Operationalizing Internal Administrative Law

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As part of the Hastings Law Journal's Administrative Law in the Age of Trump Symposium, this Essay argues that administrative law should stop fixating on federal courts. While court-centric external administrative law serves an important role in administrative practice, it is far from sufficient to safeguard against agency overreach. After all, the vast majority of agency actions never make it to court. Instead, this Essay builds on recent suggestions that federal agencies can leverage internal administrative law to self-discipline against abuses of power. By surveying internal administrative law in various regulatory contexts and drawing substantially from the important work of the Administrative Conference of the United States, this Essay seeks to operationalize the concept of internal administrative law to demonstrate its critical and attainable safeguarding role for agency actions that often escape judicial review.

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INTRODUCTION

Administrative practice is an iceberg.[1] Federal courts see only the tip peaking above the water—the judicial challenges to regulatory actions that make it to the courthouse. Administrative law scholars have dedicated much time to analyzing that small peak of judicial review of agency action and related judicial deference doctrines.[2] Yet, below the water's surface exists a mass of regulatory activity that escapes the judiciary's purview. That activity either evades judicial review entirely or is substantially insulated from review. Accordingly, as one of us has cautioned, "[i]t is a mistake for administrative law to fixate on judicial review as the core safeguard for our constitutional republic."[3]

The breadth and variety of administrative action that escapes judicial review is staggering. Indeed, almost all categories of agency action enjoy some insulation from judicial oversight.[4] For example, despite the availability of judicial review under the Administrative Procedure Act (APA), notice-and-comment rulemaking is subject to significant judicial deference per the *Chevron* doctrine, generally as long as the agency's final rule represents a "reasonable" interpretation of an ambiguous statute the agency administers.[5] Moreover, because agencies play an important role in drafting the statutes that govern them, that judicially insulated *Chevron* policy space is—at least to some degree—self-delegated.[6] Less-formal subregulatory activities are further insulated from judicial review. In particular, agency guidance itself is not legally binding and therefore not generally reviewable, though it may arise in litigation as it reflects an agency's interpretation of the underlying statute or regulation it is enforcing (and may, in the latter case, receive *Auer* deference, as narrowed by *Kisor*).[7] And

1. We borrow this analogy from Nicholas Parrillo's study of agency guidance and expand it to depict internal administrative law as a whole, which encompasses at least some types of agency guidance. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 170 (2019) ("But litigation is only the tip of the iceberg. The iceberg itself is administrative practice: the workaday world of agency officials and their attorneys who must constantly decide how to formulate and use guidance documents that are officially supposed to be nonbinding." (footnote omitted)).

2. *See, e.g.*, Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014) (observing how, with nearly 70,000 citations, *Chevron U.S.A. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984), is one of the most-cited administrative law decisions of all time).

3. Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1638 (2018).

4. For a more detailed discussion of the following examples, see *id.* at 1625–38; *see infra* Part II for further analysis.

5. Chevron U.S.A. v. Nat'l Res. Def. Council, 467 U.S. 837, 842–44 (1984); *see* 5 U.S.C. § 553 (2018) (detailing notice-and-comment rulemaking procedures); *id*. § 702 (providing for judicial review of final agency action).

6. *See* Christopher J. Walker, *Lawmaking Within Federal Agencies and Without Judicial Review*, 32 J. LAND USE & ENVTL. L. 551, 553–59 (2017) (exploring how agency policymaking is insulated from judicial review both by *Chevron* deference and agency statutory drafting practices). The administrative state's budgeting process is also largely shielded from judicial review. *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2186 (2016).

7. *See, e.g.*, Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 266–69 (2018). For a discussion of *Auer v. Robbins*, 519 U.S. 452 (1997), and *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), see *infra* note 90 and accompanying text.

regulated entities often face great incentives to comply with agency guidance and forgo judicial review even when they have avenues to challenge such guidance in court.[8]

Despite the availability of judicial review under the APA, most agency adjudications escape federal court supervision. Formal adjudication—and mass agency adjudication in particular—creates great disparities in adjudicative outcomes that go uncorrected by courts because adjudicated individuals often lack the resources or knowledge to seek review.[9] Informal adjudication receives even less attention from courts because of its lack of evidentiary hearing requirements and, in some cases, statutory limits on judicial review.[10] Enforcement actions themselves are subject to judicial review, but administrative decisions whether to enforce generally are not. That discretion includes both decisions *not* to enforce[11] as well as decisions to "crack down," as Mila Sohoni puts it.[12]

Appreciating this phenomenon of bureaucracy beyond judicial review should encourage us to rethink theories and doctrines in administrative law, and to reconsider the direction of administrative law as a field. So much scholarly attention has focused on refining judicial deference doctrines and standards of review to strike the right balance of allowing agencies to reasonably exercise their expertise, while reining in arbitrary exercises of agency discretion.[13] However, if judicial review provides no safeguard against potential abuses of power in most regulatory activities, we must turn to other mechanisms to protect liberty and the rule of law. All three branches of the federal government must play their roles. As should civil society and the agencies themselves.

This Essay calls attention to one such critical safeguard that merits further scholarly inquiry: internal administrative law. As Gillian Metzger and Kevin

8. *See* Parrillo, *supra* note 1, at 184–230 (documenting and assessing the strength of these compliance incentives).

9. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7–8 (2015); David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1191–97 (2016). In this Essay, we include within the "formal adjudication" category any agency adjudication where a hearing is required by statute or regulation, with all other agency adjudications falling within the "informal" categorization. In the new world of agency adjudication, that means we are combining "Type A" and "Type B" adjudication as formal and "Type C" as informal. *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 153–57 (2019) (discussing the Type A, B, and C categorizations of agency adjudication embraced by the Administrative Conference of the United States in Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,314–15 (Dec. 23, 2016)).

10. *See, e.g.*, Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183–84, 201–07 (2017).

11. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 837 (1985) ("[T]he presumption that agency decisions not to institute [enforcement] proceedings are unreviewable. . . .").

12. Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 33 (2017).

13. We do not mean to overclaim. Many administrative law scholars have followed in the footsteps of Jerry Mashaw, who dedicated his career to examining administrative law and regulatory practice from inside the administrative state. Such examples are set forth in a recent edited volume that honors and builds on his pioneering work. *See* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW (Nicholas R. Parrillo ed., 2017). Yet, unfortunately, the field of administrative law as a whole is still too court-centric.

Stack explain in their seminal article on the subject, "[i]nternal administrative law consists of the internal directives, guidance, and organizational forms through which agencies structure the discretion of their employees and presidents control the workings of the executive branch."[14] Thus, the world of internal administrative law is vast. Yet, it mostly escapes judicial review. Returning to the image of the iceberg, internal administrative law operates almost entirely below the surface. This is because internal administrative law is, well, internal. Yet internal law influences the everyday decisions agencies make. And these decisions matter because they collectively add up to the various ways agencies impose additional procedures on themselves beyond the bare minimum required by the APA and the agencies' organic statutes—*Vermont Yankee*'s "white space," as Emily Bremer and Sharon Jacobs so aptly describe this area of internal law.[15]

It turns out that internal administrative law has the potential to serve as a potent defense against agency overreach. Yet, as Bremer and Jacobs observe, "[o]ne major downside of the dearth of judicial oversight in this area [of internal administrative law] . . . is that procedural innovation has received limited scholarly attention."[16] This Essay seeks to help remedy that deficiency by attempting to operationalize the concept of internal administrative law to demonstrate its critical safeguarding role with respect to agency actions that often escape judicial review.

This Essay proceeds in two Parts. Part I seeks to define internal administrative law to situate its place in the modern regulatory state, including the critical role of the Administrative Conference of the United States (ACUS) in identifying, cultivating, and encouraging best practices in internal administrative law across all federal agencies. Part II shifts to apply internal administrative law in areas where agency actions are insulated from judicial review. To be sure, we do not endeavor to present a comprehensive account. Instead, we offer some concrete examples, many drawn from ACUS recommendations, on how internal administrative law can serve as a critical bulwark against potential abuses of administrative power. The Essay concludes by underscoring that internal administrative law is a necessary but not sufficient defense and calling for a more-sustained scholarly inquiry into its role and effectiveness in constraining agency overreach—especially such overreach that may occur when judicial oversight is absent.

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14. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1239 (2017).

15. Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in* Vermont Yankee*'s White Space*, 32 J. LAND USE & ENVTL. L. 523, 523–24 (2017) (citing Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, 435 U.S. 519, 524 (1978), and defining this "white space" as "the scope of agency discretion to experiment with procedures within the boundaries established by law (and thus beyond the reach of the courts)").

16. *Id.* at 542.

I. DEFINING INTERNAL ADMINISTRATIVE LAW

Internal administrative law is not a new concept.[17] Nonetheless, it remains a neglected one. This may be, as Bremer and Jacobs suggest, because of the lack of judicial oversight and, consequently, the lack of scholarly attention that such judicial activity attracts.[18] Or, as Metzger and Stack hypothesize, it may be due to a deeply ingrained distrust of administrative governance in the United States.[19] Such distrust may stem from constitutional concerns of unchecked bureaucratic power, especially as Congress delegates more power to federal agencies and courts are instructed to defer to those administrative actions. For example, Justice Scalia ominously described the combined growth of legislative delegation and judicial deference to agencies as a "dangerous permission slip for the arrogation of power" beyond constitutional boundaries.[20] Chief Justice Roberts has echoed this theme of bureaucratic distrust:

> Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.[21]

Regardless of the cause for ignoring internal administrative law, we agree that "[t]he reigning model for administrative law doctrine continues to be external constraints on agencies imposed by Congress and the courts."[22] This Part looks inward to trace the modern origins and evolution of internal administrative law. By design, our discussion is cursory, as Metzger and Stack have already given the definitive account of internal administrative law from the APA's enactment up to today.[23] Our modest objective is to further define the function of internal administrative law in the modern regulatory state and, importantly, to underscore ACUS's central role in its ongoing development.

17. *See, e.g.*, BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS § 4, at 14 (Lawbook Exchange 2014) (1903) (discussing the differences between "internal administrative law" and the external law of administration, and arguing that the former is the "real subject" of administrative law inquiry).

18. Bremer & Jacobs, *supra* note 15, at 542.

19. Metzger & Stack, *supra* note 14, at 1305–06 ("[T]he anti-administration meme has deep roots in American political culture, and . . . retains political salience." (footnote omitted)); *accord* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017); *cf.* Aaron L. Nielson, Response, *Confessions of an "Anti-Administrativist"*, 131 HARV. L. REV. F. 1, 10 (2017) (offering a critique of Metzger's stance, yet agreeing with her that the Supreme Court's "strong rhetoric has not been paired with equally strong decisions").

20. Decker v. Nw. Envtl. Def. Center, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part).

21. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010); *see also* City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) ("The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities" (quoting *Free Enter. Fund*, 561 U.S. at 499)).

22. Metzger & Stack, *supra* note 14, at 1243–44; *accord* Bremer & Jacobs, *supra* note 15, at 541–42.

23. *See* Metzger & Stack, *supra* note 14, at 1266–78 (exploring the role of internal administrative law during the enactment of the APA in 1946); *id.* at 1278–90 (analyzing the post-APA development of internal law).

A. THE ORIGIN STORY

The concept of internal administrative law is unsurprisingly broad. It has been succinctly defined as "measures governing agency functioning that are created within the agency or the executive branch and that speak primarily to government personnel."[24] The term encompasses far more than just internal procedures, as Metzger and Stack explain:

> Internal administrative law thus includes internal procedures for agency action, structures of internal agency organization and allocation of authority, specifications for how agency actors are to make evaluations or conduct analysis, guidance about the agency's understanding of what statutes and regulations mean, informal agency practices, interagency agreements and norms, and centrally generated cross-cutting requirements for agency action.[25]

Despite the diverse measures that constitute internal administrative law, all of them share the fundamental characteristic of being implemented from inside of agencies to control their actions and operations.[26]

Furthermore, we concur with Metzger and Stack that the concept of internal administrative law fits squarely within the scheme contemplated by the APA.[27] The APA was enacted in 1946 to codify the default rules for agency action and judicial review thereof.[28] The general consensus today is that the drafters of the APA intentionally left space within the default rules for agencies to add details as needed in the form of their internal laws.[29] In other words, the internal laws were intended to be the living flesh on the APA's skeleton.[30] This statutory design is evidenced in at least two ways. First, the drafters imposed one simple limitation on certain types of agencies' internal laws by requiring their publication in the Federal Register.[31] Second, the APA expressly exempts internal administrative law from the notice-and-comment requirements of rulemaking. All internal rules relating to agency management and personnel, "interpretative rules, general statements of policy, or rules of agency

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24. *Id.* at 1251.

25. *Id.* at 1256. Assessing whether internal administrative law qualifies as authoritative "law," as opposed to administration or bureaucracy, exceeds the ambitions of this Essay. For a thorough treatment of the subject, see *id.* at 1256–63.

26. *Id.* at 1254 ("Yet all of these measures share the key characteristics of internal administrative law: they are measures generated by agencies to control their own actions and operations and aimed primarily at agency personnel.").

27. *See id.* at 1266–78 (reviewing the legislative history and statutory structure of the APA).

28. Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 633 (2017).

29. Bremer & Jacobs, *supra* note 15, at 533 ("[C]ourts and scholars have increasingly understood the APA . . . as [providing] a skeletal framework that leaves substantial latitude for agency procedural innovation.").

30. *See id.* Federal agencies' internal administrative law can also be constrained by the Constitution, the agencies' respective organic statutes, judicial precedent, and presidential directives. *See id.* at 531–37 (noting these constraints beyond the APA); *see also* Metzger & Stack, *supra* note 14, at 1286–88, 1297–1301 (detailing the role of executive branch regulation of internal administrative law).

31. H.R. REP. NO. 79-1980, at 236–37 (1946); *see also* Metzger & Stack, *supra* note 14, at 1276–77 (describing the requirement in greater detail).

organization, procedure, or practice," are expressly exempted.[32] As the APA drafters themselves acknowledged, the need to "encourage the making of such rules" for various internal agency processes is critical to controlling and directing agency power beyond its statutory constraints.[33]

B. The Evolution of Internal Administrative Law

As surveyed in Part II, federal agencies have taken advantage of the APA's generous grant of flexibility to develop internal procedures and practices. Yet at least two other actors have played a critical, though perhaps unexpected, role in the evolution of internal administrative law: federal courts and the President.[34] Each will be discussed in turn.

1. From the Outside: Federal Courts

Although traditionally viewed as expositors and umpires of external administrative law, federal courts have also influenced the evolution of internal administrative law in at least three ways.[35]

First, federal courts have developed judicial reviewability doctrines for internal administrative law. The APA prohibits judicial review of agency action that has been "committed to agency discretion by law."[36] And the APA itself is a law that commits rules developed as part of internal administrative law to agency discretion without notice-and-comment constraints.[37] Yet, courts have interpreted the APA to provide for judicial review of internal administrative law when there is "law to apply."[38] As Metzger and Stack summarize these

32. 5 U.S.C. § 553(b)(A) (2018).

33. S. Rep. No. 79-248, at 18 (1946).

34. There are, of course, other key actors that shape internal administrative law. ACUS, for example, will be further discussed in Part I.C and Part II. But a few more come immediately to mind that this Essay will not discuss in detail: the Justice Department; Article I congressional agencies such as the Government Accountability Office; and the American Bar Association (ABA) and in particular its Section on Administrative Law and Regulatory Practice, which regularly advises Congress, federal agencies, and courts on the proper development of internal and external administrative law. *See, e.g.*, Kathryn E. Kovacs, *Scalia's Bargain*, 77 Ohio St. L.J. 1155, 1163–1170 (2016) (detailing the role of the Justice Department, ABA, and ACUS in the enactment of the 1976 amendment to the APA); Walker, *supra* note 28, at 638–48 (describing the roles of ACUS and the ABA in assessing potential reforms to the APA). As a matter of full disclosure, one of us (Walker) serves as a Public Member of ACUS and as Chair-Elect of the ABA's Section on Administrative Law and Regulatory Practice.

35. *See generally* Metzger & Stack, *supra* note 14, at 1281–86 (discussing the first two ways); Bremer & Jacobs, *supra* note 15, at 535–36 (discussing the third).

36. 5 U.S.C. § 701(a)(2) (2018).

37. *Id.* § 553(a)(2) (excepting from the APA's notice-and-comment requirement any proposed rules involving "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts").

38. Webster v. Doe, 486 U.S. 592, 599–600 (1988) (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971)); *see, e.g.*, Heckler v. Chaney, 470 U.S. 821, 834–35 (1985) (explaining that agency guidance is reviewable if the law "indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion"). *See generally* Ronald M. Levin, *Understanding Unreviewablity in Administrative Law*, 74 Minn. L. Rev. 689, 705–09 (1990) (discussing the flaws of the Court's "law to apply" test in *Overton Park*).

developments, "to the extent an agency's internal pronouncements appear to do the work of internal law—to establish norms that bind agency actors, or confine, structure, and constrain the agency's discretion—they risk creating grounds for external judicial review of the agency's compliance."[39] As the Introduction reveals, we are inclined to view opportunities for judicial review to be a feature, not a flaw—at least more so than Metzger and Stack.[40] But we agree that these reviewability doctrines may have the unintended and detrimental consequence of discouraging federal agencies from developing clear and constraining internal administrative law—out of fear that sophisticated regulated entities would have one more tool to utilize to obtain judicial invalidation of agency actions.[41]

Second, and related, the Supreme Court has recognized an external check on internal administrative law in the form of the *Accardi* principle: "[a]gencies must comply with their own regulations."[42] As originally understood, the *Accardi* principle only applied to agency procedures promulgated in rules subject to notice-and-comment rulemaking. In other words, if federal agencies wanted to make internal procedural rules "stickier," they could choose to expend more time and resources to go through notice-and-comment rulemaking.[43] But as Metzger and Stack explain, "[t]he Supreme Court has sent mixed signals about the scope of *Accardi*'s application to internal law."[44] If *Accardi* applies even to procedures promulgated through rules exempt from the APA's notice-and-comment process or subregulatory guidance, federal agencies may well face incentives *not* to develop internal law at all. Indeed, despite sending mixed messages, the Court has wisely recognized that "it is far better to have [purely internal procedural] rules . . . and to tolerate occasional erroneous administration . . . , than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form."[45]

Third, courts have developed a variety of "administrative common law" doctrines that graft onto the APA additional procedures for agencies to follow as well as extra-textual standards for judicial review.[46] As Kenneth Culp Davis

39. Metzger & Stack, *supra* note 14, at 1283.

40. *See, e.g.*, Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106 (2017).

41. *See* Metzger & Stack, *supra* note 14, at 1295 ("[T]hat doctrinal move creates the wrong incentives for agencies when it comes to developing and refining their internal law.").

42. Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006) (citing United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954)).

43. *See, e.g.*, Elizabeth Magill, *Foreword: Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 874 (2009) ("From the perspective of permitting an agency to credibly commit to future action, the most important feature of [the *Accardi*] doctrine is that its enforcement is not up to the agency, but is rather up to the courts."). In his contribution to this Symposium, Aaron Nielson explores another aspect of making agency actions "stickier." Aaron Nielson, *Sticky Regulations and Restoring Internet Freedom*, 71 HASTINGS L.J. 1209 (2020)

44. Metzger & Stack, *supra* note 14, at 1284.

45. United States v. Caceres, 440 U.S. 741, 756 (1979).

46. *See, e.g.*, Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012) (defending and defining administrative common law as "administrative law doctrines and requirements that are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies"). *But see* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV.

famously put it, "[m]ost administrative law is judge-made law, and most judge-made administrative law is administrative common law."[47] While administrative common law remains commonplace, the Court has sought to strike down judicial efforts to impose additional procedures on agencies that are not required by statute. Most famously, the *Vermont Yankee* Court held that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."[48] More recently, the Court rejected another administrative common law doctrine—the requirement of notice-and-comment rulemaking to reverse certain prior agency guidance—and held that such doctrine "improperly imposes on agencies an obligation beyond the 'maximum procedural requirements' specified in the APA."[49]

In sum, the Supreme Court has recognized the *Vermont Yankee* "white space" for internal administrative law as well as agencies' flexibility to create external judicial checks on internal administrative law by entrenching that internal law in legislative rules. These are good developments for internal administrative law. But federal courts have also impeded the healthy growth of internal law by providing unclear guidance on when such internal law is judicially reviewable and judicially enforceable as binding on the agency.

2. *From the Inside: The President*

Perhaps in ways not fully contemplated by the APA, the President has played an important role in the development of internal administrative law. The President, through White House offices like the Office of Management and Budget (OMB) and the Office of Information and Regulatory Affairs (OIRA), exercises some control over agency internal law in the form of executive orders, memoranda, bulletins, and circulars that generally apply to the entire executive branch.[50] One of the most important presidential directives to date for controlling internal law is President Clinton's Executive Order No. 12,866, which builds on President Reagan's Executive Order No. 12,291 and sets out a detailed system for centralized regulatory review that constrains executive agencies' flexibility to develop their own rulemaking procedures.[51] This centralized review system

113, 152 (1998) (criticizing some administrative common law); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209 (2015) (similar).

47. Kenneth Culp Davis, *Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3, 3 (1980).

48. Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, 435 U.S. 519, 524 (1978).

49. Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 100 (2015) (quoting *Vermont Yankee*, 435 U.S. at 524); *see also* Kathryn E. Kovacs, *Pixelating Administrative Common Law in* Perez v. Mortgage Bankers Association, 125 YALE L.J. F. 31, 42 (2015) (criticizing the Supreme Court's decision in *Perez v. Mortg. Bankers Ass'n* for not "explain[ing] why *Paralyzed Veterans* doctrine conflicts with the APA").

50. *See* Metzger & Stack, *supra* note 14, at 1255–56.

51. *See id.* at 1286, 1297–1301 (raising concerns about OIRA's role in internal administrative law because of, among other things, the lack of transparency). *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2285–90 (2001) (discussing further Executive Order No. 12,866 and other means the President has to control the modern administrative state).

requires agencies to submit certain rules to OIRA for review, undertake cost-benefit analysis of certain rules, and develop a regulatory agenda for OMB/OIRA approval, among numerous other requirements.[52]

Presidential administrations are increasingly relying on executive orders and other presidential directives to assert more control over the process and content of regulatory activities.[53] The Trump Administration, for instance, has issued executive orders to impose regulatory budgeting on executive agencies, to influence how they handle adjudicative and enforcement actions, and to constrain how they issue and handle guidance.[54] To be sure, we think it is fair to categorize these presidential actions as a form of internal administrative law. Unlike agency-specific internal law, presidentially created internal law typically applies across the board to all (executive) agencies, thus potentially intruding on agency-specific innovations in internal law.[55] Yet, the internal nature of these presidential directives effectively shields them from the same legislative and judicial review to which enacted laws and final rules are subject.[56]

C. The Role of the Administrative Conference of the United States

While the roles of federal courts and the President have been well covered in the literature on internal administrative law, generally missing from the conventional account is the Administrative Conference of the United States (ACUS). That is unfortunate, as ACUS plays a significant role in developing internal administrative law today and thus in protecting against agency overreach for regulatory actions that escape judicial review.

Soon after the APA was enacted, government officials, scholars, and practitioners collectively recognized the need for an independent federal agency to support and improve administrative procedure.[57] That agency was eventually

52. Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2018).

53. Metzger & Stack, *supra* note 14, at 1297.

54. Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 3 C.F.R. 284 (2018); Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (Oct. 15, 2019); Promoting the Rule of Law Through Improved Agency Guidance Documents, Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 15, 2019).

55. *See* Metzger & Stack, *supra* note 14, at 1301; *see also* Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. (forthcoming 2020) (describing the inter-agency coordination involved in the drafting of executive orders).

56. Metzger & Stack, *supra* note 14, at 1286–87; *see also* Nestor M. Davidson & Ethan J. Leib, *Regleprudence—At OIRA and Beyond*, 103 GEO. L.J. 259, 261–63 (2015) (observing that "OIRA's work of centralized regulatory review is rarely understood to be jurisgenerative, in part because its role in the Executive Branch is not subject to direct judicial review," but arguing that it is internal administrative law—"regleprudence"—that raises "immanent concerns of legality that ought to structure administrative action even in the absence of that judicial oversight").

57. Antonin Scalia & Stephen G. Breyer, *Reflections on the Administrative Conference*, 83 GEO. WASH. L. REV. 1205, 1206 (2015) (testimony of Antonin Scalia); *see also* Mariano-Florentino Cuéllar, *James Landis and the Dilemmas of Administrative Government*, 83 GEO. WASH. L. REV. 1330 (2015) (exploring the influence of James Landis on the creation of ACUS). For a brief account of ACUS's history, see David M. Pritzker, *A Brief History of the Administrative Conference*, 83 GEO. WASH. L. REV. 1708 (2015); *see also id.* at 1732–1817

brought to life in 1964 with the statutory creation of ACUS, which opened its doors in 1968.[58] ACUS brings together government officials, administrative law scholars, and regulatory lawyers to study and recommend improvements to the administrative process.[59] Thus, ACUS is vested with a unique "convening power" that allows federal agency officials and outside experts to communicate with one another beyond traditional bureaucratic channels to ensure the effective operation of administrative law.[60] Its collaborative work results in recommendations of best practices that agencies may choose to adopt.[61] Perhaps in part because agencies are substantially involved in those collaborative efforts, many of them eventually do adopt the recommended practices.[62]

ACUS places particular emphasis on studying and encouraging the development of internal administrative law.[63] As Metzger observes, internal processes are ACUS's "dominant concerns."[64] This is due to its recognition that the ability of agencies to self-impose internal procedures is a foundation on which the APA relies.[65] In other words, agencies need to be able to independently self-regulate beyond the APA's default rules to carry out administrative law "expeditiously in the public interest."[66] ACUS operates as the means to that end.[67] As noted above, ACUS makes recommendations to improve internal (and external) administrative law, but agencies do not have to comply with its recommendations. It has no statutory power to bind. Some agencies choose *not* to comply, or otherwise depart from ACUS recommendations by adapting them based on agency-specific considerations. Agencies may opt out if compliance would risk further judicial or executive intrusion into agency practices. Such agency noncompliance has spurred some

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(presenting bibliography of ACUS publications); *id.* at 1818–22 (listing articles written about ACUS); *id.* at 1823–33 (listing ACUS recommendations and statements).

58. Scalia & Breyer, *supra* note 57 (testimony of Antonin Scalia) (discussing the enactment of the Administrative Conference Act of 1964).

59. *Id.* Section 591(1) states that the purpose of the ACUS is:

> [T]o provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

5 U.S.C. § 591(1) (2018).

60. Paul R. Verkuil, *ACUS 2.0: Present at the Recreation*, 83 GEO. WASH. L. REV. 1133, 1135–36 (2015).

61. *Id.* at 1137; *see also* Michael Herz, *ACUS—and Administrative Law—Then and Now*, 83 GEO. WASH. L. REV. 1217 (2015) (chronicling ACUS's influence on administrative law); Richard J. Pierce, Jr., *The Administrative Conference and Empirical Research*, 83 GEO. WASH. L. REV. 1564, 1564–66 (2015) (exploring how ACUS's empirical work has identified best practices and improved internal law).

62. Verkuil, *supra* note 60, at 1137.

63. Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1537 (2015); *see also* Funmi E. Olorunnipa, *ACUS 2.0: Bridging the Gap Between Administrative Law and Public Administration*, 83 GEO. WASH. L. REV. 1555, 1557 (2015) (exploring how ACUS helps bridge the gap between external and internal administrative law).

64. Metzger, *supra* note 63, at 1538.

65. *Id.*

66. 5 U.S.C. § 591(1) (2018) (setting forth ACUS's purpose).

67. *See id.*

to argue that Congress should grant ACUS the power to make some recommendations mandatory.[68]

Reform is neither necessary nor prudent. Such power may discourage agencies from engaging fully in ACUS's collaborative process. It may also risk ACUS's existence if the exercise of such power upsets the political branches, as the agency had already been defunded (for nearly fifteen years) once before.[69] More to the point and as illustrated by the examples in Part II, ACUS has been able to play, and continues to play, a critical role in encouraging valuable internal administrative law without the power to bind agencies. It is effective because its substantive recommendations are persuasive, expert driven, and evidence based; and its decisionmaking process is deliberative, collaborative, inclusive, and consensus driven. ACUS's vital role in the development of internal law merits further study and scholarly attention. Part II seeks to start that discussion.

II. Applying Internal Administrative Law

Despite our best efforts, the definitional work done in Part I may strike readers as too abstract and theoretical. This is, unfortunately, inevitable in discussions about internal administrative law, which encompasses a broad scope of internal agency procedures, practices, and structures. To help operationalize internal administrative law as a safeguard against bureaucratic overreach (especially in a world without judicial review), Part II examines particular applications of internal administrative law. To do so, we return to the five categories of agency action flagged in the Introduction—(a) rulemaking, (b) subregulatory guidance, (c) formal adjudication, (d) informal adjudication, and (e) enforcement—and the aspects of those actions that escape judicial review. This is by no means an exhaustive account of the various internal agency procedures and constraints that could counteract the lack of judicial supervision. Instead, we provide a few concrete examples for each category of agency action, with the hope that such examples illustrate how to operationalize internal administrative law as a potent check on the potential dangers of bureaucracy beyond judicial review.

68. Verkuil, *supra* note 60, at 1137 (arguing that ACUS's inability to demand compliance with its recommendations "cabins [its] authority," unlike similar congressional agencies, such as GAO, that have the authority to require agencies to respond to its reports before Congress).

69. *See* Susan Jensen, *An Informal Legislative History of the Reauthorization of the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1410, 1411, 1414 (2015); David C. Vladeck, *The Administrative Conference at Fifty: An Agency Lives Twice*, 83 GEO. WASH. L. REV. 1689, 1694–97 (2015). Another scholar has criticized ACUS for shying away from political issues, such as OIRA centralized review. *See* Peter L Strauss, *The Administrative Conference and the Political Thumb*, 83 GEO. WASH. L. REV. 1668, 1680–87 (2015). ACUS's nonideological and politically cautious approach strikes us as more of a virtue than a vice, especially when it comes to encouraging the development of internal administrative law.

A. RULEMAKING

The APA contemplates both formal, trial-like adjudication and informal, notice-and-comment rulemaking, but today nearly all rulemaking is informal.[70] For informal rulemaking, the APA requires agencies to subject proposed rules to public notice and comment.[71] Once agencies publish final rules, they become subject to judicial review.[72] Judicial review, however, is not plenary, as *Chevron* deference significantly limits it.[73] Specifically, if the underlying statute is ambiguous, the reviewing court only assesses whether the agency's interpretation is "reasonable" and, thus, permissible.[74] This deference creates a *Chevron* policymaking "space" within which agencies regulate without judicial interference.[75] One survey of agency rule drafters suggests that agencies are keenly aware of that space in the rulemaking process, and perhaps even leverage it by proposing more "aggressive" statutory interpretations than they would in a world without *Chevron* deference.[76]

To be sure, we do not mean to suggest that *Chevron* policymaking space is necessarily a bad thing. After all, Congress often delegates such policymaking space to agencies because of their relative substantive expertise, use of public-engaging deliberative processes, and political accountability—at least compared to their judicial peers.[77] But concerns remain that the notice-and-comment rulemaking process may not fully leverage agency and public expertise, may not be sufficiently deliberative to fully assess the proposed regulatory action and its alternatives, and may not reflect the wishes of the people and their elected representatives.

Not surprisingly, internal administrative law can help address these concerns. Indeed, ACUS has commissioned a number of studies and made numerous recommendations to improve the rulemaking process and the public's

70. Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1160–61 (2014).

71. *See* 5 U.S.C. § 553 (2018) (detailing applicable notice-and-comment procedures).

72. *See id.* § 702 (providing for judicial review of final agency action).

73. *See* Walker, *supra* note 6, at 553–57.

74. Chevron U.S.A. v. Nat'l Res. Def. Council, 467 U.S. 837, 842–43 (1984).

75. United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) ("[*Chevron*] create[s] a space, so to speak, for the exercise of continuing agency discretion."); *see also* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1145 (2012). One empirical study of *Chevron* deference finds a difference of nearly twenty-five percentage points in agency-win rates when circuit courts apply the *Chevron* deference framework, as compared to when they refuse to do so, and finds that, as for *Chevron*'s policymaking space, once the circuit courts got to *Chevron*'s second step, agencies prevailed 93.8 percent of the time. Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 5–6 (2017).

76. Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 722–24, 722 fig.3 (2014) (finding that about four in five rule drafters surveyed agreed to some degree that a federal agency is more "aggressive" in its interpretive efforts if it believes a reviewing court will apply *Chevron* deference instead of a less-deferential standard).

77. *See, e.g.*, Kent Barnett, Christina L. Boyd, & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1475–81 (2018) (exploring the rationales for *Chevron* deference).

participation in it.[78] As ACUS stated in the preamble of one of its most recent rulemaking recommendations, "[r]obust public participation is vital to the rulemaking process" for accountability and legitimacy purposes.[79] Thus, agencies should adopt internal procedures to increase public input in their rulemaking activities. Among other things, ACUS has recommended that agencies solicit public comments "as early as feasible" when considering certain potential rules,[80] including targeting and meeting with knowledgeable or affected parties for feedback.[81] Other recent recommendations include improving online access to rulemaking dockets and related materials, utilizing social media to improve public engagement and awareness of rulemaking activities, and drafting rules in plain language for better public comprehension—just to name a few.[82]

Each of these recommendations seeks to encourage the APA's original public-participation goals for increasing transparency and accountability in the rulemaking process, not just after publication of the final rule. As such good-governance objectives are substantially insulated from judicial review, these innovations in internal administrative law should also help constrain, legitimate, and improve the *Chevron* policymaking space.

B. SUBREGULATORY GUIDANCE

To assist in regulatory activities, agencies often issue subregulatory guidance.[83] The APA exempts such agency guidance—"general statements of policy" and "interpretative rules"—from rulemaking's notice-and-comment requirements.[84] The relaxed requirements are justified by the fact that guidance is not supposed to be binding on either the agency or the public.[85] In other words, guidance is portrayed as "a mere tentative announcement" of how the agency

78. *See, e.g.*, Cynthia R. Farina et al., *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1360 (2015) ("Fifteen of the thirty-two recommendations and statements made since the 2010 ACUS revival deal directly with rulemaking or with issues of particular importance to rulemaking." (footnote omitted)).

79. Admin. Conference of the U.S., Recommendation 2018-7, Public Engagement in Rulemaking, 84 Fed. Reg. 2139, 2146 (Feb. 6, 2019).

80. *Id.* at 2148 (suggesting early solicitation of information or data through publishing ''requests for information'' (RFIs) or ''advance notices of proposed rulemaking'' (ANPRMs)).

81. *Id.* (adding that summaries of such efforts and acquired information should also be conveyed to the public).

82. Admin. Conference of the U.S., Recommendation 2018-6, Improving Access to Regulations.gov's Rulemaking Dockets, 84 Fed. Reg. 2139, 2143 (Feb. 6, 2019); Admin. Conference of the U.S., Recommendation 2013-5, Social Media in Rulemaking, 78 Fed. Reg. 76,269, 76,270 (Dec. 17, 2013); Admin. Conference of the U.S., Recommendation 2017-3, Plain Language in Regulatory Drafting, 82 Fed. Reg. 61,728 (Dec. 29, 2017). *See generally* Farina et al., *supra* note 78 (describing a number of additional ACUS rulemaking recommendations and assessing their impact on the rulemaking process).

83. Parrillo, *supra* note 1, at 168 ("[G]uidance can be produced and altered much faster, in higher volume, and with less accountability than legislative rules can.").

84. 5 U.S.C. § 553(b)(A) (2018).

85. Parrillo, *supra* note 1, at 168.

may proceed in its regulatory activities.[86] In practice, however, guidance is often effectively binding because of the phenomenon one of us has labeled "regulation by compliance."[87] Regulated parties often have strong incentives to comply with guidance. Those incentives include meeting an agency's preapproval requirements, maintaining good relationships with agency overseers, developing compliance officer positions to assist in compliance beyond legal requirements, and avoiding risks of one-off agency enforcement.[88] Moreover, guidance is rarely challenged in court due to these incentives.[89] And even in the small, unrepresentative "fraction" of cases bringing guidance to courts, the courts are likely to apply a deferential standard when assessing the guidance.[90]

However, guidance is still an important way for agencies to clarify their regulatory plans and activities. Indeed, it is also a way to bring more predictability and rule-of-law values to other agency actions, such as the exercise of enforcement discretion, that are insulated from judicial review. The Trump Administration has recognized these values and potential dangers, responding with guidance on guidance. One example is the Justice Department's "Brand Memo," which prohibits agencies from treating guidance documents as de facto regulations to avoid the notice-and-comment rulemaking process.[91] Also, as noted in Part I.B.2, the President has issued an executive order on guidance that requires agencies to establish procedures for public petitioning to withdraw or modify outdated guidance, to make all agency guidance documents available on their websites, and to follow heightened procedures for "significant" guidance that include OIRA review and public notice and comment.[92]

These executive branch declarations generally track ACUS's recommendations, which similarly suggest that agencies avoid injecting guidance with binding intent. For general statements of policy, agencies should avoid using mandatory language and should expressly state that the public may

86. *Id.* at 168–69.

87. For a discussion of one example of "regulation by compliance" regarding the issuance of "Dear Colleague Letters" by the Department of Education, see Walker, *supra* note 3, at 1626–27. In her contribution to this Symposium, Ming Hsu Chen explores issues with agency guidance that touches on civil rights and immigration. Ming Hsu Chen, *How Much Procedure Is Needed for Agencies to Change "Novel" Regulatory Policies?*, 71 HASTINGS L.J. 1127 (2020).

88. *See* Parrillo, *supra* note 1, at 184–230 (documenting and assessing the strength of these compliance incentives).

89. *Id.* at 171 (stating that "only a tiny and unrepresentative fraction of guidance is likely to end up in litigation" because of the strong incentives for maintaining healthy agency relationships, especially for high-stakes licensing schemes).

90. *Id.* at 213–14 (citing, *inter alia*, Auer v. Robbins, 519 U.S. 452 (1997)). The case *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), may narrow the reach of *Auer* deference. *See* Christopher J. Walker, *What* Kisor *Means for the Future of* Auer *Deference: The New Five-Step* Kisor *Deference Doctrine*, YALE J. ON REG.: NOTICE & COMMENT (June 26, 2019), https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/.

91. Memorandum from Assoc. Attorney Gen., U.S. Dep't of Justice, to the Heads of Civil Litigating Components, Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Jan. 25, 2018), https://www.justice.gov/opa/press-release/file/1028756/download.

92. Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 15, 2019).

take other lawful approaches than the one provided in the guidance.[93] For interpretative rules, most of the suggestions for policy statements apply, as well as additional best practices. For example, agencies should make clear which agency officials are required to follow the rule and where the public can go within the agency to modify or seek a waiver from that rule.[94] ACUS has also proposed guidelines for how agencies should internally manage published guidance documents. This includes posting guidance documents online in a "well organized, up to date, and easily accessible" manner.[95] These various ACUS proposals seek to magnify the benefits of agency guidance while minimizing the costs of such subregulatory activity that often escapes supervision by courts, Congress, or the President.

C. Formal Adjudication

Formal adjudication involves trial-like proceedings before an administrative law judge or other agency adjudicator, with the final decision subject to judicial review.[96] Despite the availability of judicial review, such review is both unlikely and ineffective for the vast majority of adjudications. This is due to at least two factors. First, adjudicated individuals often lack the resources or wherewithal to appeal adjudications to federal courts.[97] This is particularly true for high-volume agency adjudications that are subject to massive backlogs of cases that spur quicker, and thus more cursory and inconsistent, case processing,[98] often without legal representation for those pushed through the process.[99] Notable high-volume adjudications include immigration, Social Security benefits, and veterans' benefits cases.[100]

Second, adjudications that are successfully appealed to federal courts may not be representative of the majority of inconsistent adjudications that are not appealed. For example, in removal proceedings in immigration courts, only about three percent of immigrants without lawyers appeal their cases.[101] And

93. Admin. Conference of the U.S., Recommendation 2017-5, Agency Guidance Through Policy Statements, 82 Fed. Reg. 61,728, 61,736 (Dec. 29, 2017).

94. Admin. Conference of the U.S., Recommendation 2019-1, Agency Guidance Through Interpretive Rules, 84 Fed. Reg. 38,927, 38,929 (Aug. 8, 2019).

95. Admin. Conference of the U.S., Recommendation 2019-3, Public Availability of Agency Guidance Documents, 84 Fed. Reg. 38,927, 38,932 (Aug. 8, 2019).

96. *See generally* Walker & Wasserman, *supra* note 9, at 148–57 (detailing both the old and new world of agency adjudication). As noted in *supra* note 9, this Essay groups together as "formal" adjudication all agency adjudications where a statute or hearing requires an evidentiary hearing, leaving any other adjudication in the "informal" adjudication categorization.

97. David Ames et al., *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 22–23 (2020).

98. *Id.* at 9.

99. *See id.* at 23–24 (referencing the ability of immigration judges to deny continuances that would give immigrants more time to seek their own counsel and avoid navigating the system without representation, as it is not required in immigration proceedings).

100. *Id.* at 9.

101. Hausman, *supra* note 9, at 1193.

most appeals arise from cases handled by judges who gave more time to immigrants to find lawyers.[102] Thus, harsher judges "systematically evade scrutiny" from federal courts, which makes review of most immigration cases ineffective for resolving inconsistencies in the agency adjudicative system as a whole.[103] As David Ames and coauthors rightly underscore in the mass agency adjudication context, "[j]udicial review and external oversight are too infrequent and too abstract to ensure that granular realities of day-to-day decisionmaking align with legal requirements."[104]

ACUS has identified and recommended a number of best practices in internal law to improve agency adjudication. These include public availability of practice rules, availability of adjudication materials on agency websites, establishment of recusal rules for adjudicators, best practices for assisting self-represented individuals, and a sweeping suite of procedural protections for agency hearings.[105] These recommendations for improvements in internal administrative law aim to ensure that adjudicative systems are fairer and lead to more equitable results—against the backdrop understanding that very few agency adjudication decisions make it to federal court.

Agency adjudication, moreover, implicates deeper, structural forms of internal administrative law. As one recent study observed, "[q]uality assurance initiatives are the epitome of internal administrative law."[106] Adjudication at the Social Security Administration (SSA), a regular subject of Jerry Mashaw's pioneering scholarship on internal administrative law,[107] provides a particularly relevant example. The Social Security Appeals Council is an agency appellate body that is not a creature of statute, but instead born of regulation, created by the SSA Commissioner in 1940 as a delegation of final decisionmaking authority to review adjudicative decisions at the SSA.[108] Today, the Appeals Council consists of nearly 100 administrative appeals judges and appeals officers and

102. *Id.* at 1197–1205.

103. *Id.* at 1197.

104. Ames et al., *supra* note 97, at 29.

105. Admin. Conference of the U.S., Recommendation 2018-5, Public Availability of Adjudication Rules, 84 Fed. Reg. 2139, 2142 (Feb. 6, 2019); Admin. Conference of the U.S., Recommendation 2017-1, Adjudication Materials on Agency Websites, 82 Fed. Reg. 31,039, 31,039 (July 5, 2017); Admin. Conference of the U.S., Recommendation 2018–4, Recusal Rules for Administrative Adjudicators, 84 Fed. Reg. 2139, 2139 (Feb. 6, 2019); Admin. Conference of the United States, Recommendation 2016-6, Self-Represented Parties in Administrative Proceedings, 81 Fed. Reg. 94,312, 94,319 (Dec. 23, 2016); Admin. Conference of the U.S., Recommendation 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,312, 94,314 (Dec. 23, 2016).

106. Ames et al., *supra* note 97, at 29.

107. *See, e.g.*, JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983); Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

108. *See generally* Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 231–55 (1990) (detailing the history, legal basis, and procedures for the Appeals Council).

hundreds of support personnel, and processes more than 100,000 appeals per year.[109]

The creation of an internal agency appellate review system is a form of internal law for quality control of trial-level agency adjudications. Over the decades, ACUS has issued a number of reports and recommendations to improve SSA adjudication, including at the Appeals Council.[110] For example, in 2013, ACUS recommended that the Appeals Council improve its quality control measures by establishing neutral principles for selecting and reviewing unappealed decisions and otherwise identifying inconsistencies and other problems in trial-level adjudication.[111] In reviewing the SSA's efforts, Gerald Ray and Jeffrey Lubbers conclude that SSA has achieved substantial improvement in terms of productivity and the quality of adjudicative decisionmaking.[112]

When it comes to high-volume agency adjudication, external administrative law will do little to help most adjudicated individuals. Internal administrative law is not a cure-all, but when implemented effectively, it can go a long way toward ensuring consistency and fairness to their agency adjudicative systems.

D. INFORMAL ADJUDICATION

Agency actions that do not fit within the categories of rulemaking, subregulatory guidance, formal adjudication (where a statute or regulation requires an evidentiary hearing), or enforcement fall under the APA's residual category of "informal adjudication." These actions are diverse and numerous. They receive varying levels of insulation from judicial review. Many involve decisions made by frontline agency officials who act in the moment as "investigator, prosecutor, and judge."[113] One important example is expedited removal for noncitizens at the border. Jennifer Koh has written extensively about the dangers of these "shadow removal proceeding[s],"[114] in which immigration officers are able to deny noncitizens entry at the border "without further hearing or review" by an immigration judge.[115] More than four in five removal orders

109. *Brief History and Current Information about the Appeals Council*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/about_ac.html (last visited June 28, 2020). In the 2019 fiscal year, the Appeals Council processed approximately 144,000 appeals. *Id.*

110. *See, e.g.*, Gerald K. Ray & Jeffrey S. Lubbers, *A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) Is Transforming Social Security Disability Adjudication*, 83 GEO. WASH. L. REV. 1575, 1585–88, 1601–1606 (2015) (detailing the history of ACUS recommendations for SSA adjudication).

111. Admin. Conference of the U.S., Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudications, 78 Fed. Reg. 41,352, 41,354 (July 10, 2013).

112. Ray & Lubbers, *supra* note 110, at 1604–07; *cf.* Ames et al., *supra* note 97, at 77 ("SSA's recent efforts are promising, but its decades of fitful experimentation and the persistent temptation to favor quantity over quality make rigorous critique by impartial outsiders all the more essential.").

113. Koh, *supra* note 10, at 184.

114. *Id.* at 206.

115. 8 U.S.C. § 1225(b)(1)(A)(i) (2018); *see also* Koh, *supra* note 10, at 195–96.

issued in fiscal year 2013 were expedited removals that not only evaded immigration-court review, but also review in an Article III court.[116]

Informal adjudication is an unavoidable feature of modern regulatory governance, as agencies are tasked with adjudicating millions of matters each year where no statute or regulation requires an evidentiary hearing. But many of these informal adjudications are even further insulated from judicial review than their formal, trial-like counterparts. Internal law, therefore, can and should play a critical safeguarding role. Many of the quality-control tools discussed in Part II.C, for instance, could be implemented with similar success in the informal adjudication context.

One additional form of internal law that merits further attention is the use of agency ombuds, which are part of a broader concept that Margo Schlanger calls "Offices of Goodness."[117] Offices of Goodness are still dependent internal parts of the agency, but they hold "value-infused" and "advisory" roles to monitor agency actions in order to ensure they meet the values underlying agency policies and statutory directives.[118] By wielding "influence and commitment" to challenge agency action from the inside,[119] Offices of Goodness can provide an important check that may be unavailable to courts for certain informal adjudications on the outside. Not surprisingly, ACUS has encouraged agencies to create and strengthen ombuds offices. ACUS finds that internal ombuds are more likely to provide impartial support to the public while external ombuds primarily focus on furthering and improving the agency's own mission.[120]

The Internal Revenue Service (IRS), for example, provides a model that may be worth adapting in other agency contexts. The Taxpayer Advocate Service (TAS), an independent office within the IRS, is an Office of Goodness with two main, distinct objectives.[121] First, the TAS has physical offices in every state, as well as the District of Columbia and Puerto Rico, where individual taxpayers can get free help with tax problems they have with the IRS.[122] The TAS ombuds work with affected taxpayers and the IRS to resolve those issues. In 2003, for instance, then-National Taxpayer Advocate Nina Olson reported that the TAS had around 2200 employees nationwide and had closed a quarter-

116. Koh, *supra* note 10, at 184; *see also* § 1225(b)(1)(A)(ii) (providing an exception for noncitizens who indicate an intention to apply for asylum or a fear of persecution in his or her origin country, in which case the immigration officer "shall refer the alien for an interview by an asylum officer").

117. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 65 (2014).

118. *Id.* at 60–62.

119. *Id.* at 103 (explaining that the dependent and internal nature of Offices of Goodness requires them to rely on their "influence and commitment" to affect agency actions in furtherance of their assigned values).

120. Admin. Conference of the U.S., Recommendation 2016-5, The Use of Ombuds in Federal Agencies, 81 Fed. Reg. 94,312, 94,316–17 (Dec. 23, 2016).

121. *Who We Are*, TAXPAYER ADVOCATE SERV., https://taxpayeradvocate.irs.gov/about/who-we-are (last visited June 28, 2020).

122. *Id.*

million cases in the prior year.[123] Second, leveraging these tens of thousands of annual individual interactions nationwide, the TAS recommends systemic reforms to the federal tax system. As Olson explains, Congress has directed the TAS to "identify administrative issues that create or contribute to [taxpayers'] problems as well as legislative provisions that may create these problems. . . . [and then] make administrative proposals and legislative recommendations to mitigate the problems we've identified."[124] Indeed, the TAS is statutorily required to submit an annual report to Congress, in which it "identif[ies] at least 20 of the most serious problems facing taxpayers."[125]

We can easily envision the benefits of similar Offices of Goodness embedded in other high-volume agency adjudicative systems, such as immigration, veterans' benefits, or the SSA. To be sure, such Offices of Goodness may not be possible as creatures of internal administrative law. They may require statutory creation (and appropriations). But many of the best practices the TAS has embraced could be adopted piecemeal through innovations to internal agency practices and procedures.

E. Enforcement Discretion

While agency enforcement actions are subject to judicial review, the initial agency decision whether to enforce is generally not judicially reviewable. More specifically, all decisions an agency makes about whether to enforce its policies, as well as how often to enforce those policies and against whom, are presumptively left up to the agency's own prosecutorial discretion.[126] Thus, it is difficult for courts to address either under- or over-enforcement by agencies. This remains so despite the reality that either decision leads to inevitable harm of one affected party over another. For under-enforcement, those who would have benefited from enforcement actions against regulated entities, such as investors who benefit from SEC audits, now receive less protection of their legal rights and interests. For over-enforcement, those groups who triggered the increased enforcement are often disparately regulated when compared to similarly situated regulated parties who are not so targeted. Such "crackdowns" have been justified by "a fixed idea that executive power is synonymous with

123. Nina E. Olson, *Taxpayer Rights, Customer Service, and Compliance: A Three-Legged Stool*, 51 U. KAN. L. REV. 1239, 1240 (2003).

124. *Id.* at 1241.

125. *Who We Are*, *supra* note 121; *see also* Phyllis Horn Epstein, *National Taxpayer Advocate: A Champion for Fairness and Effectiveness*, PA. LAW., May–June 2019, at 42, 42–48 (detailing some of the recent achievements of the TAS).

126. *See* Heckler v. Chaney, 470 U.S. 821, 837 (1985) ("[T]he presumption that agency decisions not to institute [enforcement] proceedings are unreviewable . . . ."). *See generally* Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571 (2016) (surveying the caselaw that insulates executive nonenforcement decisions from judicial review and arguing that such judicial nonreviewability doctrine is better grounded in the political question doctrine).

the power to choose enforcement targets and to formulate enforcement policy."[127]

Internal administrative law can help fill the judicial void in patrolling agency exercises of enforcement discretion. Perhaps Offices of Goodness in particular could assist in checking against arbitrary or capricious enforcement decisions. As ACUS has recommended in the related context of regulatory waivers and exemptions, agencies can publish guidance on enforcement priorities to establish clear criteria and thus encourage consistent application.[128] Shoba Wadhia has taken this argument one step further in the immigration context, advocating that the agency should go through notice-and-comment rulemaking to more fairly channel prosecutorial discretion in immigration enforcement, and then establish procedures to make enforcement decisions more transparent and accountable.[129] To be sure, we do not argue for complete transparency, or even the same level of transparency in every regulatory context. Too much transparency in some contexts may enable sophisticated regulated parties to evade compliance with the law. And broad nonenforcement policies for broad classes of offenders could encroach on legislative powers.[130]

These examples merely scratch the surface of the variety of internal administrative laws that could bring more fairness, transparency, accountability, and process to administrative exercises of enforcement discretion. Much more work needs to be done. But these examples illustrate that, while more effective external judicial checks on agency enforcement discretion are unlikely to emerge anytime soon, the agencies themselves have many tools available to them to safeguard the regulated against abuse in administrative enforcement activities.

CONCLUSION

In seeking to operationalize internal administrative law as a crucial bulwark against agency overreach, we do not suggest it is—without more—a sufficient one. Just like judicial review is important yet inadequate on its own, so too is internal administrative law. Among other things, agencies retain great flexibility to ignore or otherwise depart from many internal procedures and practices when they desire. And even if all agencies faithfully comply, such

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127. Sohoni, *supra* note 12, at 45. Sohoni defines "crackdown" as "an executive decision to intensify the severity of enforcement of existing regulations or laws as to a selected class of offenders or a selected set of offenses." *Id.* at 33.

128. Admin. Conference of the U.S., Recommendation 2017-7, Regulatory Waivers and Exemptions, 82 Fed. Reg. 61,728, 61,742 (Dec. 29, 2017); *see also* Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517, 1545–47 (2018) (suggesting agency procedures and approaches to address the problems with regulatory waivers).

129. SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 85–87 (2015).

130. *See, e.g.*, Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014) (arguing that executive officials generally "lack discretion to categorically suspend enforcement or prospectively exclude defendants from the scope of statutory prohibitions," though they have "discretion to decline enforcement in particular cases").

internal rules cannot offer complete protection against arbitrary or capricious agency action. We must also further develop other safeguards, such as judicial review, congressional oversight, presidential review, and public observation and mobilization.

Yet, as we have illustrated with examples drawn from ACUS and elsewhere and applied in various regulatory contexts, internal administrative law has a powerful—and empowering—role to play in disciplining bureaucracy, especially for agency actions that evade judicial review. As Metzger and Stack conclude, "[t]he constraints imposed by internal administrative law will be critical in resisting unlawful or excessive assertions of administrative power now, just as they have been in the past."[131] We hope this Essay—albeit exploratory in nature—spurs a more sustained inquiry into internal administrative law and a deeper appreciation of ACUS's role in encouraging federal agencies to innovate within *Vermont Yankee*'s "white space" of internal administrative law.[132]

131. Metzger & Stack, *supra* note 14, at 1248.
132. Bremer & Jacobs, *supra* note 15, at 523–24.

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