from agencies[98] that favor harsher outcomes against petitioners.[99] The reasons for this are likely opaque and informal, such as political influence on adjudicative interpretation or pressure felt by adjudicators in the form of employment insecurity,[100] as opposed to the paradigmatic, formal factors that are understood to shape agency adjudicators.[101]

This Section considers case studies in the contexts of education and immigration that showcase presidential influence on administrative adjudication processes and highlight that agencies exercise procedural discretion as a result. Because the following examples focus on adjudicatory procedures, they raise questions about whether the

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[95] *See, e.g.*, Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 388–89 (2021) (noting that "there is no [APA] provision establishing minimum procedures for informal adjudication").

[96] *See* Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 278–79 (1994).

[97] *See* Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 623–26 (2020) (finding that the identity of the president whose administration appointed an immigration judge has no statistically significant effect on immigration adjudication outcomes, while the identity of the president currently in office does have a significant effect). For instance, immigration judges "as a whole—regardless of who appointed them—were more likely to order removal during the Trump Administration than they were during the Obama or Bush II Administrations, respectively, controlling for other variables." *Id.* at 630.

[98] *See id.* at 621–22 (noting that the Trump, Obama, and Bush II appointees in the test population had a similar dispersion of employment backgrounds).

[99] *See id.* at 579 (finding that every presidential administration through the first Trump presidency "disproportionately appointed [immigration judges] with backgrounds in the former Immigration and Naturalization Service, the Department of Homeland Security, or the Department of Justice—agencies responsible for prosecuting noncitizens"). In fact, "Trump appointees had less experience working for these agencies than did Obama or Bush II appointees." *Id.* at 622.

[100] *See* Kim & Semet, *supra* note 97, at 630.

[101] *See supra* notes 8, 12, 22 and accompanying text.

agency adjudicator, influenced by political and presidential priorities, is primarily shifting said procedure in response to those priorities or exercising discretion for substantive purposes as well.

Furthermore, on their face, presidential directives change the procedure underlying administrative decisions in ways that favor the government's interests vis-à-vis petitioners'. This, in turn, puts a thumb on the scale in favor of certain substantive outcomes. All of this reconfirms the longstanding view (as famously articulated by Justice Frankfurter) that the line between procedure and substance is difficult to draw,[102] as well as the understanding that procedural rights may at times be as, if not more, important than substantive ones.[103]

1. Education

The Department of Education has long had a presidential target on its back. In 1980, soon after its inception, President Reagan referred to it as a "bureaucratic boondoggle."[104] Today, President Trump has moved to eradicate it altogether.[105] Nonetheless, the needs of students have also garnered a fair amount of attention in recent years. For instance, the Biden Administration made an unsuccessful effort to forgive student loans for vulnerable borrowers.[106]

This tension between presidential scorn for the Department and the Department's role in protecting students has played out in

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[102] Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) ("Matters of 'substance' and matters of 'procedure' are much talked about . . . as though they defined a great divide . . . . But . . . [n]either 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem . . . .").

[103] *See*, *e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 554 (1990) (noting that the Supreme Court has prioritized procedural due process over substantive immigration determinations for noncitizens inside the U.S., because they may merit more constitutional safeguards than those seeking admission to the country).

[104] Edward B. Fiske, *Reagan Record in Education: Mixed Results*, N.Y. TIMES (Nov. 14, 1982), https://www.nytimes.com/1982/11/14/education/reagan-record-in-education-mixed-results.html [https://perma.cc/G8KT-NNH4].

[105] Exec. Order No. 14,242, 90 Fed. Reg. 13679 (Mar. 20, 2025); *see also* Abbie VanSickle, *Supreme Court Clears the Way for Trump's Cuts to the Education Department*, N.Y. TIMES (July 14, 2025), https://www.nytimes.com/2025/07/14/us/politics/supreme-court-education-department.html [https://perma.cc/FA43-P42T]; Elsie Carson-Holt & Adelaide Parker, *The Gutting of the Department of Education is Worse than You Think*, THE NATION (May 28, 2025), https://www.thenation.com/article/society/trump-cutting-department-of-education-impact [https://perma.cc/8WUU-RBHU]; *What Happens if the Education Department is Abolished?*, NPR (Feb. 21, 2025), https://www.npr.org/2025/02/21/1232862569/what-happens-if-the-education-department-is-abolished [https://perma.cc/ZDB9-ZANX].

[106] *See* Shah, *Separation-of-Powers Functionalism*, *supra* note 31, at 1030 (noting that the Court found the Biden Administration's student loan forgiveness program, which would have benefitted minorities, to be illegitimate under the major questions doctrine).

the politicization of adjudication concerning fraudulent educational institutions.[107] In 2019, the Department of Education, under the Trump Administration, implemented a discretionary, school- and institution-friendly approach making it more difficult for people to bring claims that they should not have to repay their student loans because their educational institutions engaged in fraudulent activity.[108] This policy was eventually reversed by the Biden Administration because it created substantial challenges for students, former and current.[109]

A borrower has a defense against repaying students loans if the school made a substantial misrepresentation on which the borrower relied when deciding to attend school or take out a federal student loan.[110] Indeed, "[b]orrower defense to repayment is a legal ground for discharging federal" student loans.[111] According to Federal Student Aid (FSA), an office of the Department of Education, a beneficiary of student loans "may have a borrower defense to repayment if [their] school engaged in certain misconduct related to the making of a federal loan or the educational services it provided which caused [the beneficiary] harm."[112]

Under the first Trump Administration, then-Secretary of the Department of Education Betsy DeVos issued a policy changing the procedure underlying these cases to make it more difficult for students to bring these claims against educational institutions. As Secretary DeVos declared when introducing the Trump-era policy: "We cannot tolerate fraud in higher education, nor can we tolerate furiously giving away taxpayer money to those who have submitted a false claim or aren't eligible for relief."[113] Furthermore, the Trump-era policy required

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107 *See, e.g.*, Tom Winter & Dartunorro Clark, *Federal Court Approves $25 Million Trump University Settlement*, NBC (Feb. 6, 2018), https://www.nbcnews.com/politics/white-house/federal-court-approves-25-million-trump-university-settlement-n845181 [https://perma.cc/R8JL-KGLM].

108 *See* Press Release, U.S. Dep't of Educ., Secretary DeVos Approves New Methodology for Providing Student Loan Relief to Borrower Defense Applicants (Dec. 10, 2019), https://web.archive.org/web/20210318162127/https:/www.ed.gov/news/press-releases/secretary-devos-approves-new-methodology-providing-student-loan-relief-borrower-defense-applicants [https://perma.cc/C3Z5-JYNK].

109 *Rescission of Borrower Defense Partial Relief Methodology*, U.S. Dep't of Educ. (Aug. 24, 2021), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2021-08-24/rescission-borrower-defense-partial-relief-methodology-ea-id-general-21-51 [https://perma.cc/Y2LN-4PC2].

110 34 C.F.R. § 685.222(d) (2025). By regulation, the Secretary of the Department of Education designates a Department of Education official to review and analyze the borrower's application. 34 C.F.R. § 685.222(e) (2025).

111 *Borrower Defense Loan Discharge*, Fed. Student Aid, https://studentaid.gov/manage-loans/forgiveness-cancellation/borrower-defense [https://perma.cc/6VG5-VTEP].

112 *Id.*

113 Secretary DeVos Approves New Methodology for Providing Student Loan Relief to Borrower Defense Applicants, *supra* note 108 (claiming that the "new methodology treats

that decisions regarding borrower defense to repayment be based on publicly available data regarding student earnings.[114] For example, in order to establish a claim for student loan relief, a borrower had to show that the median graduate earnings at the school they attended were lower than earnings at other comparable programs.[115] In addition, this policy emphasized several factors that rendered qualification for relief more difficult.[116] This policy was controversial enough that it lead to challenges from state and advocacy groups,[117] as well as reprobation from Congress.[118]

In 2021, after reviewing its predecessor's policy, the Biden Administration Department of Education rescinded it as a result of "finding several significant flaws."[119] The Department explained that:

> The overall effect of these flaws is that the methodology unfairly determined relief for students based upon data that may not have included them, and then incorrectly used statistical concepts that were not suited for the task at hand. This led to unachievable cut points for full relief in many cases by requiring program earnings to be negative, and many other instances in which 75 percent relief would be unavailable to borrowers who attended programs with earnings below the amount earned at full-time annual work at the minimum wage.[120]

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students fairly and ensures that taxpayers who did not go to college or who faithfully paid off their student loans do not shoulder student loan costs for those who didn't suffer harm").

114 *Id.*

115 *Id.*

116 The FSA also resumed "notifying borrowers that their loans are ineligible for relief" under certain circumstances. *Id.* (listing factors for ineligibility, such as if borrowers "did not have Direct Loans . . . [,] were not part of the pre-identified class . . . for whom approval was provided in advance[, or] did not make an allegation or provide sufficient evidence that the institution violated an applicable state law").

117 *See, e.g.*, *AG Healey Co-Leads Court Brief in Support of Challenge to Unlawful Trump-Era Borrower Defense Rule*, Mass. Off. of the Att'y Gen. (July 29, 2021), https://www.mass.gov/news/ag-healey-co-leads-court-brief-in-support-of-challenge-to-unlawful-trump-era-borrower-defense-rule [https://perma.cc/2FA2-QKHU]; Press Release, Project on Predatory Student Lending, Project Vows to Challenge DeVos Over Devastating New Borrower Defense Rule that Will Gut Protections for Students (Aug. 30, 2024), https://www.ppsl.org/news/news/press-releases/project-on-predatory-student-lending-vows-to-challenge-devos-over-devastating-new-borrower-defense-rule [https://perma.cc/6GJ8-GDR9].

118 *See* S.J. Res. 56, 116th Cong. (2019) (using the Congressional Review Act to overturn the DeVos policy); Press Release, Eric Jotkoff, Nat'l Educ. Ass'n, Senate Rebukes DeVos with Bipartisan Vote Overturning Cruel Borrower Defense Rule (Mar. 11, 2020), https://www.nea.org/about-nea/media-center/press-releases/senate-rebukes-devos-bipartisan-vote-overturning-cruel-borrower-defense-rule [https://perma.cc/CM45-WB86].

119 *Rescission of Borrower Defense Partial Relief Methodology*, U.S. Dep't of Educ. (Aug. 24, 2021), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2021-08-24/rescission-borrower-defense-partial-relief-methodology-ea-id-general-21-51 [https://perma.cc/N3VM-Y5RQ].

120 *Id.*

In its place, the Department of Education at the time created a new discretionary aspect of adjudication allowing all approved applicants for borrower defense to repayment to be given a rebuttable presumption of full relief of their loans.[121] While this Biden-era policy was student-friendly, it was also notably reactive: The Department noted the new policy was both an effort to streamline debt relief determinations for borrowers and a means to counteract the more complicated, educational institution-friendly Trump approach.[122]

Since then, the status of borrower defense to repayment claims has been complicated. On June 22, 2022, a class of plaintiffs reached a settlement with the Department of Education to resolve the borrower defense applications that were pending as of that date,[123] apparently in the wake of the DeVos policy. Later that year, the Biden Administration also finalized a regulation expanding access to borrower defenses to repayment.[124] However, implementation of that rule was enjoined in 2024 by the Fifth Circuit.[125] Perhaps in anticipation of the rule ultimately being struck down by the Supreme Court,[126] the second

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121 *Id.*

122 Cory Turner, *Education Dept. Begins Rolling Back Trump-Era Policies on Defrauded Students*, NPR (Mar. 18, 2021, 11:06 AM), https://www.npr.org/2021/03/18/978574707/education-dept-begins-rolling-back-trump-era-policies-on-defrauded-students [https://perma.cc/L3HV-WCUM].

123 Sweet v. McMahon, No. 19-CV-03674 (N.D. Cal.). The settlement became effective on January 28, 2023. Sweet v. McMahon *Settlement*, U.S. Dep't of Educ., https://studentaid.gov/announcements-events/sweet-settlement [https://perma.cc/8SSW-ET4N].

124 Institutional Eligibility Under the Higher Education Act of 1965, as Amended; Student Assistance General Provisions; Federal Perkins Loan Program; Federal Family Education Loan Program; and William D. Ford Federal Direct Loan Program, 87 Fed. Reg. 65904 (Nov. 1, 2022); *see also Final Regulations: Borrower Defense to Repayment, Pre-dispute Arbitration, Interest Capitalization, Total and Permanent Disability Discharges, Closed School Discharges, Public Service Loan Forgiveness, and False Certification Discharges*, U.S. Dep't of Educ. (Nov. 1, 2022), https://fsapartners.ed.gov/knowledge-center/library/federal-registers/2022-11-01/final-regulations-borrower-defense-repayment-pre-dispute-arbitration-interest-capitalization-total-and-permanent-disability-discharges-closed-school-discharges-public-service-loan-forgiveness-and [https://perma.cc/4Q9V-NS6S].

125 *See* Career Colls. & Schs. of Tex. v. Dep't of Educ., 98 F.4th 220 (5th Cir. 2024).

126 *See* Natalie Schwartz, *Supreme Court to Examine Biden Administration's Borrower Defense Rule*, Higher Ed Dive (Jan. 14, 2025), https://www.highereddive.com/news/supreme-court-to-examine-biden-administrations-borrower-defense-rule/737226 [https://perma.cc/2N9U-3L9H] (reporting on the Supreme Court's decision to challenge Biden's rule to grant student debt relief); Adam S. Minsky, *Court Blocks Biden Student Loan Forgiveness Rule for Key Program, Leaving Borrowers in Limbo*, Forbes (Apr. 15, 2024, 9:44 AM), https://www.forbes.com/sites/adamminsky/2024/04/15/court-blocks-biden-student-loan-forgiveness-rule-for-key-program-leaving-borrowers-in-limbo [https://perma.cc/ZW7F-ASYV] (reporting that the Supreme Court blocked Biden's student loan forgiveness program); Ben Unglesbee, *Federal Court Blocks Borrower Defense Rules, Says Legal Challenge Will Likely Succeed*, Higher Ed Dive (Apr. 8, 2024), https://www.highereddive.com/news/5th-circuit-blocks-borrower-defense-education-department-for-profit-colleges/712583 [https://perma.cc/XA52-GAKP] (reporting that the Fifth Circuit blocked Biden's borrower defense rule).

Trump Administration's Department of Education has declined to "adjudicate any borrower defense applications under the rule subject to the injunction unless and until the injunction is lifted."[127]

2. *Immigration*

Immigration adjudication is housed in USCIS, which is within DHS, as well as the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR). These adjudications are not bound by the APA's requirements for formal administrative adjudication.[128] As a result, the processes underlying immigration decisions can vary widely. These can include split-second choices in enforcement to paper-based adjudications, as well as more structured—albeit highly inconsistent[129]—immigration court decisions.

The immigration apparatus is also leveraged to accomplish the priorities of political leaders.[130] In addition, immigration adjudication is conditioned by pressure from the president[131] outside the relatively clear-cut auspices of constitutional appointments and removal requirements that govern certain ALJs.[132] For instance, immigration adjudicators, who are not ALJs, are in danger of being hired[133] and fired[134] at random as a result of presidential interests. Therefore, when a person brings an immigration case, their procedure may vary, for example, if the immigration adjudicator is interested in deciding a case as quickly as possible due to institutional expectations, or facing other pressure from higher-ups.

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127 *Borrower Defense Loan Discharge*, *supra* note 111.

128 *See supra* note 13 and accompanying text.

129 *See* Shah, *Administrative Procedural Discretion*, *supra* note 28.

130 *See* Shah, *Administrative Subordination*, *supra* note 23, at 1651–52 (observing a political emphasis on anti-terrorism enforcement in immigration administration); Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 25 Lewis & Clark L. Rev. 71, 81 (2021) (noting the Trump Administration's efforts to "highlight[] the ways USCIS had made legal immigration more difficult").

131 *See generally* Catherine Y. Kim, *The President's Immigration Court*s, 68 Emory L.J. 1 (2018) (detailing how presidents influence immigration judges).

132 *See supra* notes 8–11 and accompanying text.

133 *See* U.S. Dep't of Just., An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General 69–125 (2008), https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf [https://perma.cc/7Q97-KUGA]; *see also* Eric Lichtblau, *Report Faults Aides in Hiring at Justice Dept.*, N.Y. Times (July 29, 2008), https://www.nytimes.com/2008/07/29/washington/29justice.html [https://perma.cc/4CCV-ZU96].

134 *See, e.g.*, Bijal Shah, *Civil Servant Alarm*, 94 Chi.-Kent L. Rev. 627, 645 (2019) [hereinafter Shah, *Civil Servant Alarm*] (analyzing civil servant disobedience); *see also* Ximena Bustillo, *Trump Fires More Immigration Judges Even as He Aims to Increase Deportations*, NPR (Apr. 22, 2025), https://www.npr.org/2025/04/22/nx-s1-5372681/trump-immigration-judges-fired [https://perma.cc/F27P-6LJ8].

More generally, policies of procedural discretion in immigration adjudication, particularly in USCIS, have been influenced by President Trump's public commitment to deportation, but have also flourished under the Biden and Obama Administrations, reflecting both a vigorous institutional commitment to immigration exclusion and the continued electoral powerlessness of noncitizens. USCIS has authority to grant a variety of immigration benefits, and is "clothed with immense power over regulated parties as a benefits-granting agency and retains significant discretion in doling out those benefits."[135] These include determinations regarding whether a noncitizen can be classified as a nonimmigrant worker or as a fiancé(e) of a U.S. citizen; granted humanitarian parole, temporary protected status, refugee status, or asylum; or allowed authorization to work or become a naturalized citizen, among many others.[136]

The USCIS Policy Manual—the agency's central guidance shaping its adjudication of benefits—notes in its introduction that it is "to be followed by all USCIS officers in the performance of their duties but it does not remove their discretion in making adjudicatory decisions."[137] Scholars argue that, while immigration adjudicators regularly depend on USCIS memoranda and policy documents, they also exercise their discretion "in ways that are highly controversial and politically salient."[138]

Since the first Trump presidency, USCIS has leveraged immigration adjudication to emphasize the exclusion of noncitizens through the use of "increased denial rates, increased processing delays, a de facto change to the burden of proof applied to applications, increased procedural burdens, narrowed interpretations of law, and a decrease in customer service in favor of an emphasis on enforcement."[139] Strikingly, USCIS adjudicators may also now exercise procedural discretion to deny benefits regardless of applicants' eligibility, and

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135 Alexander Nabavi-Noori, *Agency Control and Internally Binding Norms*, 131 YALE L.J. 1278, 1332–33 (2022).

136 *See* 1 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL pt. E, ch. 8 (2025), https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8#S-B-4 [https://perma.cc/TT7K-V7SG].

137 *About the Policy Manual*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual [https://perma.cc/5FJ2-SFR3].

138 *See, e.g.*, Nabavi-Noori, *supra* note 135, at 1329 (noting that USCIS is pressured by "the political sensitivity of its mission and the significant discretion that all immigration agencies . . . necessarily wield"). Controversial exercises of discretion include the denial of benefits, *see* Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, to applicants "seeking immigration status [who] have no choice but to comply." Nabavi-Noori, *supra* note 135, at 1331. For further discussion of immigration agency adjudication discretion, see Shah, *Administrative Procedural Discretion*, *supra* note 28, at 20.

139 Family, *supra* note 130, at 81.

without any justification at all. Indeed, in 2020, USCIS changed its Policy Manual to grant its adjudicators maximum discretion to deny benefits.[140] While USCIS instructs adjudicators that an applicant must meet "all applicable threshold eligibility requirements" to be granted an immigration request, "it is legally permissible to deny an application as a matter of discretion without determining whether the requestor is otherwise eligible for the benefit."[141]

This change in guidance renders USCIS's discretionary power particularly strong, in that it is relatively unbounded by standards.[142] If they want, adjudicators may make an eligibility determination when denying on the basis of discretion for the purpose of making the record complete, but they are not required to do so.[143] The net result could be decisional outcomes that are entirely unconnected to any underlying process, which suggests that the decisions are made, in effect, without process. This lack of process is compounded by the fact that a few years earlier, the Trump Administration had implemented a policy allowing adjudicators to reflexively deny an application without requesting additional evidence or even issuing a notice to the applicant that the adjudicator intended to deny the claim.[144] Now, "if an applicant is denied outright without any chance to respond, the applicant's recourse is to pursue an appeal of the denial or to refile the application. Either path leads to increased procedural burdens."[145]

To legally justify guiding its adjudicators to discretionarily deny benefits regardless of whether threshold eligibility has been met, USCIS seemingly relied on case law relating to motions to reopen old cases,[146]

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140 *See* U.S. Citizenship & Immigr. Servs., *supra* note 136.

141 *Id.*

142 Ronald Dworkin, Taking Rights Seriously 32 (1978) (suggesting that "strong" discretion exists not simply when an adjudicator has final authority to make a decision, but when the actor "is simply not bound by standards" at all).

143 *Id.*

144 U.S. Citizenship & Immigr. Servs., Pa-2021-11, Policy Alert: Requests for Evidence and Notices of Intent to Deny (2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-RFEs%26NOIDs.pdf [https://perma.cc/N65Z-WJF3] (discussing the Trump Administration's 2018 policy change within Biden Administration guidance abandoning the change); *see also* Julie Hirschfeld Davis & Michael D. Shear, Border Wars: Inside Trump's Assault on Immigration 320–21 (2019).

145 Family, *supra* note 130, at 88.

146 *See* Peggy Gleason, Immigrant Legal Res. Ctr., USCIS Policy Manual Makes Sweeping Changes to Discretion 3–4 (2021), https://www.ilrc.org/sites/default/files/resources/sweeping_changes_in_uscis_policy_manual_for_discretion_3.19.21.pdf [https://perma.cc/6PA2-JFCL] ("The policy manual adopts discretion formulas . . . and applies them indiscriminately to the very different benefits applications described above."); 1 U.S. Citizenship & Immigr. Servs., Policy Manual, pt. E, ch. 8, at B.4 n.45 (citing Immigr. & Naturalization Serv. v. Abudu, 485 U.S. 94, 105 (1988); Immigr. & Naturalization Serv. v. Bagamasbad, 429 U.S. 24, 26 (1976); Immigr. & Naturalization Serv. v. Rios-Pineda, 471 U.S.

ignoring previous administrative precedent, mentioned in the USCIS Policy Manual, that provided a framework for applying discretion in immigration that emphasized the importance of considering all relevant factors on a case-by-case basis.[147] Advocates argue that the changes to the USCIS Policy Manual both should have gone through a notice-and-comment rulemaking process and are contrary to law because they are not explicitly authorized by regulation.[148] Immigration statutes also do not specify this level of discretion, but seem to offer wiggle room for political leaders in the Executive Branch to direct immigration enforcement.[149] In any case, "[w]hile discretion has always been an element of [immigration] decision making, the new guidance places new emphasis on the ability of officers to deny a benefit where an applicant meets the statutory requirements."[150]

In 2021, USCIS publicly announced additional discretionary factors to be weighed that had been added to the Policy Manual in the previous year: in particular, that an applicant "on the pathway" to permanent citizenship may be denied employment authorization as a matter of discretion,[151] despite a lack of clear legal foundation for this move.[152] Now, the policy guidance requires proof of a host of additional "compelling circumstances" beyond those compelled by the

444 (1985)), https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8#footnotelink-45 [https://perma.cc/C2K7-E5C8].

147 *See* Matter of Arai, 13 I&N Dec. 494 (BIA 1970); *see also Chapter 10 - Legal Analysis and Use of Discretion*, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10 [https://perma.cc/7VPV-67C4] (outlining the factor-based discretion framework).

148 *See, e.g.*, Gleason, *supra* note 146, at 7, https://www.ilrc.org/sites/default/files/resources/sweeping_changes_in_uscis_policy_manual_for_discretion_3.19.21.pdf [https://perma.cc/6PA2-JFCL] (arguing that the "policy manual additions on discretion were fundamental changes to eligibility for benefits that require a formal notice and comment rulemaking process under the Administrative Procedure Act, not a mere release of administrative guidance in the policy manual that had no public input," and that "[t]he discretionary factors listed in the policy manual are not in the regulations at 8 C.F.R. 274a.12(c) and are contrary to law").

149 Arguably, USCIS's discretion is enabled partly "by statute, partly as a consequence of vague statutory requirements." Nabavi-Noori, *supra* note 135, at 1332. Notably, there are several immigration provisions that authorize the use of administrative discretion in granting immigration benefits. *See, e.g.*, 8 U.S.C. § 1255; 8 U.S.C. § 1361; 8 C.F.R. § 274; Homeland Security Act of 2002, Pub. L. No. 107-296, § 1512(e)(1), 116 Stat. 2135, 2311; *see also* Adam B. Cox & Cristina M. Rodríguez, *The president and Immigration Law*, 119 Yale L.J. 458 (2009) (arguing that the president has considerable discretion over how immigration law is enforced).

150 Gleason, *supra* note 146, at 2.

151 *Policy Alert*, U.S. Citizenship & Immigr. Servs. (Jan. 14, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210114-DiscretionaryEADForAOSAndDA.pdf [https://perma.cc/J4AN-ZBA6].

152 Gleason, *supra* note 146, at 12 ("To challenge these new complex positive and negative factors for employment authorization, advocates can argue that none of these factors besides economic necessity or support of family members are found in the underlying regulation at 8 C.F.R. 274a.12(c)(14).").

underlying regulation (such as economic necessity), and even these do not guarantee access to employment authorization.[153]

As a result of all these policies, USCIS adjudicators both require applicants to jump through additional hurdles, unsubstantiated by the law (but not necessarily proscribed by it) in order to establish eligibility for immigration status in the first instance, and have carte blanche to deny benefits to even those noncitizens that are eligible. As to impact, on the one hand, this immense range of discretion allows for quick and responsive decisionmaking unburdened by justification. It also reduces the overall burden of governmental provision of benefits. On the other hand, these policies further the restrictionist immigration aims of political leadership, shared by both political parties as of late,[154] in a manner that leverages administrative discretion to "increase burdens on immigration applicants by narrowing the agency's interpretations of law."[155]

Perhaps unsurprisingly,[156] it is unclear as to whether the exercise of discretion to deny benefits without regard to applicants' eligibility is in fact a procedural or substantive determination. Certainly, discretion is exercised in ways that bear directly on the substantive outcome and appear to excise process altogether. However, the discretion exercised by the adjudicator is described and framed by the guidance in terms of a procedural choice. In any case, denial of asylum claims as well as delays in the processing of employment authorization and applications for citizenship both increased under the first Trump presidency and remained high during President Biden's tenure.[157]

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153 *See id.* at 6. These include factors like serious illness or retaliation by a previous employer, above and beyond "unemployment or job loss, in and of itself." 10 U.S. Citizenship & Immigr. Servs., Policy Manual pt. B, ch. 3 (2025), https://www.uscis.gov/policy-manual/volume-10-part-b-chapter-3#_ftnref1 [https://perma.cc/4DS8-T783].

154 *See*, *e.g.*, Brian Bennett & Nik Popli, *What Donald Trump's Win Means for Immigration*, TIME (Nov. 6, 2024, 9:00 AM), https://time.com/7171654/donald-trump-immigration-plan-2024 [https://perma.cc/4RWV-BJ8Y] (detailing various statements made by Donald Trump regarding immigration restrictions); *FACT SHEET: President Biden Announces New Actions to Secure the Border*, White House (June 4, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/06/04/fact-sheet-president-biden-announces-new-actions-to-secure-the-border [https://perma.cc/2PGV-D3X4] (announcing an executive action that will bar migrants who illegally crossed Southern border from being granted asylum).

155 Nabavi-Noori, *supra* note 135, at 1331.

156 *See supra* note 102 and accompanying text.

157 *See* U.S. Dep't of Just., Executive Office for Immigration Review Adjudication Statistics (2023), https://www.justice.gov/eoir/page/file/1248491/dl [https://perma.cc/F99E-EUQM]; *Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year*, U.S. Citizenship & Immigr. Servs. (2025), https://egov.uscis.gov/processing-times/historic-pt [https://perma.cc/PD4L-64RK].

In his second term, President Trump has come to exercise an immense amount of presidential administrative discretion in this context. During his first week in office, he issued a proclamation restricting "access to the provisions of the immigration laws that would enable any illegal alien involved in an invasion across the southern border of the United States to remain in the United States, such as asylum,"[158] after having already shut down an important tool without which noncitizens may be unable to access asylum altogether.[159] Here, rather than putting forward guidance discouraging grants of asylum by USCIS adjudicators on a case-by-case basis, President Trump has effectively, if perhaps unlawfully, exercised overarching discretion to eliminate grants of asylum at the Southern border under any circumstances.

Finally, adjudicator training may also instigate procedural discretion in support of White House priorities. In 1996, Congress passed immigration legislation to allow for "expedited removal" and "credible fear" determinations.[160] The former allows USCIS to more quickly deport a noncitizen at the border who is not found to be a U.S. citizen, lawful permanent resident, asylee, or refugee,[161] while the latter is initiated to determine whether noncitizens subject to deportation are credibly afraid of persecution or torture.[162] A year later, the DOJ issued a rule to implement the statute.[163] Rather than defining credible fear further, however, DOJ explained that it would allow USCIS adjudicators to "receive 'extensive training' on 'the purpose of the credible fear standard and how it is to be applied to particular cases' in order to 'ensure that the standard is implemented in a way which

158 *FACT SHEET: President Donald J. Trump Protects the States and the American People by Closing the Border to Illegals via Proclamation*, White House (Jan. 22, 2025), https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-protects-the-states-and-the-american-people-by-closing-the-border-to-illegals-via-proclamation [https://perma.cc/JUD3-UVLN]; *see also* Sergio Martínez-Beltrán, *President Trump's Suspension of Asylum Marks A Break from U.S. Past*, NPR (Jan. 23, 2025, 12:14 PM), https://www.npr.org/2025/01/23/nx-s1-5272406/trump-suspends-asylum [https://perma.cc/X8XP-VU3S] (noting that President Trump's suspension of "asylum [at] the southern border" is "unprecedented").

159 *See* Eyder Peralta, *Migrants In Mexico Left In Despair After Trump Suspends Asylum Application App*, NPR (Jan. 21, 2025, 4:00 AM), https://www.npr.org/2025/01/21/nx-s1-5268750/migrants-in-mexico-left-in-despair-after-trump-suspends-asylum-application-app [https://perma.cc/WR3Q-HKEC].

160 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546 (codified at 8 U.S.C. § 1225).

161 U.S. Dep't of Just., Exec. Off. for Immigr. Rev., Immigration Court Practice Manual § 7.4(f) (2025), https://www.justice.gov/eoir/reference-materials/ic/chapter-7/4 [https://perma.cc/7FRD-5LVL].

162 *Id.* § 7.4(d).

163 Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 Tul. L. Rev. 707, 737 (2019).

will *encourage flexibility and a broad application* of the statutory standard.'"[164] However, officials under both the Obama and Trump Administrations "revised the training materials for immigration officers to provide an increasingly *less flexible and heightened* standard for credible fear."[165] Relatedly, under President Biden, credible fear determinations began to require an opt-in system for asylum claimants in expedited removal.[166] While immigration officials formerly would ask each arriving noncitizen if they had a fear of return to their home country, claimants now need to affirmatively state they fear persecution,[167] a practice that the Ninth Circuit has allowed to continue.[168] This switch has reduced credible fear interviews.

USCIS decisions are not subject to judicial review, which is one reason why adjudicators are able to exercise expansive discretion,[169] potentially to the point of ignoring applicants' qualifications altogether. This expansive framework of discretion, which suspends all requirements for justification and reduces noncitizens' ability to support their claims, can allow subjectivity to influence immigration review in negative ways and therefore open the door to discriminatory decisionmaking. As a result, immigration decisions exclude a consistent and stable consideration of eligibility and may be skewed against applicants with fewer resources to pursue their cases or against whom USCIS adjudicators hold some kind of bias, either individually or institutionally.[170] This may also call into question the essential legitimacy

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164 *Id*.

165 *Id.* (citing immigration regulations, DOJ memoranda, and USCIS asylum officer training).

166 Proclamation No. 10773, 89 Fed. Reg. 48487 (June 7, 2024); Securing the Border, 89 Fed. Reg. 48710, 48719 (June 7, 2024) (to be codified at 8 C.F.R. pts. 208 and 235).

167 Circumvention of Lawful Pathways 88 Fed. Reg. 31314, 31322 (May 16, 2023) (to be codified at 8 C.F.R. pt. 208); 8 C.F.R. § 235.15(b)(4) (2024); *Fact Sheet: Presidential Proclamation to Suspend and Limit Entry and Joint DHS-DOJ Interim Final Rule to Restrict Asylum During High Encounters at the Southern Border*, Dep't of Homeland Sec. (June 4, 2024), https://www.dhs.gov/archive/news/2024/06/04/fact-sheet-presidential-proclamation-suspend-and-limit-entry-and-joint-dhs-doj [https://perma.cc/X6KY-SNZA].

168 *See Credible Fear Screenings*, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/credible-fear-screenings [https://perma.cc/69HC-74BN] (noting that in 2023, the Ninth Circuit stayed a lower court order that would have eliminated the need for noncitizens caught crossing into the southwestern United States to demonstrate their eligibility for asylum).

169 *See* Nabavi-Noori, *supra* note 135, at 1342 (using the example of USCIS enforcement discretion to illustrate how "the ultimate power the agency is constraining by promulgating guidance is highly discretionary and typically free from probing judicial review").

170 *See* Shah, *Administrative Subordination*, *supra* note 23, at 1651–52 (discussing institutional agency bias against humanitarian immigration); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 Stan. L. Rev. 413, 422, 435, 439, 443 (2007) (detailing various discrepancies in outcomes when controlling for several factors in immigration adjudication).

of the agency's implementation of the law in this context, especially to the extent the outcomes of presidential administrative discretion cut against statutory or regulatory requirements.[171]

B. Presidential Control Over Administrative Enforcement

Prosecutorial discretion prioritizes or limits the enforcement of particular statutes, at the agency's discretion, in order to contend with pressing concerns.[172] Prosecutorial discretion can refer to the selective administrative enforcement of punitive civil sanctions,[173] and is particularly common in immigration,[174] although it also exists in other contexts.[175] Significant administrative discretion may be exercised, including decisions to recognize and address a given situation as a matter of law enforcement.

Presidential administrative discretion impacts agencies' decisions to engage in prosecutorial discretion. Often, street-level bureaucrats are guided by agency leadership, influenced by political concerns, to prioritize how they enforce the law.[176] In this way, "[p]rosecutorial discretion can play a critical role in mitigating the dangers of overly punitive legislative schemes," but when taken "to its extreme, . . . prosecutorial discretion could place too great a thumb on the scale of presidential power . . . ."[177] In some cases, these exercises of discretion may become well-publicized, especially when they involve selective enforcement in high-profile contexts,[178] and result in controversy stemming from public intuition (correct or not) that prosecutorial discretion allows the president to undermine agency enforcement of the law.[179] In other instances, violent

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171 *See supra* notes 148–49, 158 and accompanying text.

172 *See supra* note 15 and accompanying text.

173 Peter L. Markowitz, *Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty*, 97 B.U. L. Rev. 489, 495 (2017).

174 *See* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 Colum. L. Rev. 2049, 2077–78 (2021) (noting "the long history of immigration prosecutorial discretion"). *See generally* Wadhia, *supra* note 44.

175 *See, e.g.*, Robert B. Bell & Kristin Millay, *The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Eggs?*, 33 Antitrust 80, 82 (2018) (discussing prosecutorial discretion in the antitrust context).

176 *See supra* notes 21, 27 and accompanying text.

177 Markowitz, *supra* note 173, at 514.

178 Michael Kagan, U.S. v. Texas *and the Many Shades of Prosecutorial Discretion*, Notice & Comment (July 10, 2023), https://www.yalejreg.com/nc/the-many-shades-of-prosecutorial-discretion [https://perma.cc/RKX4-HAB8] (discussing the Fifth Circuit's *United States v. Texas* holding that the Executive Branch has a high degree of prosecutorial discretion in immigration law enforcement).

179 *See* Markowitz, *supra* note 173, at 489; *see also* Shah, *Presidential Administration*, *supra* note 29, at 1167.

or unlawful agency actions may be rendered invisible by discretionary enforcement decisions made without process.

This Section illustrates how presidential administrative discretion plays out in decisions underlying prosecutorial and enforcement discretion, using the food safety and immigration enforcement contexts as case studies. Sometimes, prosecutorial discretion reduces punitive law enforcement. However, it may be difficult for vulnerable individuals to rely on the safety and stability of procedure established in the wake of prosecutorial discretion policies. Moreover, recently, presidential administrative discretion has led to unlawful executive enforcement behavior. Because the following examples focus on enforcement of the law, they raise questions about whether the front-line official is engaging in expertise-based interpretation and implementation, or exercising discretion that is primarily shaped by political expectations. In short, the following case studies do not indicate that the agency has engaged in an enforcement action based on its view of what the law means or actually prohibits, but rather, that the agency is seeking to apply the law—or go beyond the law—to further presidential priorities.

1. Food and Drug

Soon after the beginning of the COVID-19 pandemic, there was a nationwide baby formula shortage that drastically impacted families with young children.[180] Many parents of infants searched frantically to find food for their babies. In 2022, at the urging of President Biden,[181] the FDA engaged in a formal exercise of prosecutorial discretion to increase the availability of infant formula.[182] In particular, the agency exercised "enforcement discretion with respect to certain requirements for infant formulas that may not comply with certain statutory and

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[180] *See* Caitlyn Keeve, Aleia Fobia & Jennifer Berkley, *About 20% of Parents Reported Difficulty Getting Infant Formula in Summer 2023, Down from 35% in Fall 2022*, U.S. Census Bureau (Apr. 2, 2024), https://www.census.gov/library/stories/2024/04/infant-formula-shortage.html [https://perma.cc/4A63-AGMS].

[181] *See FACT SHEET: President Biden Announces Additional Steps to Address Infant Formula Shortage*, White House (May 12, 2022), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/05/12/fact-sheet-president-biden-announces-additional-steps-to-address-infant-formula-shortage [https://perma.cc/75NC-T99Y] (noting that "to address the shortage of infant formula," President Biden announced that the FDA would "cut red tape").

[182] *Enforcement Discretion to Manufacturers to Increase Infant Formula Supplies*, Food & Drug Admin. (Jan. 9, 2023), https://www.fda.gov/food/infant-formula-guidance-documents-regulatory-information/enforcement-discretion-manufacturers-increase-infant-formula-supplies [https://perma.cc/SKF5-NC7R].

regulatory requirements"[183] in order to increase the supply of infant formula in the United States during a time when it was in dire, short supply.[184]

This effort was implemented via a guidance document created by the FDA outlining its plan to exercise discretion in order to decide whether to accept baby formula that has not met certain requirements.[185] This guidance to the industry included detailed lists of recommended information a manufacturer seeking a discretionary waiver of enforcement should supply to the agency, but did not provide much detail about how the agency would ultimately make decisions about which companies would be exempt from legal requirements.

As part of this new process, the agency noted that it might be more likely to exercise its discretion for formula that does not follow labeling guidelines, and less likely to do so for formula that is missing a key nutritional ingredient.[186] In addition, it provided a list of information that manufacturers seeking discretionary waivers of enforcement should provide to the agency, as well as details about information or studies that manufacturers who receive discretionary waivers of enforcement should provide to the agency to extend the period of selective enforcement.[187] However, the agency neither specified exactly how it would make its enforcement decisions nor described its requirements for extending the period of grace, noting only that those who are recipients of discretionary non-enforcement would receive a "letter of enforcement discretion issued to the manufacturer."[188]

Reasonably, the vagueness of the policy may have been a function of the FDA attempting to exercise enforcement discretion in a manner that does not alter clear legal requirements, resulting in the agency's inability to give regulated parties any ironclad assurances about what modifications to infant formula would be tolerated in the interest of accelerating public access to it. The FDA, like any agency implementing

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[183] *See generally* Food & Drug Admin., FDA-2022-D-0814, Infant Formula Enforcement Discretion Policy: Guidance for Industry 3, 5 (2022), https://www.fda.gov/media/158476/download [https://perma.cc/RCP6-T33A] (describing the "information that an infant formula manufacturer should provide to FDA if the manufacturer wishes to have FDA consider the exercise of enforcement discretion relating to the introduction" of infant formula that "may not comply with all FDA statutory and regulatory requirements").

[184] *Id.* at 3.

[185] *See generally id.*

[186] *Id.* at 5–6.

[187] *See generally* Food & Drug Admin., FDA-2022-D-0814, Infant Formula Transition Plan for Exercise of Enforcement Discretion: Guidance for Industry (2022), https://www.fda.gov/media/161904/download [https://perma.cc/Y7L4-FH94].

[188] *See id.* at 7.

inflexible law while responding to new challenges,[189] has to walk a fine line between providing guidance and nonetheless not overstepping its statutory authority.

Still, this lack of clarity makes it difficult for consumers of infant products to evaluate the quality of the exempted formula, let alone hold the FDA accountable. For instance, around the same time as the implementation of this enforcement discretion policy and its attendant new guidelines and procedures, the FDA faced a safety issue that led to infant deaths and a substantial recall of baby formula.[190] Notably, the manufacturer at issue, Abbott, was also approved for enforcement discretion.[191] Even though it is difficult to make an obvious connection between opaque enforcement discretion and the distribution of harmful formula, this example raises meaningful concerns about whether the FDA properly ensured the safety of exempted formula, particularly the formula produced by Abbott.

2. Immigration

Beginning in 2001 with the Development, Relief, and Education for Alien Minors ("DREAM") Act and into 2019, at least ten versions of legislation were introduced in Congress to provide undocumented minors with a path to immigration status and citizenship.[192] However, none became law. As a result, in 2012, DHS was directed by President Obama to identify priorities for immigration enforcement, and to implement prosecutorial discretion that deferred, temporarily, the enforcement of punitive immigration law for certain communities of noncitizens.[193]

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189 *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. Pa. L. Rev. 1 (2014).

190 *See FACT SHEET: President Biden Announces Additional Steps to Address Infant Formula Shortage*, *supra* note 181; *FDA Calls for Enhanced Safety Measures in Letter to Powdered Infant Formula Industry*, Food & Drug Admin. (Mar. 8, 2023), https://www.fda.gov/food/hfp-constituent-updates/fda-calls-enhanced-safety-measures-letter-powdered-infant-formula-industry [https://perma.cc/VH2N-CNKL]; Kate Gibson, *FDA "Inadvertently Archived" Complaint About Abbott Infant Formula Plant, Audit Says*, CBS News (June 14, 2024, 2:02 PM), https://www.cbsnews.com/news/fda-infant-formula-abbott [https://perma.cc/EJ7T-6NYZ].

191 *See Enforcement Discretion to Manufacturers to Increase Infant Formula Supplies*, *supra* note 182.

192 *See, e.g.*, H.R. 2820, 116th Cong. (2019); H.R. 1468, 115th Cong. (2017); H.R. 3591, 115th Cong. (2017); H.R. 1842, 112th Cong. (2011); S. 952, 112th Cong. (2011); H.R. 5241, 111th Cong. (2010); S. 729, 111th Cong. (2010); S. 3992, 111th Cong. (2010); S. 2205, 110th Cong. (2007); H.R. 1275, 110th Cong. (2007); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2005); S. 1545, 108th Cong. (2003); S. 1291, 107th Cong. (2001).

193 *See* Kagan, *supra* note 178.

This policy, known as the Deferred Action for Childhood Arrivals program, or "DACA," was a temporary policy implemented by DHS identifying people who were "low priority" for immigration enforcement, in order to allow noncitizens who know only the United States as home to stay in the country.[194] This initiative built on previous efforts to focus limited immigration enforcement resources.[195] As a result, the Administration created a new process for determining whether a noncitizen fit the requisite criteria that would allow (but not require) DHS immigration agencies to defer deportation.[196]

More specifically, this policy could benefit those showing they were noncitizens between the ages of fifteen and thirty, who had been brought to the United States as children more than five years previously, and who had either graduated from high school or college in the United States, earned a GED, or served in the U.S. Armed Forces. This subset of noncitizens was eligible for—albeit not necessarily granted, as this was up to the discretion of each bureaucrat adjudicating each petition—deferred deportation in two-year increments and became eligible under preexisting regulations for certain attendant benefits (namely, employment authorization).[197] Two years after the initial DACA memo, DHS issued an expansion of DACA's prosecutorial discretion program, called Deferred Action for Parents of Americans and Lawful Permanent Residents, or "DAPA," which augmented DACA's procedural requirements to expand program eligibility.[198] It did so by removing the age cap, expanding it to the parents of the so-called Dreamers, extending the DACA renewal and work authorization to three-year increments, and adjusting the date-of-entry requirement from June 15, 2007 to January 1, 2010.[199]

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[194] Memorandum from Janet Napolitano, Sec'y of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/BQ8H-ZSQS].

[195] Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/9TQP-3QRS].

[196] *Id.*

[197] *Id.*

[198] *See* Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 2–4 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf [https://perma.cc/W7PH-956E].

[199] *Id.*

On the one hand, this new process did not guarantee benefits to those who fit its criteria; in fact, its implementation discretionary in a manner that favored denial.[200] At around the same time, DHS came under fire for making choices to enforce immigration law more so against certain noncitizens rather than others.[201] On the other hand, as a result of lawsuits brought by pro-deportation activists, the DACA program was subject to judicial scrutiny regarding whether it were promulgated through adequate process and whether it failed to rise above arbitrary and capricious behavior.[202]

Notably, the Supreme Court recognized some reliance interests present in DACA's discretionary set of procedures.[203] This means that the additional procedure resulting from DACA was ultimately difficult for the Trump Administration to revoke, which suggests that presidential administrative discretion can lead to concrete, somewhat enduring ("sticky") policy. Indeed, many noncitizens currently enjoy DACA benefits. Nonetheless, DAPA (the descendent of DACA) was invalidated by a lawsuit,[204] and due to a federal court order, first-time DACA applications also cannot currently be adjudicated by the agency.[205] These decisions will be difficult to reverse, and noncitizens face difficulties in advocating for new policies establishing temporary relief from immigration enforcement.

Other, more recent examples of this type of prosecutorial discretion include President Biden's expansion of the Venezuelan parole process to Cuba, Haiti, and Nicaragua, with "[u]p to 30,000 individuals per

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200 *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/DACA [https://perma.cc/CT3Q-WH3J] ("If USCIS denies your request for DACA, you cannot file an administrative appeal or a motion to reopen or reconsider. . . . USCIS will not review its discretionary determination to deny your request for DACA." (citing 8 CFR § 23.23(c)(3))).

201 *See* Carrie Rosenbaum, *Priorities and the States of Implicit Bias in Crimmigration*, Regul. Rev. (Apr. 13, 2022), https://www.theregreview.org/2022/04/13/rosenbaum-implicit-bias-in-crimmigration [https://perma.cc/XJ9R-MSVB] (arguing that under DHS's Priority Enforcement Program, Latinos were disproportionately targeted for deportation due to criminal convictions).

202 *See, e.g.*, DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909–15 (2020).

203 *See id.* at 1913 ("When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." (citations and quotations omitted)); Haiyun Damon-Feng, *Administrative Reliance*, 73 Duke L.J. 1743, 1787–89 (2024) (explaining that the Court in *Regents* ultimately recognized "legally cognizable reliance interests in DACA").

204 United States v. Texas, 136 S. Ct. 2271 (2016), *aff'g* 809 F.3d 134 (5th Cir. 2015) (finding that DAPA was arbitrary and capricious because it did not go through an APA notice-and-comment process and based on a substantive APA analysis that DAPA exceeded executive authority under the Immigration and Nationality Act).

205 Order of Permanent Injunction at 4, Texas v. United States, No. 18-CV-00068 (S.D. Tex. July 16, 2021).

month from these four countries, who have an eligible sponsor and pass vetting and background checks"[206] eligible for two-year parole, as well as the Biden Administration's directive to streamline legal permanent resident procedures in a manner that benefited undocumented spouses of U.S. citizens.[207] The Trump Administration and Supreme Court squelched the first program,[208] however, and the second was enjoined by a federal court.[209] Notably, immigration benefits programs resulting

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[206] *FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions*, White House (Jan. 5, 2023), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions [https://perma.cc/BE3R-VKJ8]. *See generally DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes*, Dep't of Homeland Sec. (Jan. 5, 2023), https://www.dhs.gov/archive/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and [https://perma.cc/5KHV-HLEP]; Implementation of a Parole Process for Haitians, 88 Fed. Reg. 1243 (Jan. 9, 2023); Implementation of a Parole Process for Nicaraguans, 88 Fed. Reg. 1255 (Jan. 9, 2023); Implementation of a Parole Process for Cubans, 88 Fed. Reg. 1266 (Jan. 9, 2023); Implementation of Changes to the Parole Process for Venezuelans, 88 Fed. Reg. 1279 (Jan. 9, 2023).

[207] *See FACT SHEET: President Biden Announces New Actions to Keep Families Together*, White House (June 18, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/06/18/fact-sheet-president-biden-announces-new-actions-to-keep-families-together [https://perma.cc/MR9R-7QK5] (announcing that DHS will "take action to ensure that U.S. citizens with noncitizen spouses and children can keep their families together"); President Joseph Biden, Remarks at an Event Marking the 12th Anniversary of DACA (June 18, 2024), https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2024/06/18/remarks-by-president-biden-at-an-event-marking-the-12th-anniversary-of-daca [https://perma.cc/VA6B-8AG2] (marking the twelfth anniversary of DACA as well as announcing action to keep families together); *Fact Sheet: DHS Announces New Process to Promote the Unity and Stability of Families*, Dep't of Homeland Sec. (June 17, 2024), https://www.dhs.gov/archive/news/2024/06/17/fact-sheet-dhs-announces-new-process-promote-unity-and-stability-families [https://perma.cc/HC7Z-33GM] (announcing actions "to promote family unity in the immigration process, consistent with the Biden-Harris Administration's commitment to keeping families together"); Implementation of Keeping Families Together, 89 Fed. Reg. 67,459 (Aug. 20, 2024); *Statement of Secretary of Homeland Security Alejandro N. Mayorkas on the Biden-Harris Administration's Actions to Keep American Families Together*, Dep't of Homeland Sec. (June 18, 2024), https://www.dhs.gov/archive/news/2024/06/18/statement-secretary-homeland-security-alejandro-n-mayorkas-biden-harris [https://perma.cc/YU3X-8LXU] ("[T]he Department of Homeland Security is taking action to keep American families together and end the fear and uncertainty these families face when one spouse is a United States citizen and the other is undocumented.").

[208] Termination of Parole Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, 90 Fed. Reg. 13611 (Mar. 25, 2025); U.S. Dep't of Homeland Sec., DHS Releases Statement on Major SCOTUS Victory for Trump Administration and the American People on Ending the CHNV Parole Program (May 30, 2025), https://www.dhs.gov/news/2025/05/30/dhs-releases-statement-major-scotus-victory-trump-administration-and-american [https://perma.cc/49LC-PKHX].

[209] U.S. Citizenship & Immigr. Servs., Keeping Families Together (Jan. 24, 2025), https://www.uscis.gov/keepingfamiliestogether [https://perma.cc/5P9A-LFHZ]; Hannah Schoenbaum, *Judge Strikes Down Biden Administration Program Shielding Immigrant Spouses from Deportation*, Associated Press (Nov. 8, 2024, 4:25 AM), https://apnews.com/

from presidential administrative discretion may be incomplete and difficult to rebuild and reconstruct as a result of subsequent presidential revocation or judicial curtailment, rendering them an unstable stand-in for legislation guaranteeing immigration status, benefits, and citizenship for a vulnerable community.

One scholar has warned that while limited, discretionary presidential nonenforcement of law is justified as a constitutional matter,[210] it also has the "capacity to undermine laws of all sorts."[211] Indeed, the political control exercised over immigration enforcement officials is both nontransparent and can be unrelenting. Accordingly, presidents have long harnessed discretionary immigration decisionmaking to pursue restrictionist immigration agendas,[212] and have done so while steadily decreasing the transparency and solidity of the underlying justifications for these decisions. Today, everything from a customs officer's workaday decision to subject an air traveler, citizen or not, to secondary screening to enforcement decisions regarding who should be excluded from the country based on amorphous national security interests are made in a black box, devoid of clear or accessible procedure, and often not subject to judicial review.[213]

In this vein, under the second Trump term, immigration enforcement priorities have taken a more extreme turn, under which the Administration has begun to intensify immigration punishment without adequate statutory basis.[214] Potential constitutional and procedural deficiencies have also not stymied the Trump Administration's immigration detention and deportation frenzy.[215] Earlier this year, at least a half-dozen student and other "[s]upporters of Palestinian causes with ties to American universities" were detained by Immigration and Customs Enforcement (ICE) "in the Trump administration's crackdown on immigrants," despite the fact that many held lawful immigration

article/biden-immigration-program-blocked-judge-trump-2fcfa19a8d6911f6d8e972c9d105dfd4 [https://perma.cc/B9MP-3MPH].

210 *Cf.* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014) (discussing presidential statutory nonenforcement).

211 *Cf.* Zachary S. Price, *Federal Nonenforcement at a Crossroads*, 78 N.Y.U. ANN. SURV. AM. L. 205, 209–10 (2023) (discussing presidential statutory nonenforcement).

212 *See generally* Shah, *Civil Servant Alarm*, *supra* note 134, at 635–47 (discussing such dynamics under the Reagan, George W. Bush, and first Trump Administrations).

213 *See* Shah, *Administrative Procedural Discretion*, *supra* note 28, at 23–27 (describing opaque discretionary decisions made by agencies in the national security context).

214 *See* ALEJANDRA ARAMAYO & HILLEL R. SMITH, CONG. RSCH. SERV., LSB11299, RECENT EXECUTIVE BRANCH ACTIONS ON IMMIGRATION (PART 1) (2025) (detailing the legal authority for and weaknesses of executive action on immigration by the Trump Administration); ALEJANDRA ARAMAYO & HILLEL R. SMITH, CONG. RSCH. SERV., LSB11300, RECENT EXECUTIVE BRANCH ACTIONS ON IMMIGRATION (PART 2) (2025) (same).

215 *Id.*

status and were not otherwise eligible to be removed from the United States[216] Experts have agreed that these immigration actions were likely undertaken in order to chill these noncitizens' lawful political speech.[217]

During this time, the Trump Administration also "started sending scores of Venezuelan immigrants detained in the United States to a foreign prison in El Salvador. It did so without any due process of law, under the auspices of the Alien Enemies Act (AEA), a 1798 law designed for times of war."[218] The Trump Administration has justified its farfetched use of the AEA to deport noncitizens who pose no threat to the United States by attaching a "criminal" label to them; nonetheless, most of these people have not, in fact, been accused of committing or convicted of any crimes.[219]

Concurrently, the administration also mistakenly deported Kilmar Armando Ábrego García, a resident of Maryland, to this same high-security prison in El Salvador.[220] Even though the White House admitted this deportation was the result of an "administrative error,"[221] and a federal court—affirmed by the Supreme Court—ordered the immediate return of Ábrego García back to the United States,[222] the Trump Administration refused to bring him back until recently,[223] and then only

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216 *At a Glance: Who Has Been Detained or Deported in a U.S. Crackdown on Pro-Palestinian Protestors*, Independent (Mar. 28, 2025), https://www.independent.co.uk/news/world/americas/columbia-donald-trump-israel-louisiana-gaza-b2723446.html [https://perma.cc/BTW2-T2QR].

217 Aleka Gomez-Sotomayor-Roel & Alexis Hernandez Lopez, *'Climate of Fear': Legal Experts Say DHS Activity Chills Campus Expression, Sets Dangerous Precedent*, Colum. Spectator (Apr. 24, 2025, 11:11 PM), https://www.columbiaspectator.com/news/2025/04/24/climate-of-fear-legal-experts-say-dhs-activity-chills-campus-expression-sets-dangerous-precedent [https://perma.cc/8367-QMRL]. This is not unlike previous examples of ICE activity, such as surveillance, implemented for the same purpose. *See* Ahmed Alrawi, *Immigrants Are Not Felons: A Legal Analysis of Immigrants' Civil Rights Chilling Effect Issues Caused by ICE's SmartLINK App Surveillance*, 13 J. Info. Pol'y 85, 100–04 (2023). Overall, "[i]mmigration enforcement is a mechanism for maintaining national security, which more generally permits the government to oppress people who are deemed risky." Shah, *Administrative Subordination*, *supra* note 23 at 1638 (citations omitted).

218 Trump v. J.G.G., 145 S. Ct. 1003, 1007 (2025) (Sotomayor, J. dissenting).

219 *See* Julie Turkewitz, Jazmine Ulloa, Isayen Herrera, Hamed Aleaziz & Zolan Kanno-Youngs, *'Alien Enemies' or Innocent Men? Inside Trump's Rushed Effort to Deport 238 Migrants*, N.Y. Times (Apr. 16, 2025), https://www.nytimes.com/2025/04/15/world/americas/trump-migrants-deportations.html [https://perma.cc/JC83-YMDL].

220 Myah Ward, *White House Ramps Up Defense of Abrego Garcia's Deportation*, Politico (Apr. 17, 2025, 9:59 PM), https://www.politico.com/news/2025/04/17/white-house-defense-abrego-garcia-deportation-00298118 [https://perma.cc/5882-5LRU].

221 *Id.*

222 Noem v. Ábrego García, 145 S. Ct. 1017 (2025).

223 *See* Tony Dokoupil & Caitlin Yilek, *Kristi Noem Says if Kilmar Abrego Garcia Was Sent Back to U.S. "We Would Immediately Deport Him Again"*, CBS News (Apr. 30, 2025, 8:38 AM), https://www.cbsnews.com/news/kristi-noem-kilmar-abrego-garcia-trump-deport [https://perma.cc/UY8R-MREV].

in order to impose unsubstantiated human smuggling charges on him.[224] Notably, while Ábrego García was released from criminal detention[225] because the government failed to show that detention pending trial was justified,[226] a judge also granted his attorneys' request that his release be delayed in order to stave off a second, illegal deportation.[227]

A notable aspect of recent detentions and deportations is that they are the result of administrative decisions that are bereft of process.[228] (In addition, the Administration seems happy to deploy many more resources than is usual for immigration arrests.[229]) Compared to the DACA program discussed earlier, no notice or information has been made available to targeted noncitizens regarding what has triggered more intense forms of immigration enforcement, particularly in light of the fact that many are legal permanent residents or otherwise in the

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224 *See* Maria Sacchetti, Perry Stein & Jeremy Roebuck, *Kilmar Abrego García Returned To U.S., Charged With Human Smuggling*, Wash. Post (June 6, 2025), https://www.washingtonpost.com/national-security/2025/06/06/kilmar-abrego-garcia-return-human-trafficking [https://perma.cc/72PZ-URVH] (discussing return of Kilmar Abrego García and that the Attorney General subsequently charged him with human smuggling); Evan Mealins & Michael Collins, *How a Traffic Stop Exploded into Human Smuggling Charges for Kilmar Abrego Garcia*, USA Today (June 13, 2025, 12:10 PM), https://www.usatoday.com/story/news/nation/2025/06/13/kilmar-abrego-garcia-court-date-smuggling-allegations/84165580007 [https://perma.cc/LT9C-EP7P].

225 Ábrego García v. Noem, No. 25-CV-00951, slip op. at 1 (D. Md. July 23, 2025).

226 United States v. Ábrego García, No. 25-CR-00115-1, slip op. at 1 (M.D. Tenn. July 23, 2025).

227 Order Staying Issuance of Release, United States v. Ábrego García, No. 25-CR-00115-1 (M.D. Tenn. July 23, 2025) (No. 93), https://storage.courtlistener.com/recap/gov.uscourts.tnmd.104622/gov.uscourts.tnmd.104622.97.0.pdf [https://perma.cc/XY8W-436N]; *see also* Jacob Rosen & Melissa Quinn, *Judge Orders Kilmar Abrego Garcia Released from Criminal Custody, Second Judge Bars ICE from Immediately Detaining Him*, CBS News (July 23, 2025, 7:42 PM), https://www.cbsnews.com/news/kilmar-abrego-garcia-ordered-released-criminal-custody-ice-barred-from-immediately-detaining-him [https://perma.cc/7Y3E-FWCQ] ("'These rulings are . . . a critical safeguard for Kilmar's due process rights,' [said] an attorney for Abrego Garcia . . . . 'A federal judge has now barred ICE from taking him back into custody . . . .'").

228 *See, e.g.*, Luis Ferré-Sadurní & Ashley Cai, *Trump's Immigrant Crackdown in New York: More Arrests, Longer Detention*, N.Y. Times (Aug. 4, 2025), https://www.nytimes.com/2025/08/04/nyregion/new-york-immigrant-arrests-trump.html [https://perma.cc/4LFK-8TSJ] (observing that in New York City, "in recent months, hundreds of people have been handcuffed without notice, largely out of public view").

229 Tom Bowman & Ximena Bustillo, *DHS Memo Details How National Guard Troops Will be Used for Immigration Enforcement*, NPR (June 6, 2025, 12:45 PM), https://www.npr.org/2025/06/06/nx-s1-5425421/dhs-national-guard-immigration-enforcement [https://perma.cc/7JWP-Y495] (documenting DHS's intent to use National Guard troops to support ICE's immigrant location, detention, and deportation efforts). *See generally*, *Surveillance Video Shows Moment Tufts Student is Arrested by Federal Agents*, CNN (Mar. 26, 2025) https://www.cnn.com/2025/03/26/us/video/tufts-student-detained-rumeysa-ozturk-ice-digvid [https://perma.cc/66A8-4NGQ] (showing Tufts student Rümeysa Öztürk being detained and handcuffed by several ICE officials).

United States with valid documentation. In addition, the procedure for determining that a noncitizen is "criminal" and therefore should be deported in these instances has been opaque and inconsistent at best, and nonexistent at worst, resulting in the wrongful detention and deportation of individuals who are legally allowed to be in the United States.

Note that U.S. citizens may be in danger of banishment as well,[230] particularly under a regime of reduced judicial review. Indeed, the Government Accountability Office (GAO) found that ICE arrested 674 U.S. citizens, detained 121 U.S. citizens, and deported seventy potential U.S. citizens from fiscal year 2015 through the second quarter of fiscal year 2020.[231] As President Trump declared more recently, while hosting the president of El Salvador: "We also have homegrown criminals . . . that are absolute monsters [and] I'd like to include them in the group of people to get them out of the country."[232] The implication, perhaps, is that disfavored citizens might be sent to the same inhumane Salvadoran prison now holding noncitizens deported from the U.S.[233]

Further complicating the matter, the president has been resistant to lower court orders[234] limiting his—and by extension, the immigration bureaucracy's—commitment to a speedy and cruel immigration enforcement regime,[235] even in a situation where the White House admitted the deportation was a mistake.[236] Remarkably, the president's conflict with the judiciary has even led to the arrest of at least one judge who has ruled against the Trump Administration.[237] If the Supreme

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230 *See Why One Deportation Case Has Legal Scholars Afraid for Even U.S. Citizens*, NPR (Apr. 13, 2025), https://www.npr.org/transcripts/1244593146 [https://perma.cc/4FY7-TL75] (interviewing Harvard Law professor Larry Tribe about the implications of the Ábrego García case).

231 U.S. Gov't Accountability Off., GAO-21-487, Immigration Enforcement: Actions Needed to Better Track Cases Involving U.S. Citizenship Investigations (2021), https://www.gao.gov/products/gao-21-487 [https://perma.cc/ES3P-9GWV].

232 Nik Popli, *Can a U.S. Citizen Be Deported? Trump's Comments Raise Legal Alarm*, Time (Apr. 15, 2025), https://time.com/7277884/can-a-u-s-citizen-be-deported-trumps-comments-spark-legal-debate [https://perma.cc/9SFZ-6QNP].

233 *See supra* notes 220–23 and accompanying text.

234 Isaac Chotiner, *What Happens if Trump Defies the Courts*, New Yorker (Feb. 11, 2025), https://www.newyorker.com/news/q-and-a/what-happens-if-trump-defies-the-courts [https://perma.cc/59BH-4E4H].

235 *See* Tony Dokoupil & Caitlin Yilek, *Kristi Noem Says if Kilmar Abrego Garcia Was Sent Back to U.S. "We Would Immediately Deport Him Again,"* CBS News (Apr. 30, 2025), https://www.cbsnews.com/news/kristi-noem-kilmar-abrego-garcia-trump-deport [https://perma.cc/TQD6-YM3E] (reporting that the Trump Administration has deported hundreds of people under the Alien Enemies Act of 1798).

236 *See supra* notes 220–23 and accompanying text.

237 *See, e.g.*, Andrew Goudsward, *Trump Administration's Arrest of Judge Stirs Debate Over Immigration Courthouse Arrests*, Reuters (May 13, 2025), https://www.reuters.com/world/us/

Court rules definitively against the Trump Administration in the future, it is unclear whether the president and his bureaucracy would comply with the Court's judgment.

II
Managing Presidential Administrative Discretion

Presidential administrative discretion provides opportunities for presidentialism to accomplish justifiable ends.[238] However, it also has the potential to undercut administrative accountability in underexamined and perhaps unexpected ways, particularly in the most punitive agencies—that is, those with the most enforcement power over the most vulnerable.[239] As a result, insulation and impartiality in the exercise of administrative discretion may be less common than generally assumed.

These observations both broaden the generalized understanding of how administrative discretion operates and should alter longstanding, conventional frameworks of technical oversight and political control of agency action. But how might we encourage the good possibilities of presidential administrative discretion, and manage situations in which discretion renders procedure less stable and more inaccessible? How can agencies reinforce their fidelity to legislative mandates, deepen their commitment to democratization, or even pursue conventional values of political liberalism in the face of uncompromising presidentialism? What institutional structures might encourage the building of mission-focused expertise? At the very least, how might administrators be better positioned to combat presidential aims that contravene humane or even lawful enforcement of statutes?

The usual answer to managing political influence over administration is proceduralism. Insulated procedure is hailed as a defense against the inconsistency and unfairness of politicization, particularly in the context of administrative adjudication.[240] In other words, insular decisional independence and process are supposed to ensure that adjudicatory outcomes are reasoned, fair, and not influenced by political interests that might overcome their legitimacy. More specifically, impartiality and due process are held out to be reliable mechanisms for ensuring administrative consistency. Indeed, proceduralism is assumed to be

trump-administrations-arrest-judge-stirs-debate-over-immigration-courthouse-2025-05-13 [https://perma.cc/PJW3-JB9N].

238 *See supra* Section I.B.2.

239 *See supra* Section I.A.

240 *See supra* notes 25–27 and accompanying text.

so stalwart as to be ossifying, standing as an obstacle to the flexibility agencies need to accomplish important goals.[241]

A significant challenge to this paradigm, however, is that due process fails to stabilize informal adjudication procedure, because in many of these decisions, petitioners cannot claim a constitutionally protected interest that would then trigger a due process floor.[242] In addition, decisional independence is not a requirement in informal adjudication (for better or for worse).[243] More to the point, the benefit of procedure is limited when it can be altered by presidential control, particularly to the extent this renders procedure inconsistent, confusing, or out of reach. If administrative decisionmaking procedure, including process underlying both adjudication and enforcement, is under presidential control all the way down, it will likely require some intervention to function as a vehicle for the public interest, let alone as a mechanism for incubating expertise.

Note this suggestion does not advocate for forgoing proceduralism, but rather recognizes its weakness both as a matter of longstanding limitations of the APA and in light of the current moment. This position is distinct from those that downplay the need for procedural constraints on the administrative state or even argue for dispensing with them altogether.[244] And arguably, this perspective is consistent with progressive advocacy for a deepening of "infrastructures of political power," including along the vectors of electoral accountability and majoritarianism,[245] and with an ambiguous—but not necessarily oppositional—view of presidential administration within the context of these safe administrative structures.[246]

This Part argues that shaping presidential administrative discretion for the better may require dispensing with the ideal of insulated agency decisionmaking in the first place and considering the role of

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241 *See supra* notes 15–18 and accompanying text.

242 *See* Shah, *Administrative Procedural Discretion*, *supra* note 28, at 18–19 (describing that many informal adjudications do not involve protected property or liberty interests covered by due process).

243 *See id.* at 6–7 (describing the lack of procedural requirements in informal adjudication).

244 *See supra* notes 14–20 and accompanying text.

245 *See* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784, 1829 (2020) (arguing for a reorientation of legal institutions toward democracy).

246 *See, e.g.*, K. Sabeel Rahman, *Saving Bidenomics*, Boston Rev. (Jan. 4, 2024), https://www.bostonreview.net/articles/saving-bidenomics [https://perma.cc/RFA7-JWMY] (arguing the administrative machinery is outdated and not suited to enact ambitious new governance regimes in the context of presidential administration); K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. Cal. Interdisc. L.J. 315, 324 (2018) (discussing incentives for and checks on policymaking through presidential administration).

countervailing democratic and political forces. The jig is up. Agency discretion is politicized, including in adjudication. Rather than seeking to make administrative decisionmaking as impermeable as possible, why not lean into its porous nature and draw on this to democratize it, and thereby improve accountability.

As an initial matter, presidential administration itself offers possibilities for stabilizing presidential administrative discretion, or at least for orienting the administrative state and its decisionmaking processes toward important values, such as responsiveness, expertise, and inclusion. For instance, a close presidential, bureaucratic, or judicial reading of statutory mandates themselves could constrain presidential administrative discretion, if considered and implemented carefully in order to better abide by the legislature's will.[247] Another approach could involve regulating in order to reinforce impartiality in decisionmaking more broadly,[248] especially if encouraged by a president who supports administrative independence.[249] Yet another could involve informal guidance issued by political appointees to safeguard important considerations of adjudicatory process.[250] The judiciary might be motivated to issue nuanced "agency-specific precedent"[251] to tailor its oversight to solve the problems of presidential administrative discretion as manifested in different regulatory contexts.

Under a blue sky, the involvement of the public in enforcement decisions could encourage diversity, equity, and inclusion, even if the requirements of process and participation are currently under the

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247 *See* Shah, *Presidential Administration*, *supra* note 29, at 1226–64 (offering a detailed plan to encourage presidents to direct administrative policymaking in a way that emphasizes legislative intent); *see also* Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1800–06 (2012) (suggesting that legislative intent offers insight into whether political influence or agency expertise should control its implementation).

248 *See* Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1700 (2020) (arguing in favor of such regulations to improve impartiality in formal adjudication).

249 *Cf.* Kevin M. Stack, *Obama's Equivocal Defense of Agency Independence*, 26 CONST. COMMENT. 583, 594–99 (2010) (discussing the Obama Administration's defense of agency independence).

250 For example, a memorandum issued by the EOIR Director, who was appointed by the Biden Administration, clarifies and encourages the role of Child Advocates (appointed by the Department of Health and Human Services) in immigration court proceedings. Memorandum from David Neal, Dir., Dep't of Just. Exec. Off. for Immigr. Rev., Children's Cases in Immigr. Ct. 2–3 (Dec. 21, 2023), https://www.justice.gov/d9/2023-12/dm-24-01.pdf [https://perma.cc/JN2H-7K25].

251 *See* Robert L. Glicksman & Richard E. Levy, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 500 (2011) (observing that "judicial precedents tend to rely most heavily on other cases involving the agency under review, even for generally applicable administrative law principles").

control of a hostile Administration.[252] This argument is admittedly unconventional. In general, those who favor an expansive administrative state, including progressives,[253] have eschewed the idea that the politicization of administration could be to its benefit. Presidential and political oversight and direction—for instance, executive orders—are understood to be unstable, easily issued, and suddenly revoked when a new sheriff is in town.[254] A complementary assumption is that the bureaucracy provides stability and consistency across presidential administrations,[255] both as a result of the consistency of the makeup of the civil service and due to the constraints of proceduralism (from which presidential actions are exempt, to the concern of some scholars of presidential administration[256]). Perhaps nowhere is this view stronger than in the context of administrative adjudication, where external influence is verboten in conversations about how to preserve fair and unbiased agency decisionmaking.[257]

In contrast, this Part proposes that feasible options include leveraging the internal (executive) separation of powers and institutional design to enhance administrative democratization, and explores the possibilities of control by elected officials besides the president[258] and the court. First, emphasizing the policymaking aspects of administrative adjudication,[259] rather than sidelining them, could allow for the

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252 *See* Shah, *On Administration*, *supra* note 31 (manuscript at 18–19) (citing Exec. Order 14,173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 21, 2025); Exec. Order 14,168, Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8615 (Jan. 20, 2025); Exec. Order 14,151, Ending Radical and Wasteful Government DEI Programs and Preferencing, 90 Fed. Reg. 8339 (Jan. 20, 2025); Memorandum from Pam Bondi, Att'y Gen., U.S. Dep't of Just., Ending Illegal DEI & DEIA Discrimination & Preferences (Feb. 5, 2025), https://www.justice.gov/ag/media/1388501/dl?inline [https://perma.cc/GDJ5-5JYY]) (arguing that partisan agency control has resulted in less agency benefit to the polity and disadvantaged individuals).

253 *See, e.g.*, *supra* notes 19–21 (citing scholars who advocate for administrative independence from political influence).

254 *See* Bijal Shah, *Beyond OIRA for Equity in Regulatory Process*, Regul. Rev. (Mar. 16, 2022), https://www.theregreview.org/2022/03/16/shah-beyond-oira [https://perma.cc/P9AV-D7EJ] (remarking on the transience of executive orders).

255 *See id.* (commenting that OIRA could entrench priorities through institutional design).

256 *See, e.g.*, Rosenblum, *supra* note 6 (expressing this view); Kathryn E. Kovacs, *Constraining the Statutory President*, 98 Wash. U. L. Rev. 63, 65–66 (2020) (describing the limitations of judicial review and the inapplicability of the APA to presidential administration).

257 *See* Shah, *The President's Fourth Branch?*, *supra* note 12, at 529–32 (describing the view that political control is incompatible with adjudicative independence).

258 *See id.* at 539–43 (proposing approaches to make agencies more responsive to Congress).

259 *See* Phillips, *supra* note 74, at 498–99 (advocating for agency policymaking by adjudication); *id.* at 499 ("Adjudication can offer just as much rational reason-giving and

systematic and strategic pursuit of democratically responsive decisionmaking. More specifically, administrative mechanisms furthering democratic accountability, participation by marginalized communities, and public education—important to both the internal and external separation of powers paradigms—could be extended to administrative adjudication and enforcement choices. There may be some appetite for pursuing options like these among civil servants who are resistant to a new administration's orientation or committed to expertise and stability, or among those who are part of a cohort of recently fired administrators, adjudicators, or others who are interested in intensifying administrative structures supporting rule of law and due process values.[260]

Second, to the extent presidential administrative discretion represents a crisis for the separation of powers, frameworks that balance and check the Executive Branch could serve as constraints. In this vein, the legislature and judiciary could oversee presidential administrative discretion. Congress could require more frameworks of formal adjudication, or even better, specify procedure along a spectrum of requirements to ensure a procedural floor outside of APA requirements, more consistent insulation adjudicatory process from political shifts, and public involvement in certain enforcement decisionmaking processes. The Court's anti-administrativist turn might be leveraged to encourage fair and accessible administrative procedures despite presidential involvement. Judicial review under the APA, the protection of reliance interests, reiterating the requirements of due process, and even reinforcing decisions against the president are all judicial tools for managing presidential administrative discretion.

A. Internal Separation of Powers and Agency Adjudication

Presidential administrative discretion is likely to be leveraged to further political aims that prioritize institutional interests and are unpredictable—which is most concerning for those with fewer resources to navigate these challenges—at the expense of consistent and expert

accountability as informal rulemaking, and may utilize practices that broadly permit public participation.").

260 One example of this community might include the number of personnel who have been terminated abruptly by President Trump from board positions. Shah, *On Administration*, *supra* note 31 (manuscript at 12–13). Another community might include adjudicators, like immigration judges, terminated under politicized circumstances. *See, e.g.*, Maurice DuBois, Luisa Garcia & LaCrai Mitchell Scott, *3 Immigration Judges Speak Out About Their Firings: "It was Arbitrary, Unfair*," CBS NEWS (July 24, 2025, 8:34 PM), https://www.cbsnews.com/news/immigration-judges-speak-out-firings-arbitrary-unfair [https://perma.cc/LKJ8-2S9U]; Stephanie Brown & Lisa Mullins, *Fired Immigration Judges Say Court System is Under Attack*, WBUR (July 23, 2025), https://www.wbur.org/news/2025/07/23/chelmsford-immigration-judges-terminated [https://perma.cc/2QHB-E7FX].

agency decisionmaking.[261] Embracing the inherently politicized aspects of procedural discretion provides an opportunity for adjudicators to access forms of responsiveness and attendant accountability that have been dismissed by those in favor a robust, but insulated system of administrative adjudication.

As an initial matter, amplifying presidential adjudication by continuing to widen the category of administrative adjudicators who are subject to Article II appointments requirements[262] could ensure more transparent presidential administrative discretion. Plainly put, by categorizing informal adjudicators and even enforcement officials as inferior officers, at least the lines of political control would become clearer, and might therefore be better constrained.

Conversely, and to the extent political forces lead to biased adjudication and excessive exercises of punitive enforcement discretion, civil servants can resist.[263] There is some evidence to suggest that local, front-line DOJ and EOIR employees have engaged in discretion both to further a progressive presidential agenda[264] and to resist regressive political policies in the past.[265] For example, the immigration judges' union has resisted policies curbing resources, including the understaffing of immigration courts; case quotas; and political influence over decisionmaking.[266] (Note that resistance can also serve aggressive enforcement goals, as when ICE officials defied a presidential directive to prioritize the deportation of certain noncitizens over others.[267])

This Section argues that prescriptions should involve engaging the internal separation of powers[268] by which agency stakeholders such

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261 *See* Shah, *The President's Fourth Branch?*, *supra* note 12, at 529–32 (describing the pressure a unitary executive structure puts on agencies to prioritize political concerns).

262 *See supra* notes 8–11 and accompanying text.

263 *See generally* Shah, *Civil Servant Alarm*, *supra* note 134 (illustrating that civil servants have resisted or defied presidential immigration policies across four presidencies including those of President Reagan, G.W. Bush, Obama, and Trump, and arguing frequent incidents of resistance from divergent factions of the immigration bureaucracy, particularly if met with a harsh response from the president, should be characterized as a "fire alarm" imploring a congressional response).

264 *See, e.g.*, Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 Fordham L. Rev. 619, 632 (2012) (concluding that officials within the DOJ utilized discretion to avoid removing individuals who would fail a marriage exemption due to DOMA).

265 *See, e.g.*, Kate Jastram & Sayoni Maitra, Matter of A-B- *One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*, 18 Santa Clara J. Int'l L. 48, 80 (2020) (finding that immigration judges have at times narrowly interpreted the Attorney General's decision to allow for the use of domestic violence evidence in asylum claims).

266 *See* Shah, *Civil Servant Alarm*, *supra* note 134, at 643–45.

267 *See id.* at 637–39.

268 *See* Shah, *Intra-Agency Separation of Powers*, *supra* note 46, at 1–3 (considering the "administrative separation of powers" framework, in which the political actors, civil servants,

as civil servants (including intra-agency supervisors and adjudicators themselves) and the public could be harnessed to hold adjudicators accountable. More specifically, these actors could improve and democratize informal administrative adjudication, which might offset the harms of presidential administrative discretion, by one, establishing internal agency quality assurance measures that both replicate due process protections and emphasize substantive over quantitative evaluation and two, involve the public behind closed doors in informal adjudication and exercises of prosecutorial discretion.

1. Quality Assurance

Administrative quality assurance measures could shape presidential administrative discretion for the better. In recent years, administrative process has shifted "away from the expectations of *Goldberg v. Kelly*—that petitioners before an agency have access to consistent, fulsome process, and particularly oral or in-person components—toward the significant discretion granted to agencies by *Mathews v. Eldridge* to determine what constitutes adequate process on the basis" of what is least burdensome to the agency.[269] Scholars have argued that quality assurance within agencies could take the place of *Goldberg*-like due process.[270] While quality assurance measures might themselves be subject to presidential control (if they somehow end up on the White House's radar), they could be molded by civil service expertise and institutionalized to promote stability, counteract political influence, or at least provide an additional mid-layer of insulation for administrative process.[271]

For example, supervisors and other overseeing officials might be harnessed to impose limits on presidential administrative discretion. According to one commentator, oversight by "higher-level agency officials" is a more reliable check on "line personnel" than judicial review.[272] There is some evidence that agency managers dislike "conferring discretionary authority on agency adjudicators" due

and the public constrain one another's potential for the excessive exercise of power).

269 *See* Shah, *Administrative Procedural Discretion*, *supra* note 28, at 18–19.

270 *See* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 4, 15, 149 (1983); David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 28–30 (2020) (describing Mashaw's view of internal administrative law).

271 *Cf.* DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928, at 365 (2001) (noting that bureaucracies with unique goals achieve autonomy when their middle-level officials establish reputations among diverse coalitions for effectively providing unique services).

272 Nabavi-Noori, *supra* note 135, at 1329–30.

to the fear "that discretion at the adjudicator level would pose a threat to consistent, reasoned decision-making and introduce an element of unfairness into the adjudicatory process, allowing like cases to be treated dissimilarly."[273] As a result, agency managers might be motivated "to issue internally binding guidance" on front-line officials, including adjudicators.[274] In addition, front-line officers have shown some discomfort "with exercising that controversial discretion without guidance."[275] For this reason, bureaucrats might even "voluntarily constrain their discretion"[276] in order to adhere to additional administrative process that improves both the quality and legitimacy of their decisionmaking. Agency decisionmakers might be open to limiting their efforts to further presidential interests also due to the "worry[] that any discretionary departures from established agency guidance would lead to personal culpability for the consequences of their departure."[277]

One goal in quality assurance measures may be to go beyond programs that count and compare caseload and decision numbers, or even those that screen decisions for errors,[278] by focusing on more qualitative assessments of adjudication. Emphasizing on qualitative over quantitative review could help avoid accuracy problems and the inflation of positive numbers to satisfy political goals; both issues can plague quality review systems.[279] Furthermore, the quality and accessibility of decisionmaking could be improved through binding guidance that constrains adjudicatory discretion, which can offset politicians' desire "to closely control agency discretion to advance their policy aims."[280] Quality assurance measures could also be used to resist

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[273] *Id.* at 1331.

[274] *Id.* at 1330. Such an approach can also serve as a failsafe for governmental review of third-party actions. *See, e.g.*, 45 C.F.R. § 147.136(d) (2025) (specifying that the Department of Health and Human Services has authority to review insurers under the Affordable Care Act and implementing 42 U.S.C. § 300gg–19, which calls for federal governmental review to ensure health insurance providers are maintaining consumer protection standards if no effective state review program exists).

[275] Nabavi-Noori, *supra* note 135, at 1329–30.

[276] Elizabeth Magill, *Agency Self-Regulation*, 77 Geo. Wash. L. Rev. 859, 860 (2009) (describing how agencies self-regulate).

[277] *Id.* at 1331.

[278] *See* Ames, Handan-Nader, Ho & Marcus, *supra* note 270, at 38–40 (describing successful Social Security Administration quality assurance programs that focus on these approaches).

[279] *See, e.g.*, *id.* at 45–46, 56 (describing the Board of Veterans' Appeals attempt at utilizing data-driven review and explaining the Board of Veterans' Appeals' error rate is reported annually to Congress). For further discussion of the benefits of a qualitative over quantitative review, see Shah, *Administrative Procedural Discretion*, *supra* note 28, at 36.

[280] Nabavi-Noori, *supra* note 135, at 1332; *see also* Shah, *Administrative Procedural Discretion*, *supra* note 28, at 36 (describing similar binding guidance at the NLRB).

decisionmakers' responsiveness to biases,[281] including those fostered by political leadership.

It is also possible that adjudicators could be encouraged to prioritize humanitarian values or to otherwise exercise their discretion to curtail process judiciously. In immigration, agency guidance can have an "extraordinarily strong" impact on USCIS's otherwise "significant" and "politically sensitive" discretionary power.[282] In addition, immigration judges have the discretion to engage petitioners in person more often if they desire;[283] guidance could elucidate options and enhance immigration judges' incentives to exercise this discretion in favor of additional procedure.

Guidance could also encourage immigration judges to call status conferences "more liberally in the adjudication of unrepresented noncitizens cases, particularly given the bias toward limiting the presence of lawyers in immigration court."[284] Furthermore, immigration adjudicators are empowered by previous judicial settlements and regulation "to permit representation for the 'mentally incompetent' and minors, and could be encouraged by agency guidance to allow for generous interpretations of mental incompetence that would increase access to these protections."[285] In addition, USCIS training materials, which are a form of guidance, could be designed to counteract upper-level border reinforcement priorities, thus rendering USCIS adjudicators more flexible and receptive to the needs of refugees, instead of less.[286]

Finally, many have suggested that "administrative insulation from political pressure" is "key to preserving the competencies of administrative adjudicators and experts."[287] In this context, a more insulated set of decisionmakers could serve to offset the perils of presidential administrative discretion. Ex ante, insulation could take the form of hiring adjudicators with fewer ties to agencies or organizations with a clear bias against petitioners.[288] Ex post, adjudicators could

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281 *See* Shah, *Administrative Procedural Discretion*, *supra* note 28, at 45 (discussing examples of how "quality assurance could also grapple directly with issues of bias" in immigration adjudication).

282 *Id.*

283 8 C.F.R. § 1240.17(f)(2) (2025) ("The immigration judge may schedule additional status conferences prior to the merits hearing if the immigration judge determines that such conferences are warranted and would contribute to the efficient resolution of the case.").

284 Shah, *Administrative Procedural Discretion*, *supra* note 28, at 47 (citations omitted).

285 *Id.* (citations omitted).

286 *See supra* notes 160–69 and accompanying text.

287 Shah, *Administrative Subordination*, *supra* note 23, at 1648 (citations omitted) (citing scholars concerned with the erosion of administrative insulation).

288 *See, e.g.*, Kim & Semet, *supra* note 97, at 636–39 (suggesting this in the immigration setting).

be provided with more independence by regulation or as a result of guidance. In addition, providing insulated administrative appeals could neutralize the impact of political overseers on administrative discretion.[289] For example, insulated appeals boards could stave off political interference that undermines the role of expertise in deciding what kind of process to offer the public.[290]

2. Public Participation

A powerful and overlooked source of influence on administrative adjudication is the public. Over fifty years ago, it was observed that the "public interest," after all, "involves a balance of many interests, and the presentation of otherwise unrepresented views should be viewed as a potential aid rather than a hindrance to agency operations"—including administrative adjudication.[291] Since then, one scholar has suggested citizen panels in place of administrative adjudicators.[292] Nonetheless, in today's constitutional, technical, and progressive debates regarding the proper level of external influence on agency adjudicators, not only has the focus been on formal adjudication, but both those in favor of and against decisional independence assume the only potential source of representative accountability in adjudication stems from a more unitary executive.[293] This myopia is a departure from other aspects of administrative law, particularly informal rulemaking, in which public participation is viewed as an essential part of the process and invaluable to good regulatory outcomes.[294]

The conventional view held by those who support an expansive administrative state and believe in the value of regulatory power is that outside influence is inconsistent with fair and unbiased agency

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289 *See generally* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21–24 (2010) (describing "overlooked" elements of agency design to foster insulation).

290 *See* Shah, *The President's Fourth Branch?*, *supra* note 12, at 504–09 (arguing that presidential control denigrates administrative due process and its emphasis on agency expertise); Paul R. Verkuil, *Presidential Administration, the Appointment of ALJs, and the Future of For Cause Protection*, 72 ADMIN. L. REV. 461, 465–68 (2020) (describing the impacts of insulating ALJ appointment).

291 Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 360 (1972).

292 Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV., 465, 465 (1992).

293 *See supra* notes 8–17 and accompanying text.

294 *See* Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749, 818–19 (2023) (noting the conventional importance of participation in notice-and-comment rulemaking).

adjudication (albeit acceptable in the rulemaking context).[295] However, in an administrative state where independence in formal (let alone informal) adjudication may soon cease to exist[296] and consistency in informal adjudication is nearly impossible for the judiciary to oversee, a fruitful response may be to lean into the porous nature of administrative discretion in both adjudication and enforcement decisions, rather than insisting on an increase in formalized procedural requirements (although this is also not out of the question). More specifically, adjudicatory decisionmaking could engage mechanisms for public participation by creating "interaction" to infuse administration with accountability.[297]

If the exercise of administrative discretion is shaped by external interests, including those of the president and political appointees from the top down, then why not involve other stakeholders more explicitly, from the bottom up? Firstly, agency adjudicators may be guided ex ante to take certain priorities into consideration, including the interests and perspectives of public communities. Particularly as it pertains to procedural discretion, involving the interested public in the development of agency decisionmaking guidance and manuals could serve two aims. One, it would infuse directives shaping the exercise of procedural discretion with concerns and values held by the public. As a result, this form of interaction could offset, to some degree, the emphasis on restrictionist policy and other political agendas that shape administrative adjudication and recent enforcement trends. Two, it may also, to some extent, change the calculation that leads administrators to restrict in-person and other aspects of hearings in informal adjudication,[298] by bringing to light drawbacks of such measures that might persuade decisionmakers not to dispense with more robust process after all.[299]

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295 *See generally* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (rejecting challenges to EPA rulemaking); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (arguing that the Clinton Administration used rulemaking as an extension of its political goals).

296 Cox & Kaufman, *supra* note 10, at 1773.

297 Rubin, *supra* note 21, at 714, 785 (arguing for "interaction" between government and citizens that "provides a picture of contemporary government-citizen relations that is fully consonant with the state's administrative character, and that also reflects our genuine political commitments").

298 *See* Shah, *Administrative Procedural Discretion*, *supra* note 28, at 22 (describing a shift away from in-person adjudication).

299 *See* Gellhorn, *supra* note 291, at 361 (suggesting that public participation in administrative adjudication could satisfy "demands that agencies observe the highest procedural standards").

In at least one instance, involvement by a marginalized community shaped the development of guidance improving the quality of immigration decisionmaking. More specifically, the drafting and revising of USCIS guidance governing the substance and quality of asylum decisions concerning LGBTQI+ noncitizens,[300] which was accomplished by the author in a former role as a government official,[301] involved nonprofits representing this community of immigrants.[302] As a result, relevant USCIS guidance and training "include[] specific reference to sensitivity and other considerations to keep in mind" when adjudicating decisions concerning LGBTQI+ and, notably, intersex refugees and asylees, despite continued limitations to policy and doctrine concerning this community.[303]

Public participation could be leveraged at the individual case level as well. Rather than seeking to maintain the image of independence, agencies might welcome mechanisms for public participation in certain forms of decisionmaking, including both informal adjudication and enforcement decisions. Doing so could offer a pathway to democratic accountability that balances the exercise of presidential administrative discretion by introducing another form of direct influence. For example, informal adjudication offers opportunities to encourage engagement between administrative agencies and the public, including civic organizations. This is particularly the case in decisions that are not governed by the APA, and in light of the growing recognition that inclusive public participation is key to incorporating the values and needs of vulnerable and marginalized communities into administrative decisionmaking processes and outcomes.[304] And public involvement in enforcement decisions could mitigate some of the most rash and violent forms of administrative action, such as in the immigration setting.

This approach is not without its critiques. One concern is that members of the public without a true stake in the adjudication

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300 U.S. Citizenship & Immigr. Srvs., Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims, RAIO Directorate – Officer Training (2011), https://www.uscis.gov/sites/default/files/document/guides/RAIO-Training-March-2012.pdf [https://perma.cc/3SXC-E9ZW].

301 *See generally* Bijal Shah, *LGBT Identity in Immigration*, 45 Colum. Hum. Rts. L. Rev. 100, 102 n.4 (2013); *see also id.* at 118–19 (describing the purpose of the USCIS guidance).

302 *See id.* at 119 n.54 (discussing the author's prior work with immigration agencies relating to the intersex community).

303 *Id.* at 119.

304 *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. L. Rev. 173, 213 (1997) ("[A]s the number of participants (access points) in an administrative process is expanded at the various levels of decisionmaking, the amount of monopoly rents powerful interest groups may be able to extract will decrease. This works to reinforce the norms of political equality that are central to democratic deliberation.").

might intervene.[305] Another is that participation might interfere in deliberative decisionmaking and even impinge on decisionmaking processes by "overwhelming the ability of decisionmakers to focus in depth on specific problems."[306] A few commentators have also voiced concerns about ex parte (or unauthorized third-party) communication, even in informal adjudication,[307] although one suggests that "[e]x parte advice to decisionmakers by *non-adversarial* agency staff members is customary and appropriate" under certain circumstances.[308] This recommendation could be extended to include non-adversarial public participation as well.

Notably, these criticisms have been aimed primarily at formal adjudication, and its unique constraints. Informal adjudication involves a different set of expectations, in that it does not have particularized requirements of process. For this reason, there are neither expectations—or guarantees—of participation by even the directly-affected parties, nor a minimum requirement of deliberation to uphold. Particularly in informal adjudication, "[i]f agency hearings were to become readily available to public participation, confidence in the performance of government institutions and in the fairness of administrative hearings might be measurably enhanced."[309]

Finally, public education is also a form of interaction that could reduce poor consequences of presidential administrative discretion. More specifically, making explicit to people the range of procedural choices an adjudicator might make, as well as informing stakeholders in meaningful detail about new procedures stemming from prosecutorial discretion, would allow individuals and communities to better navigate the instability of enforcement discretion. One possible template has been provided by the FDA, which offered informational webinars regarding new procedures in the wake of its policy of using prosecutorial discretion to waive requirements during the infant formula shortage.[310] The FDA

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305 *See* Gellhorn, *supra* note 291, at 359–60 (noting that one possible consequence of "broaden[ing] citizen involvement and participation in administrative decision making" is "that citizen groups and individuals without a significant personal or economic stake in the outcome are allowed to intervene as full scale 'public' parties in administrative hearings").

306 Rossi, *supra* note 304, at 213–14.

307 *See* Michael Asimow, Federal Administrative Adjudication Outside the Administrative Procedure Act 66 (2019) (noting certain highly structured informal adjudications follow a prohibition on ex parte communication); *cf.* Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 Mich. L. Rev. 1, 41–42 (1996) (suggesting that the remedies for violating ex parte rules, even in formal adjudication, are too lax).

308 Asimow, *supra* note 307, at 66.

309 Gellhorn, *supra* note 291, at 361.

310 *See FDA to Host Webinar Series to Discuss the Infant Formula Transition Plan for Exercise of Enforcement Discretion*, Food & Drug Admin. (Oct. 12, 2022), https://www.

paired its webinar with a guidance providing a path for interested firms that have benefited from enforcement discretion to bring their products into compliance with U.S. requirements to facilitate longer-term supply resiliency[311] and perhaps product safety as well.[312]

B. Checking Executive Procedural and Enforcement Discretion

To the extent presidential administrative discretion represents a challenge for the separation-of-powers framework, dynamics that balance and check the Executive Branch could serve as constraints. This Section argues that to the extent agencies engage in unjust or unlawful exercises of administrative discretion because of pressure from the president and political appointees, the legislature and judiciary might be conscripted to shape presidential administrative discretion.

First, Congress could require more frameworks of formal adjudication or, even more, specify procedure along a spectrum of requirements to ensure a procedural floor for adjudications that fall outside of APA requirements, insulate more kinds of administrative decisionmaking from political influence, and require public involvement in certain enforcement decisionmaking processes. The Supreme Court, too, could engage in targeted interventions, including holding enforcement agencies accountable to the minimum requirements of the APA, protecting reliance interests, and guaranteeing administrative due process, as well as reinforcing the import of pending lower court orders against the president.

1. Legislative Control

Generally, Congress imposes structures of independence on agencies to reduce political influence on high-level or formal adjudication.[313] In addition, "agencies can operate with functional autonomy from the president and Congress for a variety of reasons unrelated to their

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fda.gov/food/hfp-constituent-updates/fda-host-webinar-series-discuss-infant-formula-transition-plan-exercise-enforcement-discretion [https://perma.cc/BG2J-MHJC] (discussing webinars explaining new infant formula submission requirements and "quality factor" requirements).

311 *See Guidance for Industry: Infant Formula Transition Plan for Exercise of Enforcement Discretion*, Food & Drug Admin. (Sept. 2022), https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-infant-formula-transition-plan-exercise-enforcement-discretion [https://perma.cc/BQL2-ETGF].

312 For a discussion of the possible connection between enforcement discretion and product safety, see *supra* notes 190–91 and accompanying text.

313 *See generally* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 804 (2013) (arguing that for-cause removal protections are but one category of structure that ensures agency independence).

formal structures."[314] Conversely, the legislature could enhance the democratization of agency adjudication to stabilize presidentialism's impact on informal procedure. More specifically, Congress could engage mechanisms of political control to both concretize the bounds and improve the exercise of administrative discretion.

As a general matter, the legislature could require more frameworks of formal adjudication, but there is also no reason why adjudication has to be either formal or fully discretionary (one end of the spectrum or the other). Congress could instead implement hybrid approaches, either via statute or forms of legislative oversight. One example could include passing comprehensive immigration reform that focuses not only on substance (for instance, the content of immigration benefits and restrictions in broad strokes), but also on specific procedure to be implemented by the relevant agencies, including and beyond the immigration courts.

Legislation could also create requirements for the meaningful inclusion of external stakeholders and public-facing organizations in both adjudicative processes and enforcement decisions. For instance, in the immigration context, interest groups, such as immigrant advocates, could be granted a concretized avenue for participation in administrative decisions adjudicating access to immigration benefits and prioritizing the enforcement of deportation. Another possibility would be to engage in legislative oversight that neutralizes partisanship in the exercise of administrative discretion. Notably, all of these suggestions could feasibly be extrapolated to other regulatory areas.

2. Judicial Oversight

The judiciary's interest in constraining the administrative state and encouraging agency consistency and accountability—as well as its push to move agency adjudication to Article III courts in some contexts[315]—could be leveraged to set incremental boundaries for presidential administrative discretion. While these moves are perhaps the result of the Court increasingly siphoning administrative policymaking power,[316] this impulse could be harnessed to encourage

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[314] David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1511 (2015) ("For example, agencies with effective political strategies, monopolies over their policy jurisdictions, reputations for expertise, sympathetic interest group environments, and important symbolic value can operate with significant political independence.").

[315] *See supra* note 22 and accompanying text.

[316] *See generally* Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119 (2021) [hereinafter Shah, *Judicial Administration*] (arguing that the judiciary engages in administrative policymaking).

targeted forms of judicial oversight of presidential administrative discretion, rather than interpreted as an endorsement of judicial usurpation of administrative authority.[317] Note that tightened judicial constraints on informal adjudication would be a shift in the current, post-*Chevron* landscape, in which federal courts are far more likely to invalidate agency rules, while simultaneously far less likely to overturn administrative orders.[318]

The APA empowers the judiciary to ensure that administrative procedures and policymaking justifications are adequate. Now, the president is not directly governed by the APA.[319] However, as this Article has argued, the president utilizes a large and powerful administrative apparatus in order to meet his objectives. Furthermore, this apparatus is governed by administrative law—in particular, the APA. As noted earlier, the APA's requirements for formal adjudication do not apply to informal adjudication and enforcement choices.[320] Still, other safeguards maintained by the APA to ensure that all agency actions meet a minimal standard could manage presidential administrative discretion by overall restraining the mechanism—that is, the administrative state, and in this case, agency decisionmaking—that the president uses to wield his preferences.

More specifically, the judiciary might be persuaded to engage in review under APA Section 706(2)(A), which allows courts to review most agency action to ensure that it is not "arbitrary" or "capricious."[321] One challenge is that judicial review of discretion under 706(2) is generally focused on whether policy is adequately based in the agency's expertise,[322] which does not quite target the potential drawbacks of political influence over agency action. Perhaps review could limit poor or incomplete records—or even decisionmaking based in unacceptable partisanship—under the APA's substantial evidence standard or through better leveraging of the abuse of discretion standard.[323]

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317 *See generally id.* (discussing "the contours of, and potential limits to, the *judicial review* of administrative activity").

318 *See* Robert K. Craig, *The Impact of* Loper Bright v. Raimondo*: An Empirical Review of the First Six Months*, 109 Minn. L. Rev. 2671, 2732 (2025) (observing that agency regulations lost about eighty-four percent before courts, but agency adjudication and enforcement won seventy-one percent of the time).

319 Franklin v. Massachusetts, 505 U.S. 788, 796 (1992); *see also* Rosenblum, *supra* note 6; Kovacs, *supra* note 256, at 65.

320 *See supra* note 51 and accompanying text.

321 5 U.S.C. § 706(2)(A).

322 *See* Kovacs, *supra* note 256, at 105 ("Agency decisions are expected to be based on expertise, not politics.").

323 *Cf.* Shah, *Separation-of-Powers Functionalism*, *supra* note 31, at 1061–66 (arguing that judges might apply "substantial evidence review and . . . the abuse of discretion standard to limit administrative adjudication based in adjudicators' personal biases").

Furthermore, a conventional focus on expertise could offset the extent to which presidential administrative discretion might suffer from inadequate technical support.[324] In fact, during the first Trump administration, the Supreme Court deployed 706(2)(A) to restrain unjustified immigration actions that were aimed at fulfilling presidential aims. "In *DHS v. Regents* and *Department of Commerce v. NY*, the Supreme Court evolved the arbitrary and capricious standard into an accountability-forcing mechanism for censuring pretextual, or otherwise unethical, agency justifications for policies that [were implemented only to] further the President's [immigration] interests,"[325] and simultaneously protected the public's reliance on immigration protections the administration tried to revoke.

First, in *Regents*, the Court invalidated the Trump-directed rescission of the Deferred Action for Childhood Arrivals (DACA) policy.[326] This program allowed certain undocumented immigrants who were seen as favorable and a low priority for deportation to apply for a two-year deferral of deportation.[327] Those granted this relief were also eligible for work authorization and various federal benefits.[328] According to the Court, the agency acted in an arbitrary and capricious manner because it did not adequately justify its action, and instead acted quickly in order to achieve the Attorney General's (and by extension, the president's) interest in eradicating the program as quickly as possible.[329]

Second, in *Department of Commerce*, "the Court reinvigorated arbitrary and capricious review as a means for sniffing out pretextual justifications for policies developed at the president's request."[330] In this case, "the Court sought to consider 'what role political judgments can

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324 *See* Shapiro, *supra* note 51, at 1495–96 (noting how abuse of discretion review tends to focus on the expertise underlying the action).

325 Shah, *Presidential Administration*, *supra* note 29, at 1260.

326 DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020); *see also* Memorandum from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs., et al. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/GC2X-RE4B] (rescinding June 15, 2012, DACA Memorandum).

327 Memorandum from Janet Napolitano, Sec'y, Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/L6AT-P8DG] (framing the policy as "measures" that are "necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities").

328 *See id.*

329 *See Regents*, 140 S. Ct. at 1909–15 (noting that the Secretary of DHS "failed to consider . . . important aspect[s] of the problem," per the requirements of Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Corp., 463 U.S. 29 (1983) (alteration in original)).

330 Shah, *Presidential Administration*, *supra* note 29, at 1261.

and should play' in the administration of the Census."[331] In doing so, the Court found that the agency's decision to add a question to the Census inquiring about citizenship status was unsubstantiated—a cover for mere responsiveness to the White House's policy position.[332] While much of Chief Justice Roberts's majority opinion treated the Commerce Secretary's decision "as a perfectly reasonable and historically grounded policy choice," the decision ultimately found that the Secretary "had lied" in order meet the president's objectives at any cost.[333]

Furthermore, the judiciary has also required agencies to maintain an improved level of process by recognizing reliance interests.[334] At the time of the *Regents* case, 700,000 people had applied for and received deferral of deportation under DACA.[335] Accordingly, the Supreme Court found reliance interests present when evaluating whether the first Trump Administration could revoke DACA's discretionary set of procedures.[336] In doing so, the Court rendered it more difficult for DHS to revoke the DACA program itself.

During the second Trump Administration, the judiciary has attempted to apply the APA to continue to protect reliance, albeit less successfully. A federal judge resisted the decision to strip 350,000 "Venezuelan nationals who have legal status to reside and work temporarily in the" United States "of their protection under the Temporary Protected Status (TPS) program, subjecting them to possible imminent deportation back to Venezuela, a country[] rife with economic and political upheaval and danger."[337] More specifically, he found reliance interests that would require the Trump Administration to continue the Biden Administration's extension of the TPS program.[338] However, the Supreme Court failed to reaffirm the district court's

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331 Shah, *Judicial Administration*, *supra* note 316, at 1123.

332 *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019) ("We are presented . . . with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process . . . . [W]e cannot ignore th[is] disconnect . . . . Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'" (citation omitted)).

333 *See* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 Sup. Ct. Rev. 1, 26, 27 (2020) (citations omitted); Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 Yale L.J. 1748, 1788 (2021) (noting that when the Secretary "lied about his reasons for adding the citizenship question, [there was] damage to *political* accountability" as well).

334 *See supra* note 203 and accompanying text.

335 *Regents*, 140 S. Ct. at 1896.

336 *See id.* at 1914–15 (discussing reliance interests of DACA recipients); Haiyun Damon-Feng, *Administrative Reliance*, 73 Duke L.J. 1743, 1787–89 (2024).

337 Order Granting Plaintiffs' Motion to Postpone, Nat'l TPS All. v. Noem, No. 25-CV-01766, slip op. at 1 (N.D. Cal. Mar. 31, 2025).

338 *Id.* at 52–53.

decision asserting reliance interests implicated by the TPS program,[339] suggesting that the Court supports the trend toward intensifying presidential control over administrative discretion and the resulting consolidation of presidential power, even at the expense of reliance interests.

Moving forward, judicial review under the APA could limit the range and impact of illegitimate immigration enforcement resulting from presidential administrative discretion by forcing officials to improve the justifications underlying their actions. Immigration agencies might choose to accomplish this by implementing better policymaking processes in order to shore up the rationales underlying their decisionmaking. And while court decisions blocking high-profile immigration actions have provoked President Trump's ire during his second term, an incremental approach to judicial review under the APA could reduce presidential defiance by decreasing the media and popular attention that appears to motivate the Administration to push back against judicial orders.

It bears noting, however, that the Supreme Court has been resistant to restricting the president's power to direct immigration enforcement discretion during his second term. In *Trump v. J.G.G.*, the Court said that people who are detained and deported under the AEA[340] have no recourse under the APA. Instead, it declared that "[c]hallenges to removal under the AEA, a statute which largely preclude[s] judicial review, . . . must be brought in habeas."[341] In Justice Kavanaugh's concurrence, he makes the point clearer: The "question turns on whether these transfer claims belong in habeas corpus proceedings or instead may be brought under the Administrative Procedure Act. I agree with the Court's analysis that the claims must be brought in habeas."[342]

Unfortunately, as Justice Sotomayor observes, habeas corpus is the wrong tool: "The plaintiffs in this case sued not to challenge their detention, but to protect themselves from summary deportation."[343] And per Justice Jackson's dissent: "I lament that the Court appears to have embarked on a new era of procedural variability, and that it has done so in such a casual, inequitable, and, in my view, inappropriate manner."[344] In doing so, the Court may be reinforcing the president's

339 Noem v. Nat'l TPS All., No. 24A1059, 2025 WL 1427560, at *1 (U.S. May 19, 2025).
340 *See supra* notes 218–19 and accompanying text.
341 Trump v. J.G.G., 145 S. Ct. 1003, 1005 (2025) (citations and quotations omitted).
342 *Id.* at 1006 (Kavanaugh, J., concurring).
343 *Id.* at 1013 (Sotomayor, J., dissenting).
344 *Id.* at 1016–17 (Jackson, J., dissenting).

ability to harness administrative decisionmaking in unfair and perhaps unlawful ways.

First, relegating judicial review of deportation under the AEA to habeas corpus proceedings cuts against the interests of economically marginalized noncitizens. As Justice Sotomayor observes, "[i]ndividuals who are unable to secure counsel, or who cannot timely appeal an adverse judgment rendered by a habeas court, face the prospect of removal directly into the perilous conditions of El Salvador's [high security prison], where detainees suffer egregious human rights abuses."[345] Moving forward, the Administration is perhaps more likely to detain noncitizens in jurisdictions that are favorable to the administration's goals (rather than having to argue about how the APA applies before the D.C. Circuit). And noncitizens, particularly those who are targeted because of their engagement in protest and advocacy activity,[346] neither have the political power to fight these detentions and deportations as a collective nor command the electoral influence required to sway these policies from the top down.

Second, it is unclear whether the Trump Administration will adhere to the constitutional, if minimal, protection offered by habeas review, which allows an individual to challenge their detention by the government. When asked at a Senate hearing to define this right, the Secretary of DHS "described [habeas corpus] as 'a constitutional right that the president has to be able to remove people from this country.'"[347] The Secretary's confusion suggests a reduced interest in ensuring that ICE is not, in fact, unconstitutionally imprisoning people. And her belief "that the president of the United States has the authority under the Constitution to decide if [habeas corpus protections] should be suspended or not"[348] implies the same.

Even a Supreme Court reluctant to constrain presidential administrative discretion in immigration could ensure the relative safety of U.S. citizens.[349] A U.S. citizen may not be legally deported under

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345 *Id.* at 1015 (Sotomayor, J., dissenting); *see also* Samantha Schmidt, Helena Carpio, María Luisa Paúl, Silvia Foster-Frau, Teo Armus & Aaron Steckelberg, *'Welcome to Hell': Inside the Megaprison Where the U.S. Deported Migrants*, Wash. Post (July 31, 2025), https://www.washingtonpost.com/world/2025/07/31/venezuelans-deported-us-el-salvador-prison-cecot [https://perma.cc/J6RL-HVLW] (compiling firsthand accounts of the various human rights abuses in El Salvador's Terrorism Confinement Center).

346 *See supra* notes 216–17 and accompanying text.

347 Amanda Friedman, *Noem Defends Potentially Suspending Habeas Corpus, Flubs Definition as Trump's Right to 'Remove People'*, Politico (May 20, 2025, 12:27 PM), https://www.politico.com/live-updates/2025/05/20/congress/kristi-noem-habeas-corpus-00358829 [https://perma.cc/VD9B-LKV8].

348 *Id.*

349 *See supra* notes 230–33 and accompanying text.

any circumstances, regardless of their association with, or conviction under the criminal legal system. The Constitution and federal laws protect citizens from being deported, and the government cannot strip a citizen of their citizenship outside of narrow circumstances.[350]

Unfortunately, there is no systematic approach to ensuring that U.S. citizens are not wrongfully deported, nor straightforward recourse for those who are. And by relegating judicial review of all aspects of wrongful immigration enforcement to the limited domain of habeas corpus claims, the Court may well be empowering the president to deport U.S. citizens and, consequently, to resist judicial decisions reiterating the unlawfulness of doing so. Nonetheless, habeas offers at least a form of judicial oversight, based in constitutional (if not administrative law) review, for an area of regulation that implicates this set of constitutional law concerns.

Another way to leverage constitutional law to manage presidential administrative discretion is to engage the judiciary in due process claims. Feasibly, judicial reinforcement of due process requirements that are warped by national security interests provide a model for ensuring due process in the face of presidential administrative discretion, particularly in immigration matters. The politicization of decisionmaking that flows from the unilateral mission of an agency, and the agency heads in charge of implementing "agencies" norms, are distinct from the more transient control wielded by a sitting president.[351] However, both can establish political leanings that heavily influence how bureaucrats make decisions,[352] including the quality of process available to individuals facing governmental punishment.

In one case, politicized aims—namely, DHS's national security mission[353] and the FBI's core interrogation tactics, which involve torture[354]—overcame administrative adjudication, causing the government to exercise a degree of procedural and enforcement discretion biased in favor of national security interests and against individual liberties that was ultimately found untenable by the Supreme

350 For example, the government can revoke the naturalized citizenship of an individual "if he or she procured naturalization illegally." 12 U.S. Citizenship & Immigr. Servs., Policy Manual pt. L, ch. 2 (2025), https://www.uscis.gov/policy-manual/volume-12-part-l-chapter-2 [https://perma.cc/MW4W-NJTB].

351 *See* Shah, *Administrative Subordination*, *supra* note 23, at 1648–49.

352 *See id.* at 1685, 1687 (arguing that both the president and agency bureaucrats can foster change in policy).

353 *See id.* at 1651–53.

354 *See id.* at 1655 (explaining that the FBI's subcomponent office was unable to fulfill its mission in utilizing interrogation methods other than torture and coercion because the subcomponent was too dependent on the FBI and other agencies in the national security space).

Court. Here, a U.S. citizen of Sudanese descent was placed on the "No Fly List" in 2009 after traveling to Sudan for business.[355] Inclusion on the No Fly List is the result of informal agency adjudication. After arriving in Sudan, the individual "informed U.S. officials of his interest in pursuing business opportunities in the country. . . . Eventually, he received an invitation to the U.S. embassy—ostensibly for a luncheon."[356]

Once he arrived at the embassy, he was told by FBI agents that he had been placed on the No Fly List, questioned about his activities at his U.S.-based house of worship (a mosque in his place of residence, Portland, Oregon), and told he could be removed from the list if he agreed to become an FBI informant and to report on other members of his religious community.[357] After the petitioner refused to become an informant and then traveled to the United Arab Emirates for business, he was "arrested, imprisoned, and tortured" and held for 106 days at the behest of the FBI.[358] He finally ended up in Sweden, where he remained until 2015.[359]

While in Sweden, he filed suit against the U.S. government for violating "his rights to procedural due process by failing to provide any meaningful notice of his addition to the No Fly List, any information about the factual basis for his listing, and any appropriate way to secure redress."[360] In addition, "he claimed, the government had placed him on the list for constitutionally impermissible reasons, including his race, national origin, and religious beliefs."[361] In 2016, the government sent the petitioner a notice that he had been removed from the list but provided no explanation. Nonetheless arguing that its action rendered the petitioner's concerns moot.[362]

Last year, the Supreme Court held—unanimously—that the petitioner's claim was not moot,[363] suggesting that this petitioner's enduring concerns and claims about the No Fly List process remain justified. As the Court observed, "the government's sparse declaration" that it would not put the petitioner on the No Fly List again fell "short

355 FBI v. Fikre, 144 S. Ct. 771, 775 (2024).

356 *Id.* (citation omitted).

357 *Id.*

358 *Id.* at 776 (quoting Fikre v. FBI, 35 F.4th 762, 766 (9th Cir. 2022)).

359 *Id.*

360 *Id.* The petitioner contended, and the government did not contest, that he was placed "on the No Fly List for constitutionally impermissible reasons, including his religious beliefs" as a Muslim. *Id.* at 777.

361 *Id.*

362 *Id.*

363 *Id.* at 777 ("Instead, our precedents hold, a defendant's voluntary cessation of a challenged practice will moot a case only if the defendant can show that the practice cannot reasonably be expected to recur." (quotations and citations omitted)).

of demonstrating that it [could not] reasonably be expected to do again in the future what it [was] alleged to have done in the past."[364] Here, the judiciary was important in "precipitat[ing] limited reform in the [No Fly List] watchlisting process"[365] despite an influential political interest in national security at all costs.[366] Likewise, the Court could ensure due process even in situations where agency decisionmaking is heavily focused on the president's harsh immigration priorities.

In another case,[367] the plaintiffs "suspected that they were on the No Fly List," but DHS "refused to confirm or deny their listing statuses, or to provide assurances about future travel."[368] As a result, they argued that their inclusion on the No Fly List "violated their Fifth Amendment due process rights, and that it was arbitrary and capricious and thus unlawful under the APA."[369] In response, the court "held that the plaintiffs had a constitutionally protected interest in international air travel and in defending their reputation" and that "the TRIP [Traveler Redress Inquiry Program] procedure created a high risk of erroneous deprivation of these interests."[370]

Furthermore, "[a]ccording to the court, judicial review was an insufficient safeguard because the plaintiffs were denied any access to the administrative record."[371] Ultimately, this decision "led to a revision of the DHS TRIP redress procedure,"[372] per which DHS established[373] that "[a]n order to maintain an individual on the list must state the basis for the decision, subject to national security constraints."[374] This decision may offset, at least to some extent, the agency's habit of maintaining only an impoverished record, which could improve judicial review over time and stave off not only the DHS's tendency, but also the orientation of presidential administrative discretion, toward penalizing certain ethnic and religious communities as result of amorphous and xenophobic fears about the origins of national security threats.[375] Note, however, that courts have resisted

364 *Id.*

365 Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1107 (2020).

366 *See generally* Shirin Sinnar, *The Unaccountable Racialized Security State*, DAEDALUS (forthcoming) (discussing courts' deference to the executive for national security concerns).

367 Latif v. Holder, 28 F. Supp. 3d 1134, 1142 (D. Or. 2014).

368 Chachko, *supra* note 365, at 1107.

369 *Id.*

370 *Id.*

371 *Id.*

372 *Id.* at 1108. Indeed, "the court concluded that additional procedures like notice and a hearing would have had significant probative value." *Id.* at 1107.

373 *See id.* at 1107–08 (noting that "the court left it to the government to devise new, adequate procedures without jeopardizing national security").

374 *Id.*

375 *See* Shah, *Administrative Subordination*, *supra* note 23, at 1606–07.

additional litigation against these DHS No Fly List review policies, which suggests limits to judicial review as a bulwark against overly restrictive procedure[376] resulting from institutional or presidential control.

Finally, in this moment, it is worth considering how courts might respond to threats to the constitutional separation of powers. One threat is that, by usurping and wrangling bureaucratic discretion in a manner that is at odds with the law, the president is in danger of supplanting legislative authority.[377] A second threat stems from the Executive's defiance of judicial authority in his efforts to maintain a stronghold over the bureaucracy.[378]

As to Executive infringement on legislative authority, one scholar describes President Trump's elimination of asylum at the southern border as "blatantly illegal and unconstitutional."[379] The United States has admitted asylees and refuges under the Refugee Act since 1980.[380] Under both this law and international agreement[381] the United States has legal obligations to provide protection to those who qualify. The president's action is therefore unlawful because "[t]he president cannot single-handedly undo laws passed by Congress nor can the president unilaterally change international treaties to which the United States is a party."[382]

Likewise, immigration advocacy groups argue that that the "[p]roclamation and implementing guidance [is] an unlawful effort to supplant the detailed provisions of the [Immigration and Nationality Act] with an alternative set of immigration laws established by executive

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376 *See, e.g.*, Latif v. Lynch, No. 10-CV-00750, 2016 WL 1239925 (D. Or. Mar. 28, 2016) (finding that the government's revised procedures, in response to *Latif v. Holder*, met the requirements of procedural due process and that national security interests can limit that process); Kashem v. Barr, 941 F.3d 358, 364 (9th Cir. 2019) (affirming the *Latif v. Lynch* holding).

377 *See supra* notes 158–59 and accompanying text.

378 *See supra* notes 219–23, 234–37 and accompanying text.

379 *See* Martínez-Beltrán, *supra* note 158 (quoting Prof. Elora Mukherjee) (internal quotations omitted).

380 *See* Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 USC) (establishing a formal system for refugee admittance and expanding legal protections for refugees).

381 *See, e.g.*, 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, (entered into force Oct. 4, 1967), https://www.refworld.org/legal/agreements/unga/1967/en/41400 [https://perma.cc/X9DX-5F3A] (example of a treaty creating obligations); U.N. High Commissioner for Refugees, Convention and Protocol Relating to the Status of Refugees (Dec. 2010), https://www.unhcr.org/sites/default/files/2025-02/1951-refugee-convention-1967-protocol.pdf [https://perma.cc/M43R-X6T4] (same).

382 *See* Martínez-Beltrán, *supra* note 158 (quoting Prof. Elora Mukherjee) (internal quotations omitted).

'fiat.'"[383] And a D.C. federal district judge agrees with this assessment, staying the asylum policy because the president does not have the constitutional authority to "adopt an alternative immigration system, which supplants the statutes that Congress has enacted."[384] In granting the stay, the judge highlighted the statutory limits of presidential administrative discretion in this context.[385]

Regarding Executive disregard for judicial power, the judiciary is also pushing back, to limited effect.[386] For example, a district court in Maryland required the Trump Administration to effectuate the immediate return of Mr. Ábrego García[387] from El Salvador back to the United States and the Supreme Court affirmed the lower court's authority to order the government to do so.[388] Nonetheless, the Trump Administration failed to comply.[389]

In addition, a federal district court judge in Washington, D.C., issued a temporary restraining order barring the use of the AEA to deport the plaintiffs named in the case;[390] this order was soon amended to include a nationwide class of individuals.[391] The oral order made clear that any planes in the air must be returned to U.S. airspace and that custody of these individuals must not be relinquished to a foreign government.[392] Despite this clear command, two planes that had already departed U.S. airspace, but that had not yet arrived in El Salvador,

383 Refugee and Immigrant Ctr. for Educ. and Legal Servs. v. Noem, No. 25-CV-00306, 2025 WL 1825431, at *31 (D.D.C. July 2, 2025). (citing Plaintiffs' Opposition to Defendants' Motion for Summary Judgment and Reply in Support of Plaintiffs Motion for Summary Judgment at 11, Refugee and Immigrant Ctr. for Educ. and Legal Servs. v. Noem, No. 25-CV-00306 (D.D.C. Apr. 7, 2025)); *see also* Complaint at ¶¶ 2–33, Refugee and Immigrant Ctr. for Educ. and Legal Servs., No. 25-CV-00306, 2025 WL 1825431 (D.D.C. July 2, 2025), ECF No. 1.

384 Refugee and Immigrant Ctr. for Educ. and Legal Servs. v. Noem, No. 25-CV-00306, 2025 WL 1825431, at *4 (D.D.C. July 2, 2025).

385 *Refugee and Immigrant Ctr. for Educ. and Legal Servs*., slip op. at 64.

386 *See* Caitlin Wilson & Jessica Rawnsley, *US Judge Says He Could Hold Trump Administration in Contempt of Court*, BBC News (Apr. 16, 2025), https://www.bbc.com/news/articles/c045qg9xr30o [https://perma.cc/3D64-HDLH] (noting a federal judge's efforts to hold the Trump Administration in contempt of court for "wilful [sic] disregard" of a judicial order to halt the departure of deportation flights) (referencing J.G.G. v. Trump, No. 25-CV-00766 (D.D.C.)).

387 *See supra* notes 220–27 and accompanying text.

388 Noem v. Ábrego García, 145 S. Ct. 1017, 1018 (2025).

389 Ábrego García v. Noem, No. 25-CV-00951 (D. Md. Apr. 11, 2025) (detailing the supplemental declaration the Defendants were directed to file and stating that "Defendants made no meaningful effort to comply").

390 *See* Minute Order, J.G.G. v. Trump, No. 25-CV-00766 (D.D.C. Mar. 15, 2025) (granting Plaintiffs' Motion for a Temporary Restraining Order).

391 *See id.* (granting Plaintiffs' Motion for Class Certification).

392 *See supra* note 388–89 and accompanying text.

continued en route.[393] In response to the court's request for information to determine whether its order had been observed, the Administration characterized the judicial inquiry as "a picayune dispute over the micromanagement of immaterial factfinding"[394] and ultimately "evaded its obligations" to the court.[395] According to leading expertise, if executive officials "really are determined to resist a court order, there is very little the court can do."[396] Be that as it may, there is some evidence that the president may be relenting,[397] if only to emphasize noncitizens' unsubstantiated "criminality" in a different way.[398]

Conclusion

The administrative state is said to have "substantial political accountability, relatively effective implementation of statutory mandates, and more or less fair procedures."[399] However, people are personally and profoundly impacted by discretionary administrative decisionmaking, without necessarily benefitting from conventional systems of democratic or procedural accountability. This dearth of accountability is not necessarily due to a lack of unitary executive control over adjudication (as is the conviction of the current Supreme Court), but instead may be the *result* of presidential power over agency decisionmaking.

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393 Joyce Sohyun Lee & Kevin Schaul, *Deportation Flights Landed After Judge Said Planes Should Turn Around*, Wash. Post (Mar. 16, 2025), https://www.washingtonpost.com/immigration/2025/03/16/deportation-flights-trump-el-salvador [https://perma.cc/XPY7-UXRM].

394 J.G.G. v. Trump, No. 25-CV-00766, slip op. at 1 (D.D.C. Mar. 19, 2025).

395 J.G.G. v. Trump, No. 25-CV-00766, slip op. at 1 (D.D.C. Mar. 20, 2025).

396 Chotiner, *supra* note 234; *see also* Nick Miroff, *An 'Administrative Error' Sends a Maryland Father to a Salvadoran Prison*, The Atlantic (Mar. 31, 2025), https://www.theatlantic.com/politics/archive/2025/03/an-administrative-error-sends-a-man-to-a-salvadoran-prison/682254 [https://perma.cc/3MBF-UNSB] (reporting that the Trump Administration admitted to errors but "said that U.S. courts lack jurisdiction to order [the] return" of wrongfully deported Kilmar Ábrego García).

397 The return of deportee "O.C.G.[] represented a dramatic turnaround a week after federal authorities had vowed to fight a May 23 order by U.S. District Judge Brian E. Murphy in Boston to 'take all immediate steps' to return the man to the United States." Maria Sacchetti, *Trump Administration Returns Guatemalan Man It Erroneously Deported*, Wash. Post (June 5, 2025), https://www.washingtonpost.com/immigration/2025/06/05/first-deportee-returned-trump-guatemala [https://perma.cc/4WWC-627Z] (noting O.C.G. is "the first known instance of the Trump administration returning a deportee in response to a judicial order"); *see also* D.V.D. v. Dept. of Homeland Sec., No. 25-CV-10676, slip op. at 13 (D. Mass. May 23, 2025) ("Defendants are hereby ORDERED to take all immediate steps, including coordinating with Plaintiffs' counsel, to facilitate the return of O.C.G. to the United States.").

398 *See supra* notes 224–26 and accompanying text.

399 Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 Harv. L. Rev. 718, 719 (2016).

This Article argues that presidents harness administrative discretion in administrative decisionmaking that falls outside the ambit of the APA in order to pursue their own aims. Because administrative discretion in informal agency adjudication and enforcement is both easily politicized and relatively impervious to law ensuring a procedural floor, it may be troublingly inconsistent with an abstract confidence in the pervasiveness and reliability of administrative accountability. In both the adjudication and enforcement contexts, presidential administrative discretion has at times encouraged a focus on procedural and humanist values. However, the current president has pressured agency adjudicators to meet his ideological aims and exacerbated the loss of rule of law values in administrative enforcement.

In an era of presidential administration that emphasizes increasing executive power at all costs,[400] and in which the assumed counterweight to presidentialism is resilient internal agency process and more expansive administrative discretion, this Article advises scholars, advocates, and other stakeholders to be aware of and more closely monitor overlooked forms of presidential administrative decisionmaking, especially on the front lines, where the institutional incentives driving bureaucratic discretion and individual interests collide. To expand on Justice Holmes's advice, "judicial process values should trump political process values [*especially*] when an agency"—as directed by the president—"has singled out an individual for adverse treatment."[401] When the president shapes administrative decisionmaking discretion to reach substantive ends, consistent process informed by public interaction and the courts could stabilize particularly aggressive presidential control and mitigate unlawful enforcement actions.

400 *See* Moynihan, *supra* note 15, at 364 (arguing that the "new model of politicization pursued by President Trump features" key attributes including "a personalist infrastructure of presidential power" and "governing by fear" and conspiracy).

401 Pierce, *supra* note 7, at 500–01 (paraphrasing Justice Holmes) (citation omitted).