

ADMINISTRATIVE PROCEDURAL DISCRETION

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The conservative Supreme Court has established maximum presidential control over formal administrative adjudication, despite the resulting impact on independence and expertise in adjudicatory process. Concurrently, a progressive public law perspective advocates for agencies to be released from procedure to allow them to accomplish more, regardless of the fact that procedures create important guardrails for agency action. Both of these perspectives devalue the understanding that maintaining adequate and accessible process ensures that administrative adjudication is accountable to the people that agencies serve.

Both views also overlook the large expanse of informal administrative adjudication that is neither conditioned by constitutional appointment requirements nor anchored by consistent statutorily mandated procedure. Constitutional appointments requirements primarily impact administrative law judges, who engage in formal adjudication per the Administrative Procedure Act (APA). In addition, the APA does not define a procedural floor in informal adjudication, which creates wild variations in process. In fact, access to process has always been minimal in many informal adjudications and has further deteriorated over time due to—as this Article illustrates—administrative discretion.

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This Article is the first to uncover and offer an overview of administrative “procedural discretion,” which it identifies as administrative discretion that impacts the contours and defensibility of administrative process in informal adjudication. This Article illustrates that procedural discretion originates from agencies and adjudicators themselves, reducing or eliminating process in a manner that reflects both the ongoing decline of administrative due process in the post-Goldberg era and ongoing legislative battles concerning the rights of disempowered communities.

Procedural discretion enables great variation among the processes underlying informal adjudication—not only across different types of adjudication, but also within the same category of adjudication. In entities including the National Labor Relations Board, State Department, and the immigration agencies, procedural discretion tends to limit the process underlying informal administrative adjudication, including aspects such as access to in-person hearings, the opportunity to provide testimony, and decisionmaking on the record.

Sometimes, procedural discretion is the result of reasonable pragmatic concerns about resources and efficiency that nonetheless serve to reduce access to or even wholly gatekeep individuals from process. Other times, administrative decisionmakers engage in expedited processes in response to powerful interests, thus disadvantaging vulnerable people. Under-resourced communities, and those in need of governmental support or protection, are perhaps more likely to be harmed by procedural discretion. Furthermore, despite Article III courts’ expertise in matters of process, neither procedural discretion itself nor the outcomes of decisions based in discretionary administrative procedure are necessarily subject to judicial review.

This Article argues that, overall, procedural discretion is in tension with the values and stability of proceduralism, which many assume to be a cornerstone of administrative legitimacy. Ultimately, procedural discretion has the potential to undercut administrative accountability to the communities served by informal adjudication in underexamined ways that escape oversight.

The existence and operation of procedural discretion, this Article suggests, should inspire and inform frameworks that ensure the quality and accessibility of administrative adjudicatory process. This Article prescribes neither heavy reliance on political accountability nor a one-size-fits-all approach to proceduralism. Rather, this Article’s suggested interventions emphasize agencies’ own institutional tools for managing their exercises of procedural discretion. In this vein, a turn to administrative and judicial review could be fruitful. More specifically, procedure itself can be enhanced or managed carefully at many

stages of an agency's decisionmaking, including by improving the quality of initial decisions through qualitatively (rather than merely quantitatively) focused internal quality assurance oversight, intra-agency appeals processes that encourage procedural experimentation, and judicial review that privileges access to core administrative safeguards and adherence to constitutional values.

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Procedure can be a mechanism through which commitments to equal treatment and open and accountable decision-making materialize.

—Helen Hershkoff et al.¹

I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time.

—Regulatory Reform Act Hearing²

INTRODUCTION

Nearly half a century ago, a prominent academic observed that a “recurrent sense of crisis” surrounds the administrative state.³ Despite its age, scholars have noted the prescient and enduring nature of this remark.⁴ But this recognition generally fails to scrutinize this scholar’s observation, at the time, that the perception of crisis “has particular applicability to . . . the kinds of questions . . . [that] concern the status, the soundness, and ultimately the legitimacy of the administrative process”—namely, the process of administrative adjudication.⁵ In the present day, there is an ongoing set of debates concerning the division of adjudicatory labor between the judiciary and administrative state. These controversies engage the continuing ways in which this distribution of power impacts the stability, fairness, and accessibility of agency decisionmaking.

Two leading models of accountability in administrative adjudication⁶ resonate today in the wake of noteworthy shifts in governmental structure. The first is majoritarianism, which

¹ Helen Hershkoff, Luke Norris & Judith Resnik, *Procedure, Inequality, and Access*, LAW & POL. ECON. PROJECT (July 16, 2024), <https://lpeproject.org/blog/procedure-inequality-and-access/> [<https://perma.cc/Y4KS-EPXA>].

² *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John D. Dingell, Chairman, H. Comm. on Energy & Com.).

³ JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 6 (1978).

⁴ See, e.g., Brian D. Feinstein, *Legitimizing Agencies*, 91 U. CHI. L. REV. 919, 921 (2024); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 718 (2016) (reviewing DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014)).

⁵ FREEDMAN, *supra* note 3, at 6.

⁶ 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.”).

suggests that control by elected officials ensures that administrative agencies are trustworthy.⁷ The second is faith in internal administrative law, which insists that agencies do not require political tethers to hold them accountable because they adhere to procedural requirements that safeguard their legitimacy.⁸ Indeed, this model posits that the politicization of administration renders it inherently less trustworthy.⁹

On the majoritarian side, changes wrought by the modern Supreme Court have reinforced presidential control over formal administrative adjudication in ways that impact the independence, quality, and proliferation of administrative decisionmaking.¹⁰ Those in the opposing camp “believe that political influence will compromise administrative decisional independence [in adjudication], which is understood to maintain high-quality and unbiased decisionmaking.”¹¹ From this perspective, administrative procedure is an unyielding cornerstone of administrative accountability that supports an extensive system of administrative discretion.

This, in turn, is consistent with the progressive argument that expanding administrative discretion increases the benefits and quality of agency policymaking.¹² Claims that the

⁷ 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).

⁸ See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 515–16 (2003) (observing that procedures internal to agencies are “integral to the legitimacy of the administrative state”).

⁹ See Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 706 (2016) (describing prior situations when presidential control of agencies decreased accountability, transparency, and accuracy of agency policymaking).

¹⁰ Bijal Shah, *Presidential Administrative Discretion*, 100 N.Y.U. L. REV. 2128, 2131 (2025) (footnotes omitted) [hereinafter Shah, *Presidential Administrative Discretion*]; Bijal Shah, *On Administration by Fiat*, MICH. L. REV. (forthcoming 2027) (manuscript at 14–22) (on file with author).

¹¹ Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2131. “[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.” Bijal Shah, *The President’s Fourth Branch?*, 92 FORDHAM L. REV. 499, 526 (2023) [hereinafter Shah, *The President’s Fourth Branch?*]; see also Hershkoff, Norris & Resnik, *supra* note 1 (focusing on civil procedure and noting that “procedure is deeply related to the U.S. regulatory state. Decisions by the Supreme Court have undermined the independence and capacity of agencies as rulemakers, statutory interpreters, and adjudicators”).

¹² See Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. 1263, 1267–68 (2025).

Administrative Procedure Act (APA) is overly “transubstantive and monistic” assume regularity in administrative procedure.¹³ By some accounts, administrative process is so plentiful that it is understood to be “time-consuming, costly, and cumbersome,” which has led to longstanding “calls for more flexible and efficient procedures.”¹⁴ So reliable is administrative procedure that scholars have even decried its “ossification”¹⁵ and “fetishization.”¹⁶ Some commentators on the left are committed to the position that agencies should have far fewer bureaucratic procedures and rules holding them back, so they can get things done more quickly and efficiently.¹⁷

This provocation denigrates the fact that procedure fosters accountability. In theory, expanding the exercise of administrative discretion in regulatory policymaking could improve agencies’ implementation of statutory law. Though agencies tend toward maximizing their own power,¹⁸ it may be that a more generous interpretation of administrative authority lends itself to better enforcement of laws designed to protect public health, alleviate the burdens of consumers, and address climate change¹⁹—especially when the President aligns herself with agencies’ missions (as opposed to requiring agencies to defend themselves against presidential efforts to “dismantle” the administrative state).²⁰ And yet, these assertions ignore the decline of hard procedural rules and overlook tough questions regarding whether an administrative state unburdened by procedure is the ideal setting for decisions impacting vulnerable communities.²¹

¹³ Noah A. Rosenblum, Lev Menand & Ash Ahmed, *Beyond Neoliberal Administrative Law: Towards a Political Economy Approach* 3 (June 9, 2024) (unpublished manuscript) (on file with author).

¹⁴ Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 260 (1978).

¹⁵ Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 94 (2018).

¹⁶ See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 345 (2019).

¹⁷ See generally EZRA KLEIN & DEREK THOMPSON, *ABUNDANCE* (2025).

¹⁸ See Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603, 1622–24 (2024) [hereinafter Shah, *Administrative Subordination*].

¹⁹ See Bijal Shah, *A Critical Analysis of Separation-of-Powers Functionalism*, 85 OHIO ST. L.J. 1007, 1030 (2024) [hereinafter Shah, *A Critical Analysis of Separation-of-Powers Functionalism*].

²⁰ See generally Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165, 1226–64 (2022) [hereinafter Shah, *Statute-Focused Presidential Administration*].

²¹ However hollow his invocation of their plight, none other than Justice Gorsuch questioned whether *Chevron* deference ever actually benefited “the immigrant, the veteran seeking his benefits, the Social Security Disability applicant,

Calls to reduce administrative process also overlook the fact that adjudicative process has been in decline. Fifty years ago, administrative agencies at least tried to give petitioners access to an in-person conversation with the decisionmakers in charge before they made any life-changing decisions; however, since then, agencies have increasingly avoided doing so.²² Agencies have since been on a path of cutting processes,²³ including by reducing public opportunities for in-person or other forms of interaction with agencies for those subject to agency adjudication.²⁴ As a result, an interest in expanding institutional power to pursue values “in the public interest” by reducing administrative process further may, in fact, disadvantage people.²⁵ “This is counterintuitive particularly to liberals and progressives who advocate for an expansive, discretionary bureaucracy in the face of conservative efforts, for example, to install a unitary and more politically responsive executive branch.”²⁶

In contrast to popular narratives of procedural inflexibility, even adjudication governed by the APA has moved away from generous procedural requirements.²⁷ In addition, mainstream accounts of administrative law are inadequate precisely for their failure to grapple with the pervasiveness of informal adjudication in administration.²⁸ “[D]iscretion within the pattern of government is no less important nor dispensable than the more fundamental aspects of political democracy”²⁹ for

who have no power to influence agencies, who will never capture them, and whose interests are not the sorts of things on which people vote, generally speaking.” Transcript of Oral Argument at 133–34, *Relentless, Inc. v. U.S. Dep’t of Com.*, 144 S. Ct. 325 (2024) (No. 22-1219), 2024 WL 250638 at *132. The implication, perhaps, was that in these forms of administrative adjudication, deference had been “exploited against the individual and in favor of the government.” *Id.* at 136, 2024 WL 250638 at *135.

²² See *infra* notes 162–171 and accompanying text.

²³ See *infra* notes 73–76 and accompanying text.

²⁴ See *infra* subpart II.A.

²⁵ Shah, *Administrative Subordination*, *supra* note 18, at 1613.

²⁶ *Id.*

²⁷ See MICHAEL ASIMOW, *FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT* 6 (2019) (noting that “some systems” of adjudication governed by the APA, such as the inquisitorial Social Security disability program and disputes arising under Medicare, “are less formal than many” informal adjudication schemes).

²⁸ ATT’Y GEN.’S COMM. ON ADMIN. PROC., *FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE*, S. DOC. NO. 77-8, at 35 (1st Sess. 1941) [hereinafter *FINAL REPORT*].

²⁹ Robert M. Cooper, *Administrative Justice and the Role of Discretion*, 47 *YALE L.J.* 577, 577 (1938).

determining the legitimacy of and accountability fostered by agency decisionmaking.

The task of ensuring adequate "procedural safeguards for the informal administrative processes . . . must begin with particularized studies of how these processes actually work in practice."³⁰ And one key component of these processes, which has been overlooked in the literature thus far, is the extent to which their components are discretionary—that is, subject to change by agency adjudicators themselves. This Article is the first to reveal and study an unscrutinized form of administrative discretion—which it refers to as administrative "procedural discretion"—that operates within the context of informal adjudication.³¹ In doing so, this Article explores how administrative discretion exercised outside the APA contravenes our conception of the stability, reliability, and consistency of proceduralism and exposes how shifts in procedure may reduce fairness, access, and accountability. The survey in this Article is based in primary sources—including executive branch memoranda and directives, as well as agency regulations and policy guidances—uncovered as part of a multi-year project tracking the operation of administrative discretion on the ground and at the regional level of bureaucratic action.³²

Procedural discretion describes agency action that alters the nature and quality of administrative procedure—indeed, not just the outcomes, but the procedure itself. Administrative adjudicators have the power to both determine and to change the processes of administrative adjudication, which agencies rely on as the primary means both to further new legal principles and to implement the law.³³ Procedural discretion uniquely relates to informal adjudication because a lack of

³⁰ FREEDMAN, *supra* note 3, at 242.

³¹ The category of informal adjudication therefore excludes arenas of administrative adjudication in which ALJs preside and process is required by the APA (such as, for instance, the Social Security Administration (SSA) and Securities and Exchange Commission (SEC)). See *infra* notes 77–79 and accompanying text; see also *infra* notes 104–108 (describing some of the process required by the APA for formal—as opposed to informal—adjudication).

³² Note that this larger project explores how administrative discretion operates—including when agencies issue legal requirements, regulatory policies, adjudications, enforcement choices, and implementation decisions—within and across diverse regulatory areas, and is based in the collection of a novel dataset of several primary sources that govern the behavior of agencies, including statutes, regulations, guidances, memoranda, directives, online policies, and other intra-agency documentation.

³³ See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1014.

defined process allows for greater procedural variation. Informal adjudication operates outside the constitutional appointment and removal process and the APA's procedural control, but nonetheless comprises the bulk of agency action.³⁴ Thus, the prevalence of informal adjudication also leads to greater procedural discretion.

In some cases, adjudicators exercise procedural discretion in ways that benefit those seeking protection or support from the government, particularly in systems that are set up to be flexible in order to help people. However, other times, relevant administrative decisionmakers may be beholden to institutional norms such as speed/efficiency and resource conservation;³⁵ to the interests of politicians, such as legislators; and to the interests of moneyed or influential stakeholders, like corporations, rather than maintaining responsiveness—and by extension, accountability—to the individuals who bring their concerns before administrative tribunals.

First, agencies take liberties to reduce access to various aspects of process in informal adjudication, in seeming reflection of a shift toward reduced due process requirements (that is, away from the *Goldberg* procedural apex) in the current, *Mathews v. Eldridge* era.³⁶ On the one hand, National Labor Relations Board (NLRB) regional officials have discretion to ensure that labor claims are not easily dismissed once brought, which serves to protect such claims on behalf of workers.³⁷ Likewise, other agencies' adjudicators may similarly behave in ways that favor under-resourced petitioners. More specifically, immigration adjudicators, adjudicators dealing with consumer reparations from deceitful investors, adjudicators investigating gun permit holders, and adjudicators investigating fraudulent

³⁴ This has been the case prior to the enactment of the APA through today. See ASIMOW, *supra* note 27, at v; see also Michael Herz, *ACUS—And Administrative Law—Then and Now*, 83 GEO. WASH. L. REV. 1217, 1245 (2015); Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145 (2001); Schuck & Elliott, *supra* note 33, at 1014; Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 741 (1976) (noting that “informal adjudication” describes the vast majority “of what the government does with respect to the individual”); FINAL REPORT, *supra* note 28, at 35 (“[E]ven where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process.”).

³⁵ See Shah, *Administrative Subordination*, *supra* note 18, at 1632–48 (arguing that a concern with efficiency can lead to administrative action that harms vulnerable communities).

³⁶ See *infra* notes 162–171 and accompanying text.

³⁷ See *infra* notes 177–178 and accompanying text.

educational institutions can draw on procedural discretion to support vulnerable or unsophisticated petitioners.³⁸

On the other hand, agencies as varied as the NLRB³⁹ and the national security and immigration agencies,⁴⁰ among a number of others,⁴¹ have established for their bureaucrats the discretion to limit in-person facets of process. Importantly, they have not done so across the board for certain, or all, types of informal adjudications, but rather reserve the right to restrict access on a case-by-case basis in contexts that make it more difficult to establish labor rights, access immigration benefits, and protect those bringing personal civil rights claims.

Second, agencies may engage in pre-adjudication choices or actions that restrict access to adjudicative process altogether—or, on occasion, that expedite access to process in order to further particular interests.⁴² The NLRB gatekeeps whether those claiming unfair labor practices have access to a hearing, while also allowing for one pathway to expedited review—but only for those arguing that a labor union stepped out of line. These ground-level policies both reflect the tension between the original New Deal legislation empowering the NLRB and reactionary law passed by subsequent Congresses alarmed by the rise of labor protection and indicate an anti-union bias.⁴³ Other examples of procedural gatekeeping include administrative policies denying lawful access to asylum adjudication,⁴⁴ agencies limiting the investigation of claims in matters of public land use and civil rights by agencies such as the Department of the Interior and the Department of Education's Office for Civil Rights,⁴⁵ and legislation allowing expedited review in order to benefit the interests of companies providing medical devices.⁴⁶

This Article argues that, overall, procedural discretion is in tension with the stability and values of proceduralism, which many assume to be a cornerstone of administrative legitimacy. The processes of informal adjudication vary not only across

³⁸ See *infra* notes 126–127, 131, 290–93, 268–77 and environs, 229–30 and accompanying text.

³⁹ See *infra* section II.A.1.

⁴⁰ See *infra* subsections II.A.2(a) & II.A.2(b).

⁴¹ See *infra* subsections II.A.2(c) & II.A.2(d).

⁴² See *infra* subpart II.B.

⁴³ See *infra* subsection II.B.1(a).

⁴⁴ See *infra* subsection II.B.2(a).

⁴⁵ See *infra* subsection II.B.2(b).

⁴⁶ See *infra* subsection II.B.1(b).

different types of adjudication, but also within the same category of adjudication. In other words, administrators may alter the process even within a single adjudicatory framework such that similarly situated petitioners experience substantially distinct procedures.

When agencies have the power to select and alter administrative process itself,⁴⁷ they may exercise it to preserve the agency's time and resources. Alternatively, they may exercise procedural discretion to ensure that the outcomes of adjudication reflect politicized priorities and agency interests, at the expense of petitioners. As a result, procedural discretion can reduce informal adjudications' fairness and accountability to individuals.

Procedural discretion can also favor the interests of more powerful stakeholders, including corporations and other interests, who may or may not be party to the adjudication in the first place. In these cases, it is primarily petitioners with fewer resources and those with limited political power who are harmed by procedural discretion, given the dearth of tools available to these communities to force permanent or more generous administrative process. In this way, procedural discretion may exclude vulnerable communities from administrative process, reduce access to government benefits and protection, and exacerbate punitive enforcement.

Scholars observe that "it is poor people of color whose legal claims wind up in [executive tribunals], while [other] claims go to Article III courts,"⁴⁸ which benefit from more fulsome process. Analogously, it may be under-resourced communities, and people with more needs vis-à-vis the state, who are more likely to be disadvantaged by administrative procedural discretion, while others remain relatively unscathed. In this way, procedural discretion destabilizes the assumption that

⁴⁷ Verkuil, *supra* note 34, at 741 (noting that informal adjudication describes the vast majority "of what the government does with respect to the individual").

⁴⁸ Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1795 n.112 (2023); *see also id.* at 1816–17:

The "high volume" administrative courts are social-security courts, immigration courts, Medicare courts, and veterans-affairs courts. These are courts where poor people of color file legal claims. When one compares this collection of cases to the disputes that separation-of-powers formalists would siphon out of the administrative state—notably, patent, property, and securities cases—the border between Article II and Article III does not look coincidental. Instead, the formalist vision re-designs the administrative state based on a regressive theory of whose due-process claims deserve an initial hearing in Article III.

(footnote omitted).

administrative procedure is reliable and inclusive, which is crucial to an administrative state that is legitimate and committed to democratic principles. Furthermore, to the extent a lack of process leads to impoverished agency rationales and an incomplete record, procedural discretion would seem to render the agency at risk for litigation.

Ultimately, procedural discretion has the potential to undercut administrative accountability in underexamined ways and in a manner unchecked by oversight, which both broadens the generalized understanding of how administrative discretion operates and should alter longstanding, conventional frameworks of political control and technical oversight of agency action. Managing both the incentives driving and the impact of agency decisionmaking that operates outside of APA procedure will require dedication to the project of uncovering informal adjudication and considering meaningful limits to its discretionary aspects. In any case, rather than assuming the presence of adequate procedural safeguards, faith in them warrants reconsideration given that administrative adjudication is both highly susceptible to political influence and heavily subject to administrative discretion.⁴⁹

Note, however, that the answer to challenges to ensuring transparent and accountable procedural discretion is not eradicating it altogether. Administration, including in the form of adjudication, does not exist without discretion. Eliminating procedural discretion could reduce beneficial adjustments to process, either for purposes of efficiency or to improve consideration of petitioners. Alternatively, pursuing the fallacy that procedural discretion can in fact be removed completely would simply force its growth in unchecked spaces, perhaps allowing it to reduce other deliberative aspects of adjudication.

Rather, interventions should emphasize oversight of, constraints on, and even opportunities to leverage the exercise of administrative discretion to ensure and improve accountability and legitimacy in administrative procedure. Encouraging a responsive version of procedural discretion means ensuring that agencies both incorporate the interests of petitioners into adjudicatory process and seek to reduce confusion and opacity when possible. A turn to administrative and judicial review,

⁴⁹ See Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2153–54 (discussing how the Department of Homeland Security U.S. Citizenship and Immigration Service (USCIS) granted its adjudicators the “discretion to” expedite process by denying immigration “benefits regardless of applicants’ eligibility, and without any justification at all”).

the latter in limited capacity and with a focus on managing the exercise of discretion as well as on transparency in proceduralism, could be a fruitful way to encourage the good possibilities of procedural discretion and mitigate its harm.

More specifically, administrative adjudicatory procedure itself could be improved or enhanced carefully at many stages of an agency's decision, including by improving the quality of initial decisions through qualitatively (rather than merely quantitatively) focused internal quality assurance, intra-agency appeals processes that encourage procedural experimentation, and judicial review that requires adequate process and adherence to constitutional norms.

This Article proceeds as follows. Part I offers a brief overview of administrative discretion and informal adjudication, both essential to procedural discretion, and highlights procedural discretion in formal adjudication. With this context at hand, Part II presents examples of procedural discretion gathered from diverse informal adjudication contexts, including procedural discretion that reduces or eliminates process, results in agency gatekeeping of access to any procedure in the first instance, or, on occasion, expedites process in response to powerful interests. In doing so, it examines the interaction between procedural discretion and political control, as well as the impact of procedural discretion on the accessibility and stability of proceduralism. While the focus of this Article is on the descriptive project, Part III nonetheless broaches the topic of reform. Suggested interventions include leaning on the administrative separation of powers, including quality assurance and intra-agency appeals, as well as drawing on judicial review to protect claimants' procedural access and rights. These approaches suggest the application of institutional tools that encourage agencies to prioritize accountability and responsiveness in the exercise of procedural discretion.

I

FRAMING PROCEDURAL DISCRETION

Administrative discretion enables flexibility in procedural choice. This administrative "procedural discretion" tends to operate within informal adjudication. To understand procedural discretion, one must have a handle on the extensiveness of administrative discretion, which is a precondition for procedural discretion, and on the prevalence of informal adjudication, which is a key context in which procedural discretion flourishes.

This Part outlines how administrative discretion and informal adjudication give rise to procedural discretion. It also explores procedural discretion in the unlikely context of *formal* adjudication as defined by the APA, as a means of reiterating that even highly structured forms of administrative adjudication may be malleable. Overall, procedural discretion is useful as a framework for better understanding administrative discretion and for exploring overlooked aspects of both formal and informal adjudication.

A. Administrative Discretion

Discretion is a linchpin of administration. Administrative agencies ensure that the implementation and enforcement of law is functional. In order to do so, they hold an immense amount of discretionary power.⁵⁰ “Administrative discretion is the freedom of choice or judgment with which an executive officer or an administrative agency is entrusted in order to insure the constant and complete effectuation of the legislative policy in any situation which might arise in connection with the enforcement of the statute.”⁵¹ Notably, agencies exercise discretion when they engage in behavior that is not specified by their governing statutes.⁵² Indeed, “[a]dministrative officials are not only empowered to fill in the details of general laws, but increasingly they have been given permissive power.”⁵³

Nearly all outcomes of governance, whether beneficial or concerning, are affected by administrative discretion to some extent. Arguably, there has always been a “Goldilocks” problem

⁵⁰ Discretion refers to “the power to choose between two or more courses of action each of which is thought of as permissible.” HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 144 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

⁵¹ Cooper, *supra* note 29, at 581; *see also id.* at 578–79, 588 (noting that “administrative discretion is the life blood upon which the entire administrative process feeds; without its vitalizing contribution the machinery of administration would degenerate into an impotent force with neither purpose nor direction”).

⁵² *See id.* at 581–82 (“To guide and limit the administrative agency in the exercise of its lawful authority the legislature establishes a criterion or standard of action within the terms of the statute itself.”); *id.* at 582–83 (“It would seem to be beyond all reasonable argument that Congress could, under any circumstances, adequately define [legislative standards] to the extent that the exercise of judgment and discretion by administrative agencies would no longer be desirable or necessary.”); *see also id.* at 582 (listing a handful of agencies—including the ICC, FCC, SEC, FTC, and NLRB—that exercise administrative discretion in the course of executing legislation).

⁵³ Marshall E. Dimock, *The Rôle of Discretion in Modern Administration*, in *FRONTIERS OF PUBLIC ADMINISTRATION* 46, 46 (1936).

regarding the optimal amount of discretion for administrators to exercise. Too little, and agencies may as well default to ministerial implementation of the law—or to artificial intelligence. Too much, and administrators are in danger of acting as little fiefs, behaving in an “extralegal” and “supralegal” manner vis-à-vis the people they govern.⁵⁴

Administrative discretion has been subject to criticism not only in recent years⁵⁵ but also since the dawn of the modern administrative state.⁵⁶ Historically, there were no clear categories of administrative discretion. At the start of the New Deal, one academic opined that discretion might be beneficial to routine, day-to-day matters, emergency scenarios, the provision of benefits, and situations involving social conflicts, including labor disputes.⁵⁷ In each of these cases, discretion could be used “in the development of administrative standards, as well as in the solution of new problems.”⁵⁸

In the wake of the New Deal and as a result of the proliferation of regulatory bodies throughout the mid-twentieth century, the public began to perceive the “administrative state” as a potentially threatening concentration of governmental power.⁵⁹ This fear intensified the clash between pro-agency support for expansive administration⁶⁰ and an anti-administrativist interest in disabling agencies and encouraging “laissez faire” policies.⁶¹

⁵⁴ See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 48, 50 (2014).

⁵⁵ See, e.g., Bressman, *supra* note 8, at 516 (noting discretion and flexibility delegitimize administrative agencies).

⁵⁶ See Cooper, *supra* note 29, at 577 (“The exercise of discretionary authority by administrative agencies has probably been subjected to more criticism than any other task of governmental administration. . . . Among those opposed to the use of discretion by administrative officials . . . [a]ll too frequently the exercise of discretion is loosely characterized by reference to some such vague symbolism as ‘tyranny,’ ‘despotism,’ or ‘bureaucracy.’”).

⁵⁷ See Dimock, *supra* note 53, at 47–50.

⁵⁸ *Id.* at 50.

⁵⁹ See generally Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

⁶⁰ See Cooper, *supra* note 29, at 580–81 (noting that limits to the amount of “detail[]” Congress can “possibly enact into a single body of law,” a lack of congressional expertise, and the fact that Congress is only “intermittently” in session are some of the “practical reasons why Congress has been compelled to create administrative agencies for the execution and enforcement of its expressed policies”).

⁶¹ Compare *id.* at 577–78 (describing discretion as a “legitimate administrative function” and its use as an “unavoidable necessity” for “the execution of governmental policies”), with *id.* at 578 (noting that opponents view the exercise of administrative discretion as “inherently dangerous if not completely undesirable”

As the administrative state began to expand, it was recognized that “[n]o function of administration [has been] more urgently in need of such a realistic analysis than the exercise of administrative discretion.”⁶² “[H]owever ‘normal’ the administrative state may (in truth) be, the American people’s ‘uneasiness’ about its legitimacy persists.”⁶³ And yet, scholars, lawyers, and even judges are arguably no closer today than they were in the early twentieth century to pinpointing precisely how administrative discretion operates and the degree to which it impacts the processes and outcomes effected by the administrative state.

Today, the discretion to identify the meaning of law, the legality of policy, and the relevance of fact are central to the administration of statute. Thus, discretion is exercised both during rulemaking and adjudication. In rulemaking, agencies exercise discretion to fill in gaps or interpret ambiguities in legislation.⁶⁴ In adjudication, administrative discretion is empowered by jurisdiction to evaluate “questions of fact,” as distinguished from the judiciary’s sphere of authority and responsibility over “matters of law.”⁶⁵ Within each of these contexts, the Court tends to refer to an agency’s discretionary action as an exercise of judgment legitimated by the administrator’s expertise.⁶⁶ Within the last fifty years, “[t]he watchword of administration [has become] expertise,”⁶⁷ including the fact that “[t]he key doctrine

and remarking on “the increasing disposition of those opposed to governmental interference to use the principle of administrative discretion as a whipping post for the revival of a *laissez faire* policy”).

⁶² *Id.* at 579.

⁶³ Kessler, *supra* note 4, at 719.

⁶⁴ *Cf.* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (limiting the discretion agencies are afforded when doing so).

⁶⁵ The former is subject to *de novo* review by the court. *SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947). For the latter, judicial review is more limited, *Heckler v. Chaney*, 470 U.S. 821, 830–31 (1985), although the court can draw on the APA to review the exercises of agency discretion to ensure a minimal level of quality, including by applying the arbitrary and capricious standard (to any policy, notice and comment rulemaking, or informal, non-APA guidance/memos) or the substantial evidence standard (to adjudications deemed formal under the APA). 5 U.S.C. §§ 551, 702.

⁶⁶ *See* Cooper, *supra* note 29, at 599 (noting that “the primary purpose of investing the instruments of administration with a discretionary authority was to place the enforcement of legislative policies in the hands of officials who presumably possess a technical competence and specialized knowledge in their particular fields of governmental activity”).

⁶⁷ Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1496 (1983).

of judicial review of administrative action became deference to that expertise.”⁶⁸

In other words, “[d]iscretion and expertise” have become synonymous.⁶⁹ As a result, exercises of procedural discretion may be justified as not only within agencies’ rightful discretion, but consistent with their expertise. More specifically, procedural discretion may be rationalized by the view that agencies know how much process is “enough” and can be trusted to balance an interest in time and resource conservation, on the one hand, with accessibility and administrative due process on the other. And yet, procedural discretion seems to be shaped, at best, by indeterminate forms of expertise. Procedural discretion is neither oriented toward developing standards and solving problems, in the sense of pinning down a substantive answer to an open policymaking question, nor based in technocratic expertise, like more well-known and better observed exercises of administrative discretion.⁷⁰

Procedural discretion is feasibly based on institutional knowledge regarding the appropriate level of procedure for a particular informal adjudication in light of structural/institutional or resource-related limitations. Nonetheless, these choices arguably involve under-justified, and sometimes idiosyncratic, exercises of expertise, given their focus on filling institutional needs or capitulating to legislative capture. Arguably, administrative discretion is consistent with scientific or technocratic expertise primarily when it is exercised as the result of process.⁷¹ But when process itself is discretionary, as a result of procedural discretion, the expertise informing said (procedural) discretion is difficult to evaluate and substantiate. That agencies exercise discretion to curtail access and process, and that they do so under the radar, also calls into question the consistency of agency deliberation and responsiveness. This is exacerbated by the fact that procedural discretion has flourished in relative obscurity and with minimal constraints.⁷² Notably, agency adjudicators are not

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *supra* notes 64–65 and accompanying text.

⁷¹ See Daniel B. Rodriguez, *Whither the Neutral Agency? Rethinking Bias in Regulatory Administration*, 69 *BUFF. L. REV.* 375, 448–49 (2021).

⁷² Contrast this to the extent to which attention to and controversy over *prosecutorial* discretion has led to its constriction. See Shah, *Presidential Administrative Discretion*, *supra* note 10.

necessarily lawyers,⁷³ which feasibly limits their knowledge of the importance of procedure and of possible implications when procedure is inadequate.

Great dissatisfaction remains with expansive administrative discretion, particularly given its role in “the way government responds to the concerns of its citizens.”⁷⁴ At least one prominent scholar has argued that justice might be improved by “eliminat[ing] unnecessary discretionary power,” if not all discretionary power.⁷⁵ Procedural discretion may add to this concern,⁷⁶ particularly given its role in reducing access to process.

B. Informal Adjudication

Informal adjudication is a form of decisionmaking where there is no defined procedural floor, leading to variable processes at the discretion of the administrative agency.⁷⁷ The APA provides, in some cases, a baseline of procedural requirements—namely in rulemaking and formal adjudication. This floor is considered an important guarantor of the legitimizing accountability of the administrative state. But informal adjudication—unlike the formal adjudication targeted by recent Court cases⁷⁸—is not presided over by administrative law judges (ALJs), as defined by the APA, and does not benefit from the procedural floor established by the APA. In fact, the APA says altogether very little about “informal action.”⁷⁹

⁷³ See 8 C.F.R. § 292.1 (2026); U.S. CITIZENSHIP & IMMIGR. SERVS., ADJUDICATOR'S FIELD MANUAL, ch. 12: Attorneys and Other Representatives, <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm12-external.pdf> [<https://perma.cc/RLE9-JDE6>] (last visited Mar. 21, 2026); Jeffrey Parker, *Two Perspectives on Legal Authority Within the Department of Veterans Affairs Adjudication*, 1 VETERANS L. REV. 208, 208 (2009) (noting that regional Department of Veterans Affairs offices are comprised of nonlawyers).

⁷⁴ Frank J. Remington, Book Review, 36 U. CHI. L. REV. 884, 885 (1969) (reviewing KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969)); *id.* at 884 (“We live in a day of increasing mistrust of government particularly by the young, the poor, and the black.”); see also JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989) (“We worry most about the arbitrary rule at the hands of those street-level bureaucracies that deal with us as individuals rather than as organized groups and that touch the more intimate aspects of our lives . . .”).

⁷⁵ DAVIS, *supra* note 74, at 217.

⁷⁶ See *supra* notes 31–46 and accompanying text.

⁷⁷ See *Informal Adjudication*, LEGAL INFO. INST. (Nov. 2021), https://www.law.cornell.edu/wex/informal_adjudication [<https://perma.cc/4AD5-RPWR>].

⁷⁸ See *supra* note 10 and accompanying text.

⁷⁹ Shapiro, *supra* note 67, at 1487–88 (describing the “game of procedural catch-up” that was and remains the APA’s attempt to constrain agencies’ exercise of their authority).

In contrast to formal adjudication, where the APA establishes procedural requirements, procedure in informal adjudication is imposed primarily by the Due Process Clause, internal guidance, or statutory requirements.⁸⁰ Notably, agencies sometimes take pains to explicitly exempt informal adjudication from APA requirements.⁸¹ As a result, informal adjudication lacks unifying process and may range from hearings that resemble proceedings before Article III courts to one-sided decisions based only in limited paperwork review.⁸²

Notably, the controversial aspects of informal adjudication go beyond the broader, well-worn contention that rulemaking is an inherently better form of agency policymaking than adjudication⁸³ and that administrative adjudicators are less knowledgeable than regulators.⁸⁴ As an initial matter, some

⁸⁰ *Id.*

⁸¹ See, e.g., 33 C.F.R. § 159.321(a)(2)(i) (2026) (imposing penalties on ships in violation of anti-pollution ordinances):

Before assessing a civil penalty under this subparagraph, the [DHS] Secretary or his delegatee shall give to the person to be assessed such penalty . . . a hearing on the proposed penalty. *Such hearing shall not be subject to 5 U.S.C. 554 or 556, but shall provide a reasonable opportunity to be heard and to present evidence.* (emphasis added).

⁸² Michael Asimow, *The Last Frontier: Fair Procedure in Informal Administrative Adjudication*, 14 MICH. J. ENV'T & ADMIN. L. 1, 12–39 (2024) (describing and differentiating various informal adjudicatory schemes).

⁸³ Rulemaking may be viewed as preferable because adjudication may result in “decreased public participation, a lack of prospectivity, lesser transparency or predictability for regulated entities, and a tendency to arise in fact-bound circumstances.” See Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 649 (2008); see, e.g., DAVIS, *supra* note 74, at v (asserting that, compared to discretionary decisionmaking, “rules make for evenhandedness, because creation of rules usually is relatively unemotional, and because decision-makers seldom err in the direction of excessive rigidity when individualization is needed”); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308–09; William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 103; David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 929–42 (1965) (arguing that, in general, rulemaking is fairer and more effective than agency adjudication); Carl McFarland, *Landis’ Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 433–38 (1961).

⁸⁴ See Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1215–24 (2021) (suggesting that administrative adjudicators, as compared to policymakers that generally engage in rulemaking, have less understanding of the ins and outs of the law they are applying); see also Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1017 (2015) (showing a strong interaction between agency officials with legislative expertise and those who engaged in rulemaking).

academics have begun to push back against this view,⁸⁵ including in the controversial immigration context.⁸⁶ Furthermore, because informal adjudication is widespread, it could not feasibly be replaced by rulemaking. Perhaps agencies make certain important decisions through rulemaking,⁸⁷ but many of their decisions overall happen via informal adjudication, including, for instance, in the vast area of immigration.⁸⁸

Indeed, informal adjudication covers an expansive area of statutory implementation that rulemaking could never be employed efficiently to accomplish. Historically, the majority of agencies acted primarily through informal adjudication, including to create policy and implement the law, and this continues to be the case. As of the mid-twentieth century, “[m]ore than 80 percent of the work of the federal administrative agencies [wa]s done informally, without an adjudicatory hearing.”⁸⁹ For example, informal decisionmaking operated in spaces such as national security,⁹⁰ financial regulation,⁹¹ and food and drug safety,⁹² among others, and was justified as both better for administrative efficiency and bounded by procedural due process.

Also, the informality of an adjudication does not necessarily indicate these decisions are unimportant. For example, a number of decisions that are core to issues of national security—and highly impactful on individual rights—are made through malleable processes.⁹³ Informal adjudication also has the distinct

⁸⁵ See, e.g., Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 495 (2021) (arguing that “developing policy through case-by-case adjudications—akin to courts’ development of the common law—can offer significant benefits over informal rulemaking, both to agency policymakers (e.g., speed, case-by-case policy development, ex post policy clarification, increased policymaking opportunities) and to the public (e.g., increased participation by marginalized communities, tailored policies)” (emphasis omitted)).

⁸⁶ See, e.g., Eyer, *supra* note 83, at 695 (noting that there is a lack of scholarship discussing the benefits of administrative adjudication and drawing on the Board of Immigration Appeals to argue that administrative adjudication has rule-of-law benefits, including that it develops consistency in standards applied across the immigration legal system, furthers predictability in results for individual immigrants, and restricts otherwise arbitrary exercises of government discretion).

⁸⁷ Herz, *supra* note 34, at 1246.

⁸⁸ See Jill E. Family, *A Lack of Uniformity, Compounded*, in *Immigration Law*, 98 NOTRE DAME L. REV. 2115, 2117 (2023) (stating that all removal proceedings are bound by the INA and not the formal requirements of the APA).

⁸⁹ FREEDMAN, *supra* note 3, at 207.

⁹⁰ See *id.* at 215–16.

⁹¹ See *id.* at 218–19.

⁹² See *id.* at 219–22.

⁹³ See *infra* notes 187–224 and accompanying text.

feature of being able to “control the decisions of ostensibly superior entities (such as the federal courts).”⁹⁴ For instance, appeals of immigration decisions, which result from informal adjudication, made up the largest percentage of appeals of agency decisions in almost every court of appeals last year.⁹⁵ Many of these are high-stakes decisions.⁹⁶

Overall, the perceived lack of procedural requirements in informal adjudication has been of concern since the advent of the modern administrative state. In the 1920s, in the midst of controversy and concern surrounding administrative procedure, then-professor Felix Frankfurter declared (quoting Justice Brandeis) that administrative safeguards must include, among other facets, “a flexible, appropriate and economical procedure [always remembering that ‘in the development of our liberty insistence upon procedural regularity has been a large factor’) [and] easy access to public scrutiny.”⁹⁷ By the 1930s, the American Bar Association pushed the legislature to infuse more rigid procedural requirements into administrative adjudication,⁹⁸ ultimately leading to the Walter-Logan bill.⁹⁹ As an extension of these efforts, Roscoe Pound—head of the relevant ABA Special Committee—raised concerns about the lack of adversarial proceedings in certain administrative adjudications and their potential impact on the quality of administrative decisionmaking.¹⁰⁰ All of this suggests that “the absence of APA

⁹⁴ Eyer, *supra* note 83, at 648.

⁹⁵ *Federal Judicial Caseload Statistics 2025*, U.S. CTS., <https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2025> [https://perma.cc/UVM8-8RTC] (last visited May 25, 2026) (“Appeals of decisions by the Board of Immigration Appeals accounted for 75 percent of administrative agency appeals and constituted the largest category of administrative agency appeals filed in each circuit except the DC Circuit.”).

⁹⁶ Cf. HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., IN12492, FY2024 EOIR IMMIGRATION COURT DATA: CASELOADS AND THE PENDING CASES BACKLOG 1 (2025) (finding that most of the pending 3.6 million cases in U.S. immigration courts are deportation proceedings).

⁹⁷ Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 618 (1927) (quoting *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting)).

⁹⁸ O. R. McGuire, *A Bill to Provide for the More Expeditious Settlement of Disputes with the United States*, 23 A.B.A. J. 609, 610–11 (1937).

⁹⁹ H.R. 6324, 76th Cong. (1939) (obligating the administrative state to engage in far more formalized procedure than its successor, the Administrative Procedure Act, which was ultimately adopted instead); 76 CONG. REC. S9389 (daily ed. July 18, 1939) (describing consideration of S. 915).

¹⁰⁰ See *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 339–46 (1938).

procedures for "informal adjudication" has been viewed, at least to some extent, as "a major flaw in design."¹⁰¹ This flaw both allows for the flourishing of agency decisionmaking without consistent process and for administrative adjudication's escape from judicial and public oversight as compared to other exercises of administrative discretion.

C. Procedural Discretion in Formal Adjudication

Finally, before the next Part engages in a fulsome exploration of procedural discretion in informal adjudication, it is worth noting that even formal adjudication is susceptible to procedural discretion. First, part of the reason for this may be that all administrative adjudication is relatively unconstrained. As an initial matter, administrative law doctrine has established only that agencies may choose to make policy via either rulemaking or adjudication per the APA, as long as they are authorized by statute to engage in both.¹⁰² In addition, the APA grants ALJs—who conduct formal adjudication—broad discretion to manage orderly and fair hearings.¹⁰³ Second, the legislature may shape formal adjudication processes through either statute or funding decisions.

At first blush, formal adjudication may seem to lack the obvious avenues to procedural discretion that exist in its informal counterpart. Per the APA, if an enabling statute specifies that the agency may engage in adjudication "on the record after [the] opportunity for an agency hearing,"¹⁰⁴ then the agency must conduct a formal adjudication. This involves offering an in-person hearing¹⁰⁵ as well as allowing a party "to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."¹⁰⁶ The APA also specifies that "[a]ny oral or documentary evidence may be received" by the agency, with the exclusion of "irrelevant, immaterial, or unduly repetitious evidence."¹⁰⁷

¹⁰¹ Verkuil, *supra* note 14, at 260.

¹⁰² See SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1405 (2004).

¹⁰³ 5 U.S.C. § 556(c).

¹⁰⁴ See, e.g., *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1540 (9th Cir. 1993) (alteration in original) (quoting 5 U.S.C. § 554(a)).

¹⁰⁵ See 5 U.S.C. § 555(b).

¹⁰⁶ *Id.* § 556(d).

¹⁰⁷ *Id.*

These provisions together suggest that the statute prioritizes oral communication with the agency and cross-examination in formal adjudication. Indeed, the right to cross-examination before an ALJ has been reinforced by Article III courts.¹⁰⁸ However, ALJs have made progress in ratcheting down access to in-person hearings.

For example, Securities and Exchange Commission ALJs often skip in-person hearings concerning their enforcement actions, choosing instead to issue “summary judgments”¹⁰⁹ in seeming contravention of the APA.¹¹⁰ In addition, State Department ALJs adjudicating cases under the Program Fraud Civil Remedies Act (PFCRA)¹¹¹ have discretion to require only written motions, except for those made at a prehearing conference or during a hearing.¹¹² Moreover, ALJs have discretion to allow parties “to waive appearance at an oral hearing and to submit only documentary evidence.”¹¹³ Litigants may technically choose whether to appear in person or not, but it is likely that the ALJ has influence over which choice a party makes.

On the one hand, the PFCRA was enacted to deal with lower dollar value cases, which ensures federal agencies have redress for false statements and smaller false claims not selected for enforcement litigation by the Department of Justice (DOJ) under the False Claims Act. Furthermore, given the limit on claims amounts, it makes sense both that PFCRA actions are adjudicated by agencies (while False Claims Act cases are decided by Article III judges) and that in some cases, a litigant might decide to waive an in-person hearing because the adjudication concerns a relatively small claim.

On the other hand, it is likely that the ALJ has influence over whether a party chooses to waive their hearing—and that parties who choose to waive their appearances may in fact be

¹⁰⁸ For example, courts have reversed ALJ discretionary decisions to deny the right to cross-examine witnesses. *See, e.g.,* Demenech v. Sec’y of the Dep’t of Health & Hum. Servs., 913 F.2d 882, 882–83 (11th Cir. 1990); Cunanan v. Immigr. & Naturalization Serv., 856 F.2d 1373, 1373–74 (9th Cir. 1988); Solis v. Schweiker, 719 F.2d 301, 301 (9th Cir. 1983); ABC Air Freight Co. v. Civ. Aeronautics Bd., 391 F.2d 295, 305 (2d Cir. 1968); Pac. Molasses Co. v. FTC, 356 F.2d 386, 389–90 (5th Cir. 1966).

¹⁰⁹ Alexander I. Platt, *Unstacking the Deck: Administrative Summary Judgment and Political Control*, 34 YALE J. ON REGUL. 439, 440 (2017).

¹¹⁰ *See generally* Alexander I. Platt, *Is Administrative Summary Judgment Unlawful?*, 44 HARV. J.L. & PUB. POL’Y 239 (2021).

¹¹¹ 31 U.S.C. §§ 3801–3812.

¹¹² 22 C.F.R. § 35.28(b) (2026).

¹¹³ *Id.* § 35.19(c)(5).

harming their claims inadvertently (or under pressure from the ALJ). Furthermore, Congress recently raised the ceiling for claims under the PFCRA from \$150,000 to \$1 million.¹¹⁴ From this perspective, the opportunity for ALJs to allow claimants to waive process undercuts the APA requirement that formal adjudication includes an oral hearing,¹¹⁵ possibly to the detriment of adequate process for those suffering from significant losses due to fraud. Note, as well, that advocates have raised concerns about whether these claims should be decided by the judiciary instead of administrative courts,¹¹⁶ similar to claims under the False Claims Act. This suggests ongoing concern about the relative fairness and solidity of administrative procedure in this setting, which might be further undercut by its discretionary nature.

In the context of communication regulation, the Communications Act of 1934¹¹⁷ has long given the Federal Communications Commission (FCC) authority to engage in adjudication. Recently, however, the FCC moved away from its previously more formalized decisionmaking process that allowed the participation of parties who disagree with the agency's regulatory decisions. In contrast, the FCC adopted new procedural rules purportedly to "streamline the hearing process" by, among other changes, amending "its rules to codify and expand the use of a process that relies on written testimony and documentary evidence in lieu of live testimony and cross-examination" and "dispens[ing] with the preparation of an initial opinion whenever the record of a proceeding can be certified to the Commission for final decision."¹¹⁸ This move was recognized by the agency as the informalization of its adjudication and was made in order to conserve agency resources.¹¹⁹

¹¹⁴ Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159, § 5203(c), 138 Stat. 1773, 2440 (2024).

¹¹⁵ See *supra* notes 104–08 and accompanying text.

¹¹⁶ See Paul E. Pompeo, *The Jury's Out - A Seventh Amendment Challenge to the Program Fraud Civil Remedies Act*, 12 GEO. MASON L. REV. 207, 209 (1990); Peter B. Hutt II et al., *Congress Attempts to Revitalize the Program Fraud Civil Remedies Act*, COVINGTON: INSIDE GOV'T CONTS. (Jan. 14, 2025), <https://www.inside-governmentcontracts.com/2025/01/congress-attempts-to-revitalize-the-program-fraud-civil-remedies-act/> [https://perma.cc/T9YP-QQW4].

¹¹⁷ 47 U.S.C. §§ 151–609.

¹¹⁸ FCC Procedural Streamlining of Administrative Hearings, 47 C.F.R. pts. 0, 1, 76 (2026) (adopting a final rule).

¹¹⁹ See *id.*

According to one commentator, “[p]erhaps the most significant salutary impact of the streamlined procedures will be to reduce the likelihood that a formal trial-type adjudication process will be used by the Commission as a sure-fire ‘kill mechanism’ to bury proposed mergers”¹²⁰ and reduce attendant benefits like improved communication infrastructure. That being said, mergers approved by the FCC can harm the public by raising costs of access to communication services and reducing incentives to improve service or innovate, particularly when the mergers decrease competition.¹²¹ The streamlined process may worsen this trend by diminishing opportunities for the public to contribute information regarding the benefits and drawbacks of mergers and other decisions.

Likewise, the Federal Energy Regulatory Commission (FERC), in discharging its statutory duties to investigate market abuse, natural gas and oil pipeline violations, and to evaluate energy infrastructure applications,¹²² has given individual ALJs—referred to as “presiding officers”—the power to shape access to various aspects of a hearing.¹²³ For example, presiding officers may decide whether oral testimony may be excluded from any FERC hearing.¹²⁴ Presiding officers also have an unspecified power to determine which aspects of the hearing may occur off the record, and which may not.¹²⁵ While presumably more efficient, this discretion may leave the underlying records incomplete or presiding officers’ decisions bereft of public input.

¹²⁰ Randolph May, *Streamlining Adjudications at the FCC*, YALE J. ON REGUL.: NOTICE & COMMENT (Sep. 20, 2019), <https://www.yalejreg.com/nc/streamlining-adjudications-at-the-fcc-by-randolph-may/> [https://perma.cc/YKQ3-CEDQ].

¹²¹ See, e.g., Corey Martin, *Channelopoly: Dangers of FCC Approving a CBS, ABC, NBC and Fox Merger*, FORBES (Oct. 15, 2025), <https://www.forbes.com/sites/legalentertainment/2025/10/06/channelopoly-dangers-of-fcc-approving-a-abc-cbs-nbc-fox-merger/> [https://perma.cc/3UWQ-VEC5].

¹²² See 49 U.S.C. § 60502 (“The Federal Energy Regulatory Commission has the duties and powers related to the establishment of a rate or charge for the transportation of oil by pipeline or the valuation of that pipeline”); Federal Power Act, 16 U.S.C. §§ 791a–825r (empowering the Federal Power Commission, which was eventually superseded by FERC, to oversee interstate electric, gas, and hydroelectric power activities).

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied.

Id. § 825g(b).

¹²³ See generally 18 C.F.R. pt. 385, subparts A–H, O, T–V (2026).

¹²⁴ See *id.* § 385.506(a).

¹²⁵ See *id.* § 385.510(a).

In another context, the Commodity Futures Trading Commission (CFTC) Reparations Program provides an “inexpensive, expeditious, and fair forum to resolve disputes between derivatives customers and registered trading professionals.”¹²⁶ “Congress designed the program to be inexpensive, fast, and accessible—especially for people who cannot afford to go to court.”¹²⁷ The program became part of core administrative law doctrine as a result of *CFTC v. Schor*’s determination that the Commodity Exchange Act—which enables the CFTC overall and empowers it to entertain state law counterclaims in reparation proceedings—does not unconstitutionally give an agency powers that rightfully belong to the federal courts.¹²⁸ Still, the process for deciding claims can be inconsistent and relatively inaccessible even if it does not violate Article III of the Constitution.

More specifically, ALJs are “authorized to conduct all reparations proceedings,”¹²⁹ including all claims for less than \$30,000, as well as claims above that amount,¹³⁰ and they do so per the APA’s requirements for formal adjudication. On the one hand, the CFTC can consider any issue, not just those briefed, on review,¹³¹ which may benefit unrepresented litigants. On the other hand, ALJs at the CFTC have discretion to decide whether claimants receive an oral hearing, and also to determine whether this hearing will be in person or over the phone.¹³² In addition, the adjudicator may decide that witness testimony can only be provided via documents, as opposed to orally.¹³³ These choices allow for more efficient communication

¹²⁶ See *Reparations Program*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/LearnAndProtect/ReparationsProgram/index.htm> [https://perma.cc/E7C3-QMBE] (last visited May 11, 2025).

¹²⁷ *Reparations Program Customer Handbook*, COMMODITY FUTURES TRADING COMM’N 3 (July 16, 2026), <https://www.cftc.gov/media/14236/CFTCReparationsHandbook061626/download> [https://perma.cc/HC8C-ZR6X].

¹²⁸ 478 U.S. 833, 851–52 (1986) (delineating several factors that establish this power as within the agency’s purview).

¹²⁹ 17 C.F.R. § 12.2 (2026).

¹³⁰ See *Select the Right Proceeding for Your Issue*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/LearnAndProtect/ReparationsProgram/ChooseTheAppropriateProceeding> [https://perma.cc/7UCN-U882] (last visited May 12, 2025).

¹³¹ 17 C.F.R. § 12.401(f) (2026).

¹³² *Id.*; *id.* § 12.209(a) (2026) (“When the Administrative Judge determines that an oral hearing is necessary and appropriate, such oral hearing will be held either by telephone or in person . . .”).

¹³³ *Id.* § 12.312(d)(1) (2026) (“To expedite the hearing, the Administrative Law Judge may, in their discretion, order that the direct testimony of the parties and

between the agency and investors, but may also result in the ALJ gathering insufficient information to decide the case fairly.

Sometimes, procedural discretion that impacts formal adjudication is not initiated by ALJs, but is in fact enabled by statute. For example, a legislative scheme may even allow ALJs to outsource adjudication to outside parties.¹³⁴ Indeed, Medicare law allows for contractors outside the Social Security Administration to make decisions.¹³⁵ One ALJ from inside the agency suggests that these provisions also constituted a work-around by the legislature, since contracting out to accomplish Medicare adjudications requires appropriating less money to the agency.¹³⁶

More specifically, Medicare administrative contractors engage in two types of informal adjudication: first, determining the amount of payments to be made to service providers, suppliers, and individuals; and second, determining what constitutes a reasonable cost for a Medicare-covered service.¹³⁷ In addition, Medicare contractors adjudicate appeals below the level of appeals decided by ALJs.¹³⁸ In this way, control by contractors over important aspects of process—including, for instance, the substance of the record that ALJs eventually review—has impacted the quality of decisionmaking outcomes.¹³⁹

The legislature also shapes how procedural discretion operates via the appropriations process, which may incentivize ALJs to engage in gatekeeping. More specifically, ALJs are appropriated funding for their caseloads. Inadequate

their witnesses be presented in documentary form, by affidavit, interrogatory, and other documents.”).

¹³⁴ Cf. Rebecca L. Keeler, *Managing Outsourced Administrative Discretion*, 45 STATE & LOC. GOV'T REV. 183, 184–87 (2013) (discussing challenges of managing discretion outsourced to contractors).

¹³⁵ Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, §§ 911–912, 117 Stat. 2066, 2378–88 (codified as amended at 42 U.S.C. § 1395kk-1); see *id.* § 931, 117 Stat. 2396–99 (requiring the transfer of the functions of ALJs hearing Medicare appeals from the Social Security Administration to the Department of Health and Human Services).

¹³⁶ “Today, the Medicare appeals system is swamped—mostly with provider appeals [and one reason for the congestion is the large number of hospital appeals over decisions of contractors regarding Medicare admissions.” Eleanor D. Kinney, *The Accidental Administrative Law of the Medicare Program*, 15 YALE J. HEALTH POL'Y L. & ETHICS 111, 130 (2015).

¹³⁷ 42 U.S.C. §§ 1395h, 1395u.

¹³⁸ *Id.*; see also Kinney, *supra* note 136, at 112.

¹³⁹ See, e.g., Kinney, *supra* note 136, at 130–33 (illustrating how paying contractors to make important determinations rendered Medicare more similar to a procurement, for-profit program rather than a benefits program).

funding/defunding can lead to reduced resources such as fewer legal secretaries and other tools needed to get adjudications done, may cause a big backlog of cases, and will generally limit ALJs' ability to adjudicate cases.¹⁴⁰ More funding allows ALJs to adjudicate more of a certain type of case. In response, ALJs are forced to navigate these restrictions in order to serve claimants whose interests are not adequately protected by the legislature.

For instance, ALJs in the Department of Labor (DOL) advocate for funding based on a mix of cases. Some of these are Black Lung Act cases,¹⁴¹ which involve restitution for Midwestern coal miners.¹⁴² These decisions are profoundly skewed against miners,¹⁴³ but ALJs are also aware that legislators with Midwestern constituents are attentive to these cases. Other DOL cases include workers' compensation,¹⁴⁴ such as payment to New Orleans longshoremen with relatively little representation in Congress. Yet another type of DOL adjudication involves the Defense Base Act, under which cases are brought by people who have been harmed on defense bases around the world.¹⁴⁵ According to a DOL ALJ, as the military has begun hiring contractors, those contractors have hired internationally—from Uganda, Kosovo, and other countries.¹⁴⁶ As a result, thousands of Defense Base Act cases are now brought by international communities.¹⁴⁷ However, since none of these people have representation in the U.S. legislature, it is difficult to advocate for legislative support and funding for these cases.¹⁴⁸

Under these circumstances, an ALJ may advocate to Congress for funding to decide Black Lung Act cases, which align with legislative interests. Once funding is received to decide those cases, ALJs use discretion to prioritize other cases

¹⁴⁰ Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 438–39 (2007).

¹⁴¹ See JEREMY S. GRABOYES & JENNIFER L. SELIN, IMPROVING TIMELINESS IN AGENCY ADJUDICATION app. E at E-2 to -3 (Dec. 11, 2023) (report to the Admin. Conf. of the U.S.).

¹⁴² See *About the Office of Administrative Law Judges*, OFF. OF ADMIN. L. JUDGES, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/oalj/about/ALJMISSN> [<https://perma.cc/4E9R-YURB>] (last visited May 12, 2025).

¹⁴³ See Brian C. Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 ADMIN. L. REV. 1025, 1027 (2002).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Interview with Medicare Admin. L. Judge, at 61st Ann. Educ. Seminar of the Fed. Admin. L. Judges Conf., in Bos., Mass. (Sep. 16, 2024).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

instead, such as pressing workers' compensation cases unrelated to Black Lung matters and even Defense Base Act cases that receive less support and advocacy from legislators in comparison to Black Lung cases.¹⁴⁹ In sum, even formal adjudication offers opportunities for the exercise of procedural discretion that either originates in ALJs themselves or is enabled by the legislature.

II

PATHWAYS OF PROCEDURAL DISCRETION

Procedural discretion shapes informal adjudication. Because it is unrestricted by the APA, informal adjudication may provide additional opportunities for agencies to alter adjudicative process. Procedural discretion in this setting leads to limited access to, a reduction in, or the omission of procedure underlying informal administrative adjudication. This may include bureaucratic options limiting or gutting administrative process even if an individual's claim is granted a hearing, as well as administrative decisions to eliminate procedure altogether.

Procedural discretion may originate in agencies and adjudicators, reducing or eliminating processes in a manner reflecting the ongoing decline of administrative due process. Accordingly, procedural discretion may be endogenous, concretized by the President or agencies' own policies.¹⁵⁰ Sometimes, procedural discretion reflects clear legislative preferences. Importantly, there may be an underlying aspect of legislative influence or pressure even in endogenous procedural discretion schemes. (This operates alongside the presidential control that shapes how agencies adjudicate.¹⁵¹) In addition to the fact that Congress exercises control over agencies by enacting "statutes that establish substantive standards to govern agency decision-making,"¹⁵² legislators also have the power to sway adjudicative decisionmaking in less transparent and more targeted ways. As a result, procedural discretion may be shaped by political interests and render agencies controversial as a result.¹⁵³

¹⁴⁹ *Id.*

¹⁵⁰ See *infra* section II.B.2.

¹⁵¹ See generally Shah, *Presidential Administrative Discretion*, *supra* note 10 (discussing this dynamic throughout).

¹⁵² Pierce, *supra* note 6, at 481.

¹⁵³ Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 AM. POL. SCI. REV. 1094, 1114 (1985) (discussing the NLRB).

Part II engages in a descriptive analysis of the use of procedural discretion by various agencies. More specifically, this Part explores both the shift in procedure away from in-person requirements and limited or preferential access to adjudication in the first instance, which have been concretized in regulation and policy governing informal adjudication. In doing so, this Part shows how agencies exercise discretion that impacts agency adjudicatory process, including both its contours and access to it.

First, this Part shows how agencies endeavor to reduce access to in-person and oral components of process. Second, it considers how agencies may engage in pre-adjudication choices or actions that limit access to adjudicative process altogether. These pathways of procedural discretion may restrict access to procedure in some instances and eliminate existing administrative process in others. Entities as varied as the NLRB, the immigration agencies, the State Department, and the Federal Energy Regulatory Commission (FERC) have established for their bureaucrats the discretion to limit in-person facets of process. Importantly, they have not done so across the board for certain types of decisions or for all informal adjudications, but rather have reserved the right to restrict access on a case-by-case.

Note that this Part emphasizes examples of procedural discretion that are substantiated by statute, regulation, or agencies' policy manuals or other guidance. Sometimes, there may be only minimal specificity of procedural discretion.¹⁵⁴ For instance, adjudicators are sometimes advised, at most, that procedural discretion focus on curtailing procedure if a petitioner does not submit adequate information on time or

"The NLRB is responsive to all the major governmental institutions: the presidency, the Congress, the courts." *Id.* However, "it would be a mistake to dismiss it as a special case." *Id.*

The NLRB is hardly at the center of political controversy[; v]ery few politicians pay any attention to the agency, and, when they do, they tend to be obsessed with its workload rather than its policies [Nonetheless, it illustrates that] the behavior of a typical agency . . . is influenced by politicians and constituency groups as well as the agency's internal characteristics

Id. "[O]ur findings on the NLRB . . . simply confirm what students of public administration have long been saying about the determinants of bureaucratic behavior." *Id.*

¹⁵⁴ See, e.g., 42 U.S.C. § 7254 (providing the Department of Energy (DOE) Secretary generalized power to prescribe procedural and administrative rules for DOE programs).

entail limiting the timeframe for submitting information.¹⁵⁵ Nonetheless, examining procedural discretion with some basis in text allows for boundaries around the field of study undertaken by this Part. This, in turn, results in a more manageable and penetrable observation of variation in procedure in the context of administrative adjudication, which is otherwise rife with discretion.

In addition, this approach contributes the insight that adjudicatory spaces assumed to be fairly formal, or “hearing-like,”¹⁵⁶ as suggested by the presence of documented procedure, are in fact more discretionary than expected. In general, informal adjudication can be taxonomized from more to less formal,¹⁵⁷ and the assumption is that more formal (if not “formal” per the APA) process involves less procedural discretion. This Part complexifies this literature by introducing the breadth and variation of procedural discretion in somewhat more formalized adjudicative contexts.

The overall impact of procedural discretion and growing procedural informality is complicated. At first glance, the fact that agencies engage in adjudication with significantly wide-ranging process appears conventional, if potentially disadvantageous compared to rulemaking—the water all of government swims in.¹⁵⁸ Indeed, procedural discretion may seem not only inevitable, a product of an expansive system of administration, but also necessary to an administrative state that applies the law at a minute level with limited resources.

¹⁵⁵ See, e.g., 10 C.F.R. § 609.5(b)(5) (2026) (limiting the timeframe for submission of materials to procure a loan from the DOE for clean energy projects (implementing 42 U.S.C. § 7254)); 21 C.F.R. § 1.94 (2026) (limiting timeframe for submitting testimony to the Department of Health and Human Services regarding whether an item should be destroyed as adulterated food per the Federal Food, Drug, and Cosmetic Act (implementing 21 U.S.C. § 381)); 50 C.F.R. § 13.29(b) (4) (2026) (limiting timeframe for request for reconsideration of a permit decision by the Department of the Interior Fish and Wildlife Service); 25 C.F.R. § 292.19 (2025) (limiting timeframe for submitting comments to the Department of the Interior Bureau of Indian Affairs on decision regarding whether to establish gaming (for instance, casinos and other gambling establishments) on tribal land (implementing 25 U.S.C. § 2719)); 19 C.F.R. § 210.46(a) (2026) (limiting timeframe for written submissions in response to an initial determination that the respondent had violated section 337 of the Tariff Act (implementing 19 U.S.C. § 1337)).

¹⁵⁶ This category of informal adjudication may be referred to as “Type B.” See, e.g., ASIMOW, *supra* note 27, at 4.

¹⁵⁷ This category of informal adjudication may be referred to as “Type C.” See, e.g., *id.*

¹⁵⁸ Cf. Donald P. Moynihan, *Rescuing State Capacity: Proceduralism, the New Politicization, and Public Policy*, 44 J. POL’Y ANALYSIS & MGMT. 364, 364–65 (2025) (characterizing “state capacity” as the “water in which we swim”).

Complementarily, procedural discretion originates in efforts to improve efficiency, reflected by a longstanding recognition of the tension between responsiveness and fairness inherent in "expedited" proceedings.¹⁵⁹

That having been said, intrinsically fast-moving agency processes and the attendant need for flexibility, however well-intentioned, do not excuse procedural discretion that defaults to speed or to assumptions held by administrators, at least not in all cases or without a sufficient foundation of expertise and democratic accountability informing the exercise of discretion. The reality is that procedural discretion may serve as a vehicle for the politicization of agency decisionmaking that is more likely to further, for example, restrictionist immigration policies¹⁶⁰ and anti-labor aims.¹⁶¹ In these contexts, political control can be exercised over agency decisionmaking even if constitutional appointments requirements do not apply, and both process and outcomes are manifested outside the constraints of APA or constitutional procedural protections. As a result, procedural discretion has the tendency to obstruct vulnerable communities' access to administrative process and may therefore impede both the provision of government benefits and protection and exacerbate punitive administrative enforcement.

A. Reduced In-Person Process

To a meaningful extent, procedural discretion reflects the administrative due process shift away from the expectations of *Goldberg v. Kelly*¹⁶²—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, at least partially, of what is less burdensome to the agency.¹⁶³

While the implementation of a plethora of procedural requirements was considered a requirement of administrative due process in the *Goldberg v. Kelly* era, this is no longer

¹⁵⁹ FREEDMAN, *supra* note 3, at 251–53.

¹⁶⁰ See *infra* subsections II.A.2(a), II.A.2(b), II.B.2(a).

¹⁶¹ See *infra* section II.A.1 & subsection II.B.1(a).

¹⁶² 397 U.S. 254, 261 (1970); see Albert H. Meyerhoff & Jeffrey A. Mishkin, *Application of Goldberg v. Kelly Hearing Requirements to Termination of Social Security Benefits*, 26 STAN. L. REV. 549, 550 (1974) (listing the procedural requirements the Court found necessary in *Goldberg v. Kelly*).

¹⁶³ 424 U.S. 319, 349 (1976).

the case. Now, the calculus used to determine whether the individual's interests have been adequately considered—the *Mathews v. Eldridge* three-factor balancing test—allows the government to limit process in order to prioritize the government's institutional interest in conserving fiscal and administrative resources, as well as its substantive concern with maintaining national security, even at the expense of individual liberty.¹⁶⁴

As a result, decisions to reduce access to in-person process are only minimally constrained by the law.

This section focuses on how agencies may tailor informal adjudication process away from in-person and oral requirements and toward written and other less accessible forms of process, as well as ways that adjudicators may reduce access to counsel and consolidate cases to improve efficiency, which may be valorized at the expense of procedural values.¹⁶⁵ It considers these dynamics in contexts like labor, immigration, national security, communications regulation, energy, civil fraud, and consumer protection, including education.

In some situations, Congress and agencies have pulled back holistically from requirements deemed minimal prior to the *Mathews* revolution. For example, in passing the Social Security Act, distant from “*Goldberg v. Kelly*, and thus the notion that procedural due process rights should be granted for disputes over federal benefits,”¹⁶⁶ the legislature only provided for limited in-person appeals of decisions before the Commissioner of Social Security.¹⁶⁷ In the regulatory context, the Armed Services Board of Contract Appeals, which represents the Secretaries of Defense, the Army, the Navy, and the Air Force to

¹⁶⁴ Shah, *Administrative Subordination*, *supra* note 18, at 1645 (footnotes omitted); see also Thomas W. Merrill, *Jerry L. Mashaw, the Due Process Revolution, and the Limits of Judicial Power*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW* 39, 43–45 (Nicholas R. Parrillo ed., 2017); Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1981–84 (1996).

¹⁶⁵ See Jason Parkin, *Due Process Disaggregation*, 90 NOTRE DAME L. REV. 283, 298 (2014); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 472–73 (1986); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976); see also Kathryn A. Sabbeth, *Who Says Evictions Should Be Efficient?*, LAW & POL. ECON. PROJECT (July 17, 2024), <https://lpeproject.org/blog/who-says-evictions-should-be-efficient/> [<https://perma.cc/NU53-JDPJ>].

¹⁶⁶ Kinney, *supra* note 136, at 119.

¹⁶⁷ See *id.* at 119 n.51 (citing Social Security Amendments of 1965, Pub. L. No. 89-97, § 1869, 79 Stat. 286, 330 (codified as amended at 42 U.S.C. § 405 (2012))).

adjudicate contract disputes,¹⁶⁸ has the discretion to allow its hearings to “be as informal as may be reasonable and appropriate under the circumstances.”¹⁶⁹

As *Goldberg* itself asserted, a move away from somewhat consistent and formalized hearing processes may harm our most vulnerable populations.¹⁷⁰ Likewise, procedural discretion may impede individuals who require benefits or protection from the government, although there are pockets of procedural discretion that benefit individuals vis-à-vis powerful institutions.¹⁷¹

1. *Legislative Underpinnings*

a. *Labor*

The protection of labor, and related organizing, is important to wage earners. Procedural discretion complicates workers’ access to fulsome process, including in-person opportunities, in the adjudication of labor disputes. Bureaucrats in the NLRB are empowered by the National Labor Relations Act (NLRA) to hear unfair labor claims, including those that legitimize the actions and elections of labor unions.¹⁷² The NLRB is an independent agency that has no subcomponents. It engages almost exclusively in adjudication,¹⁷³ notwithstanding critiques of this approach.¹⁷⁴ To that end, its leadership consists of the Board and General Counsel,¹⁷⁵ which oversee adjudication and pre-adjudication investigations that determine whether to grant a claimant access to a hearing. The NLRB Statements

¹⁶⁸ FAR § 2 app. A, pt. 1(1) (2026).

¹⁶⁹ *Id.* § 2 app. A, pt. 2, r. 10(c).

¹⁷⁰ *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that welfare recipients are uniquely unable to defend themselves before an agency adjudication after benefits were terminated due to their lack of resources).

¹⁷¹ See, e.g., *infra* section II.A.2(c) (discussing how expedited process can benefit students by limiting the recourse of fraudulent institutions).

¹⁷² 29 U.S.C. §§ 151–169.

¹⁷³ Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2016–17 (2009); Shapiro, *supra* note 83, at 922.

¹⁷⁴ See Mark H. Grunewald, *The NLRB’s First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 279, 281 (1991); Merton C. Bernstein, *The NLRB’s Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 587–98 (1970).

¹⁷⁵ See *Organization Chart*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/who-we-are/organization-chart> [<https://perma.cc/8G52-4HLC>] (last visited May 9, 2025).

of Procedure provide guidelines for the implementation of the NLRA.¹⁷⁶

As an initial matter, during an adjudication to determine whether an unfair labor practice has occurred, the regional director has the protective power to restrict the parties from withdrawing the case. The parties are required to show evidence jointly either that the dispute is not meritorious or that it has been settled between the parties.¹⁷⁷ This suggests that just one of the parties, even if that party brought the dispute in the first place, may not individually withdraw the case. This, in turn, may reflect the importance, to the NLRB, of ensuring no violations of the law have occurred once the possibility has been brought to the agency's attention,¹⁷⁸ as well as the agency's commitment to helping organizers set a first contract with management as reflected in the original NLRA.

However, other aspects of the NLRB's procedural discretion seem to reflect the fact that amendments to the Taft-Hartley Act were notoriously anti-worker.¹⁷⁹ This procedural discretion is less than beneficial to the contract maintenance or union preservation that was once in keeping with the original intention of this legislation. More specifically, the NLRB has granted itself discretion by regulation to include or exclude elements of a hearing, such as oral argument (in addition to its usual paper-based decisionmaking),¹⁸⁰ and to permit "the taking of video testimony" instead of in-person testimony during NLRB proceedings.¹⁸¹ The NLRB can seemingly substitute video for live testimony, notwithstanding the problems associated with video testimony.¹⁸² Furthermore, in order to determine

¹⁷⁶ NAT'L LAB. RELS. BD., STATEMENTS OF PROCEDURE—PART 101, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/Final-Rules101%26TOC.pdf> [<https://perma.cc/7VJT-F8LX>] (implementing the National Labor Relations Act, 29 U.S.C. §§ 151–169) (last visited May 9, 2025).

¹⁷⁷ 29 C.F.R. § 101.33 (2026).

¹⁷⁸ See *id.*

¹⁷⁹ While the Wagner Act, 29 U.S.C. §§ 151–169, protected unions, the Taft-Hartley Act amended it to restrict union power and improve the playing field for management. Labor Management Relations Act, 29 U.S.C. §§ 141–187; see also Archibald Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 257 (1960).

¹⁸⁰ See 29 C.F.R. § 102.152 (2026).

¹⁸¹ See *id.* § 102.35(c).

¹⁸² Evidence of problems associated with video testimony has been identified in the immigration court context. See Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 966 (2015) (concluding that the use of video testimony led to differences in procedure and higher likelihood of deportation for immigrants); see also Leslie Birnbaum, *Due Process and Administrative*

whether a labor organization has the authority (as an initial matter and prior to an election) to allow employees to join, the regional director can make a decision with or without a hearing at all, based on the director's unilateral discretion.¹⁸³ In these ways, the NLRB can limit working communities' ability to introduce the kind of information necessary to bring a successful unfair labor claim or to empower a labor union to protect workers' rights.

Note that these hearings do not necessarily result in a decision, but rather a record that is forwarded to the regional director.¹⁸⁴ However, the regional director can choose whether to accept post-hearing briefs before making a final decision.¹⁸⁵ This is not dissimilar from the Attorney General's discretion to vary the procedure accorded those seeking to appeal a decision of the Board of Immigration Appeals,¹⁸⁶ except that the NLRB actor exercising discretion is neither a political appointee nor an agency head but rather at a lower (regional) level of bureaucracy.

2. *Executive- or Agency-Initiated*

a. *National Security*

National security policy has become increasingly focused on individuals in the past few decades.¹⁸⁷ And yet, procedural discretion may limit access to in-person aspects of process in national security decisions that can significantly limit individual rights, including financial access and wellbeing. Beginning in the 1980s, the Department of the Treasury Office of Foreign Assets Control (OFAC) began to blacklist certain individuals, groups, and entities by designating them as threats.¹⁸⁸ These

Hearings in the Time of COVID-19: Help, I Need Somebody!, 41 J. NAT'L ASS'N ADMIN. L. JUDICIARY 140, 168–69 (2021) (noting potential inequities stemming from virtual hearings including technology access and quality, particularly for non-native English speakers).

¹⁸³ See 29 C.F.R. §§ 101.29–101.30 (2026).

¹⁸⁴ *Id.* § 101.30(c).

¹⁸⁵ *Id.*

¹⁸⁶ See Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129, 134 (2017) [hereinafter Shah, *The Attorney General's Disruptive Immigration Power*].

¹⁸⁷ Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1070 (2020).

¹⁸⁸ Ganesh Sitaraman, *Deplatforming*, 133 YALE L.J. 497, 528 (2023); Paul Rose, *Chinese State Capitalism and the Holding Foreign Companies Accountable Act*, 96 S. CAL. L. REV. POSTSCRIPT 172, 176 (2023); see also James Janison, *Taking*

designations are included on a Specially Designated Nationals and Blocked Persons (SDN) List, the primary purpose of which is to combat threats to national security and foreign policy objectives.¹⁸⁹ As a result, OFAC “has overseen a host of longstanding and new financial sanctions as a tool in modern warfare against American adversaries as varied as the Iranian Revolutionary Guard, terrorist organizations, Mexican drug traffickers, and foreign nation-states.”¹⁹⁰

Via executive order, the President can sanction countries, business entities, or individuals by placing them on the SDN list, which designates them as owned or controlled by, or acting for or on behalf of, the governments of target countries or as associated with international narcotics trafficking or terrorism.¹⁹¹ This designation “typically prohibit[s] U.S. persons from transacting with blacklisted entities by blocking or freezing U.S.-based or -controlled property of the blacklisted entity.”¹⁹²

On the one hand, the SDN list has been utilized to condemn governments for oppressive or violent actions. For example, President Reagan leveraged the SDN list to sanction the government of South Africa because “‘the policy and practice of apartheid [were] repugnant to the morals and political values of democratic and free societies’ and presented a threat to American interests.”¹⁹³ In addition, “building on preliminary

a Step Back: Do Sanctions Under IEEPA Require Just Compensation?, 78 N.Y.U. ANN. SURV. AM. L. 313, 338 (2023); Chris Jones, Note, *Caught in the Crosshairs: Developing a Fourth Amendment Framework for Financial Warfare*, 68 STAN. L. REV. 683, 690 (2016).

¹⁸⁹ *Specially Designated Nationals List*, OFAC SANCTIONS LIST SERV. (Jan. 16, 2026), <https://sanctionslist.ofac.treas.gov/Home/SdnList> [<https://perma.cc/Z6KJ-KSCU>]. “The list encompasses all designated terrorist organizations and individuals and also includes groups that currently have their assets blocked for other reasons as well, such as narcotics trafficking.” Kathryn A. Ruff, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 447, 487 n.233 (2005).

¹⁹⁰ Tom C.W. Lin, *Financial Weapons of War*, 100 MINN. L. REV. 1377, 1402 (2016).

¹⁹¹ U.S. DEPT OF THE TREASURY, OFAC REGULATIONS FOR THE FINANCIAL COMMUNITY 3 (Jan. 24, 2012), <https://ofac.treasury.gov/media/16151/download?inline> [<https://perma.cc/Z7BB-8LJN>].

¹⁹² Rose, *supra* note 188, at 176; see also Cathy Lesser Mansfield, *It Takes a Thief . . . and a Bank: Protecting Consumers from Fraud and Scams on P2P Payment Platforms*, 57 U. MICH. J.L. REFORM 351, 393 (2024).

¹⁹³ Marguerite Colson & Eric Van Nostrand, Note, *Sanctions That Sting: Private Sector Solutions to the Paper Tiger Problem*, 32 YALE J. ON REGUL. 561, 566 (2015) (alteration in original); see also Exec. Order No. 12532, 3 C.F.R. 387 (1985). OFAC has since routinely relied on executive order for new proliferator designations. Colson & Van Nostrand, *supra*, at 566.

groundwork laid by the H. W. Bush and Clinton Administrations, President W. Bush” issued an executive order to block the assets of proliferators of weapons of mass destruction and their supporters.¹⁹⁴ Other entities “included among the thousands of names and aliases on the SDN list are Bank Saderat Iran, the largest bank in Iran, and ISIL caliph Abu Bakr al-Baghdadi.”¹⁹⁵

On the other hand, inclusion on the SDN List comes with significant consequences for not only governments and banks, but also for “individuals’ ability to participate in the national economy.”¹⁹⁶ For instance, the Obama Administration drew on the SDN list to sanction Russian brothers engaged in criminal art dealership.¹⁹⁷ More recently, President Biden ordered the Treasury Department to engage in an expansive block of anyone who has operated in “the technology sector or the defense and related materiel sector of the Russian Federation economy, or any other sector of the Russian Federation economy as may be determined by the Secretary of the Treasury.”¹⁹⁸ The order also blacklisted anyone, including individuals, engaging in undefined “activities that ‘undermine the peace, security, political stability, or territorial integrity’” of the U.S.¹⁹⁹

“OFAC’s designation process is somewhat opaque to the outside observer”²⁰⁰ “OFAC regulations allow a designated person or entity to seek administrative reconsideration of the designation” and “[a]ccording to OFAC, this administrative review offers a genuine opportunity to challenge designations.”²⁰¹ However, this delisting process is inscrutable as well.²⁰² Despite

¹⁹⁴ Chachko, *supra* note 187, at 1096.

¹⁹⁵ Victoria Anglin, Note, *Why Smart Sanctions Need a Smarter Enforcement Mechanism: Evaluating Recent Settlements Imposed on Sanction-Skirting Banks*, 104 GEO. L.J. 693, 705 (2016).

¹⁹⁶ Sitaraman, *supra* note 188, at 528.

¹⁹⁷ Mary Genevieve Sanner, Note, *Settling Old Scores: Proposing Targeted Regulation to Mitigate the Problem of Looted Antiquities*, 72 DUKE L.J. 235, 244 (2022).

¹⁹⁸ Exec. Order No. 14024, 3 C.F.R. 542 (2021).

¹⁹⁹ Rose, *supra* note 188, at 176 (citing Exec. Order No. 14024, 3 C.F.R. 542 (2021)).

²⁰⁰ Chachko, *supra* note 187, at 1098.

²⁰¹ *Id.* at 1099.

²⁰² See David E. Bernstein, *Constitutional Hardball Yes, Asymmetric Not So Much*, 118 COLUM. L. REV. ONLINE 207, 231 (2018), https://columbialawreview.org/wp-content/uploads/2018/12/Bernstein-CONSTITUTIONAL_HARDBALL_YES_ASYMMETRIC_NOT_SO_MUCH.pdf [<https://perma.cc/CX7B-TJD4>] (quoting an Obama Administration official as saying—after delisting Iran Air despite an executive order sanctioning the entity as a proliferator of weapons of mass destruction—that “I’m not at liberty to go into the reasons behind the fact that it was removed from the [Specially Designated Nationals and Blocked Persons] list.

the severe penalties and nontransparent processes associated with inclusion on the SDN, OFAC has given itself discretion to not include an in-person hearing requirement as part of its delisting decisionmaking processes.²⁰³ These obstacles to fulsome process render it more difficult to seek delisting based on a legitimate justification, particularly for individuals seeking to disprove significant accusations.

This approach is not entirely unique. For instance, the Department of State Bureau of Consular Affairs “is solely responsible for the administrative review of previous findings of loss (or nonloss) of U.S. citizenship”²⁰⁴ as the result of serious, potentially expatriating acts.²⁰⁵ The reasons for expatriation can also include unspecified acts of treason.²⁰⁶ In making this determination, a consular officer “may” be asked by the Office of the Legal Adviser for Consular Affairs to “interview or convene a video teleconference with the individual residing abroad to obtain information regarding the voluntariness of . . . relinquishing their citizenship and/or their intentions [to retain] U.S. citizenship at the time of the commission of the expatriating act.”²⁰⁷ Even in an era where immigration enforcement measures are becoming more extreme,²⁰⁸ seizing a person’s U.S. citizenship without process may unduly prioritize expediency—admittedly as it pertains to potentially serious expatriating acts—over an individual’s rights and freedoms.

All I could tell you is that we wouldn’t have done that if we weren’t comfortable doing so.” (alteration in original) (citation omitted)).

²⁰³ 31 C.F.R. § 501.807(b)(2) (2026) (implementing 8 U.S.C. § 1189):

A person seeking removal of a person or property from the SDN List or any other list or identification of sanctioned persons or property maintained by OFAC may request a meeting with OFAC; however, such meetings are not required, and the office may, at its discretion, decline to conduct such meetings prior to completing a review pursuant to this section.

²⁰⁴ U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1232(a) (2021).

²⁰⁵ *Relinquishing U.S. Nationality*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Relinquishing-US-Nationality.html> [<https://perma.cc/CC8K-7BL2>] (last visited Dec. 21, 2025). Such acts include obtaining naturalization in a foreign state, making a formal declaration of allegiance to a foreign state, and entering or serving in the armed forces of a foreign state, among other actions. *Id.*

²⁰⁶ *Id.*

²⁰⁷ U.S. DEP’T OF STATE, *supra* note 204, § 1237 (emphasis omitted).

²⁰⁸ See Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2157 (discussing how the Department of Homeland Security U.S. Citizenship and Immigration Services (USCIS) granted its adjudicators the discretion to expedite process by denying immigration benefits regardless of applicants’ eligibility and without any justification at all).

Likewise, the Department of Homeland Security (DHS) “No Fly List”—which restricts a person’s ability to travel by air domestically and to cross the U.S. border—is based on information gathered by the National Counterterrorism Center and evaluated by the Terrorist Screening Center to determine whether a person should be added to the list based on a “reasonable suspicion” of terrorist activity.²⁰⁹ Notably, even as DHS makes mistakes in who is included on the No Fly List,²¹⁰ their process for re-evaluating someone on the list is not transparent, and may also lead to governmental harm against individuals wrongfully placed on the list.²¹¹

In 2007, Congress directed DHS to create a program for people who believe they have been wrongly denied boarding or subjected to heightened screening.²¹² Under the DHS Traveler Redress Inquiry Program (TRIP)—which DHS clarifies does “not create or confer any legal right, privilege or benefit on the applicant or participant, and [is] wholly discretionary on the part of” the agency²¹³—aggrieved airline passengers seek redress by submitting a form online or via mail.²¹⁴ DHS then reviews the form to determine if that person was erroneously included.²¹⁵ Applicants are not informed about the outcome of DHS’s final decision, though they may petition a court for review.²¹⁶ The court reviews the government’s evidence *in camera* only, without a hearing from the passenger.²¹⁷ Process in this context is highly discretionary and inaccessible to individuals despite the cost to liberty of placement on the No Fly List.²¹⁸

²⁰⁹ Chachko, *supra* note 187, at 1104; *see also* NAT’L COUNTERTERRORISM CTR., WATCHLISTING GUIDANCE 33–34 (2013), https://www.eff.org/files/2014/07/24/2013-watchlist-guidance_1.pdf [<https://perma.cc/ZJ8F-WRJ6>].

²¹⁰ *See, e.g., User Clip: Senator Kennedy on the Watch List* (C-SPAN, Aug. 19, 2004), <https://www.c-span.org/video/?c4499809/senator-kennedy-watch-list> [<https://perma.cc/EX3F-68AV>].

²¹¹ *See* Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2191–93 (discussing mistreatment of and constitutional violations against a U.S. citizen based on wrongful inclusion on the No Fly List and the inadequate re-evaluation process).

²¹² 49 C.F.R. § 1560.205 (2026).

²¹³ 8 C.F.R. § 235.12(k) (2026).

²¹⁴ *Id.* § 235.12(k)(1); *see also* DHS Traveler Redress Inquiry Program (DHS TRIP), U.S. DEP’T OF HOMELAND SEC. (June 5, 2025), <https://www.dhs.gov/dhs-trip> [<https://perma.cc/5UX8-3EDG>].

²¹⁵ U.S. DEP’T OF HOMELAND SEC., *supra* note 214.

²¹⁶ *Latif v. Holder*, 28 F. Supp. 3d 1134, 1142 (D. Or. 2014).

²¹⁷ *Id.*

²¹⁸ *Cf.* Shah, *Administrative Subordination*, *supra* note 18, at 1645 (noting, more generally, the cost to individual liberty resulting from the ratcheting up of governmental activity aimed at protecting “national security”).

In determinations by OFAC, the State Department, and DHS, individuals have limited ability to challenge erroneous classification as a terrorist. More generally, procedural discretion is the result of the politicization of decisionmaking in matters of national security, including those that impact individual rights.²¹⁹ OFAC has the discretion to decide who should be granted an in-person meeting,²²⁰ a choice which may be influenced—or even exploited—by political interests, particularly given the SDN List’s basis in executive order and other presidential concerns.²²¹ A high-profile legal body in the Department of State has discretion to require a consular officer to meet an individual in danger of being expatriated, but this is not a requirement of the decisionmaking process.²²² Meanwhile, DHS’s national security exclusion mandate is prioritized²²³ such that it does not offer an in-person option under any circumstances during either the administrative or the judicial review processes evaluating the validity of inclusion on the No Fly List. In all of these situations, the consequences of failing to effectively contest a designation are severe. Furthermore, the lack of procedure in both OFAC and the No Fly List settings may impact certain communities, such as Muslims and other ethnic minorities, who have often been targeted for policing under the guise of national security policy.²²⁴

b. Immigration

Immigration adjudication has faced its share of controversy. Some decry the politicization of immigration decision-making as an erosion of crucial administrative independence²²⁵ and due process.²²⁶ Others assert the necessity, or at least the inevitability,²²⁷ of presidential control over the enforcement of

²¹⁹ See Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2172.

²²⁰ See *supra* notes 200–03 and accompanying text.

²²¹ See *supra* notes 191–192 and accompanying text.

²²² See *supra* note 207 and accompanying text.

²²³ Shah, *Administrative Subordination*, *supra* note 18, at 1651–52.

²²⁴ *Id.* at 1607 n.15 (collecting sources).

²²⁵ See Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 644–45 (2020); Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 732–33 (2019).

²²⁶ See, e.g., Cox & Kaufman, *supra* note 48, at 1792–93; Marouf, *supra* note 225, at 732–33.

²²⁷ See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 461–64 (2009).

immigration law or characterize immigration administration as essentially incompetent.²²⁸

Procedural discretion in immigration impacts the community of noncitizens facing deportation and seeking humanitarian protection and immigration benefits. Immigration adjudicators view discretion as a tool for ensuring fairness and therefore tend to resist attempts to constrain it.²²⁹ In fact, some adjudicators may be more receptive to noncitizens' claims than others.²³⁰ However, closer examination of procedural discretion suggests that it could lead to inaccessible, somewhat unstable decisionmaking that is therefore insufficiently accountable to noncitizens. Interestingly, while prosecutorial discretion may temporarily "save" certain noncitizens from deportation,²³¹ procedural discretion exercised by adjudicators can eliminate access to process and status for this community in seemingly unpredictable and idiosyncratic ways—including in decisions impacting noncitizens' essential liberty.²³² As a result, procedural discretion bears on essential matters of fairness and justice in this setting. This may be especially so given that the Supreme Court's skepticism toward administrative discretion in adjudication²³³ does not necessarily extend to the expansion

²²⁸ See, e.g., *Chavarria-Reyes v. Lynch*, 845 F.3d 275, 280 (7th Cir. 2016) (Posner, J., dissenting) (referring to immigration judges as "the least competent federal agency").

²²⁹ *NAIJ Has Grave Concerns Regarding Implementation of Quotas on Immigration Judge Performance Reviews: Oversight Hearing on the Department of Justice Before the S. Judiciary Comm.*, 115th Cong. 6 (2017) (written statement of Nat'l Ass'n of Immigr. Judges), https://www.naij-usa.org/images/uploads/publications/NAIJ_-_Concerns_Regarding_Implementation_of_Quotas_10-17-17.pdf [<https://perma.cc/ATJ4-5XDF>].

²³⁰ For example, certain immigration adjudicators may act more favorably toward asylum seekers than others. See Peter Margulies, *The Boundaries of Habeas: Due Process, the Suspension Clause, and Judicial Review of Expedited Removal Under the Immigration and Nationality Act*, 34 GEO. IMMIGR. L.J. 405, 417–22 (2020) (comparing U.S. Citizenship and Immigration Services asylum officers favorably to immigration judges in this regard). But see Beth K. Zilberman, *The Non-Adversarial Fiction of Immigration Adjudication*, 2020 WIS. L. REV. 707, 707, 741–58 (arguing that adjudication by asylum officers is not, in fact, "non-adversarial").

²³¹ See Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2162–63.

²³² See Mary Holper, *Discretionary Immigration Detention*, 74 DUKE L.J. 961, 962–63 (2025) (observing that immigration judges' decisions to put noncitizens in detention are both highly discretionary and unreviewable by the federal judiciary).

²³³ See Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2131 (noting how the Court has tightened presidential control over administrative adjudication); *supra* notes 10–11 and accompanying text.

of discretion in administrative law enforcement, including in immigration.²³⁴

Immigration adjudication is housed in the DOJ Executive Office for Immigration Review (EOIR), and the DHS U.S. Citizenship and Immigration Services (USCIS), respectively. In general, 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.”²³⁵ 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.²³⁶

USCIS is often the front line for affirmative claims for benefits or status made by those who are in the country.²³⁷ The USCIS Policy Manual is the agency’s central guidance shaping the agency’s adjudication of benefits. The Policy Manual notes in its own 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.”²³⁸ “[S]cholars have observed that USCIS adjudicators regularly depend on the agency’s memoranda and policy documents in conducting adjudications,” but immigration adjudicators exercise their “discretion in ways that are highly controversial and politically salient.”²³⁹

²³⁴ See generally Bijal Shah, *Envisioning a Protective Administrative Law Framework*, 61 HARV. C.R.-C.L. 341 (2026) [hereinafter Shah, *Envisioning a Protective Administrative Law Framework*] (arguing that the Court has done little to limit aggressive immigration enforcement under the current Trump Administration); Bijal Shah, *Abandoning Administrative Law During a Presidential Immigration Crisis*, LAW & POL. ECON. PROJECT (July 7, 2025), <https://lpeproject.org/blog/abandoning-administrative-law> [<https://perma.cc/49HQ-KWU2>] (arguing that the Court has turned away from limiting administrative discretion in immigration enforcement).

²³⁵ Alexander Nabavi-Noori, Note, *Agency Control and Internally Binding Norms*, 131 YALE L.J. 1278, 1332 (2022).

²³⁶ *Policy Manual*, U.S. CITIZENSHIP & IMMIGR. SERVS. vol. 1, pt. E, ch. 8 (Aug. 12, 2026), <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8#S-B-4> [<https://perma.cc/XND7-Q4R9>].

²³⁷ See *id.*

²³⁸ *Policy Manual*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 2, 2025), <https://www.uscis.gov/book/export/html/68600> [<https://perma.cc/XP6C-BBR8>].

²³⁹ See, e.g., Nabavi-Noori, *supra* note 235, at 1329–30 (noting that USCIS is pressured by “the political sensitivity of its mission and the significant discretion that all immigration agencies . . . necessarily wield” (footnote omitted)).

For instance, experts argue that immigration adjudicators often exercise their discretion in order to deny benefits²⁴⁰ and “[a]pplicants seeking immigration status have no choice but to comply.”²⁴¹ The immigration apparatus is also leveraged to accomplish the priorities of presidents.²⁴²

Indeed, in 2020, USCIS changed its Policy Manual to grant its adjudicators maximum discretion to deny benefits. 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.”²⁴³

This leaves noncitizens vulnerable to discretionary denials of benefits regardless of the strength of the petitioners’ claims.

Like USCIS, EOIR is a subcomponent of a larger cabinet agency. Both the subcomponents and their umbrella agencies (DOJ and DHS, respectively) engage in a variety of actions, including adjudication and notice-and-comment rulemaking, and do so in a politically responsive manner. EOIR adjudicators, such as immigration judges and the Board of Immigration Appeals, decide the bulk of “defensive” claims—meaning requests for documented immigration status or suspension of deportation for those who have been apprehended by immigration enforcers.²⁴⁴ Unlike the affirmative applicants that USCIS services, those in a defensive posture are subject to EOIR proceedings without choice.

Procedural discretion in EOIR is outlined in the EOIR Policy Manual, which includes “the Immigration Court and Board of Immigration Appeals Practice Manuals, the Office of the Chief Administrative Hearing Officer Practice Manual, and all

²⁴⁰ See Zilberman, *supra* note 230, at 741–58 (arguing that “the United States Citizenship and Immigration Services (USCIS), the agency charged with administering the legal immigration system, has turned what once was a pathway to immigration status and citizenship into a pipeline to deportation proceedings”); Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 370–71 (2020); Janet A. Gilboy, *Deciding Who Gets in: Decisionmaking by Immigration Inspectors*, 25 LAW & SOC’Y REV. 571, 574 (1991).

²⁴¹ Nabavi-Noori, *supra* note 235, at 1331.

²⁴² See Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2153.

²⁴³ *Id.* (describing procedural discretion that was “influenced by President Trump’s public commitment to deportation, but [which has] also flourished under the Biden and Obama Administrations”) (footnotes omitted).

²⁴⁴ *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sep. 13, 2023), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states> [<https://perma.cc/ESN2-D6GG>].

current agency policy memoranda.”²⁴⁵ The power of immigration judges, in particular, is established by regulation and further described by the Immigration Court Practice Manual.²⁴⁶ These documents give EOIR adjudicators the discretion to shape and constrain procedure in immigration adjudication. Continued use of the derogatory term “alien” rather than “noncitizen” in all of these documents suggests an overall limited interest in prioritizing petitioners’ interests in this context.

As an initial matter, at the earlier stages of adjudication, the “immigration court may consolidate cases at its discretion,” for instance (but not necessarily) to combine cases of family members, or “sever cases in its discretion” without constraints.²⁴⁷ Many immigration hearings are held by video only.²⁴⁸ Per regulation, an immigration judge’s decision “may be oral or written.”²⁴⁹ Furthermore, it should “include a finding as to inadmissibility or deportability,” but a “formal enumeration of findings is not required.”²⁵⁰ In addition, immigration judges’ power to call additional in-person or “status” conferences is contingent on whether they “would contribute to the efficient resolution of the case.”²⁵¹ Also, no immigration hearings benefit from any rules of evidence.²⁵²

Under the previous administration, an immigration judge could review the previous denial,²⁵³ by DHS, of a claim by a noncitizen who is subject to “expedited removal” that they are a U.S. citizen, lawful permanent resident, asylee, or refugee.²⁵⁴ Today, immigration judges have only the opportunity to review

²⁴⁵ *EOIR Announces the Release of a Comprehensive Policy Manual*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T OF JUST. (Jan. 13, 2021), <https://www.justice.gov/eoir/pr/eoir-announces-release-comprehensive-policy-manual> [https://perma.cc/TM5F-VR87].

²⁴⁶ IMMIGRATION COURT PRACTICE MANUAL, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T OF JUST. (Nov. 16, 2020), <https://www.justice.gov/eoir/media/1052736/dl?inline=> [https://perma.cc/E47K-VTFZ].

²⁴⁷ *Id.* § 4.21.

²⁴⁸ See Eagly, *supra* note 182, at 934; Christopher Costa, Mimi Emma Tsankov & Natalia Ghayoumi, *Judges’ Tips for Your First (or Latest) Administrative Hearing So You Don’t Feel Like a Fish Out of Water*, at 11:49 (A.B.A., Feb. 19, 2026), <https://www.americanbar.org/groups/judicial/resources/on-demand/tips-for-administrative-hearing/> [https://perma.cc/G8ZW-63SK].

²⁴⁹ 8 C.F.R. § 1240.12(a) (2026).

²⁵⁰ *Id.*

²⁵¹ *Id.* § 1240.17(f)(2); Shah, *Administrative Subordination*, *supra* note 18, at 1632–48.

²⁵² See Costa, Tsankov & Ghayoumi, *supra* note 248, at 35:46.

²⁵³ IMMIGRATION COURT PRACTICE MANUAL, *supra* note 246, § 7.4(f).

²⁵⁴ *Id.*

USCIS denials of credible fear claims, which are made by non-citizens subject to deportation who are afraid of persecution or death,²⁵⁵ and to introduce evidence at these hearings at their own discretion.²⁵⁶ However, in both claimed status and credible fear hearings, noncitizens are not allowed to bring legal representation,²⁵⁷ and it is up to the immigration judge whether a lawyer or other consultant may even be present.²⁵⁸ Only in reasonable fear hearings, which involve fear of persecution or torture by noncitizens subject to expedited removal or to the reinstatement of prior deportation orders, is legal representation (at the noncitizen's expense) allowed. Even then, this is "[s]ubject to the Immigration Judge's discretion."²⁵⁹

Members of the Board of Immigration Appeals also exercise procedural discretion, some of which is discussed in the Board of Immigration Appeals Practice Manual.²⁶⁰ Like immigration judges, Board members traditionally had the discretion to choose to consolidate or sever cases;²⁶¹ the Board was also able to "concurrently consider unrelated appeals at its discretion."²⁶² In addition, the Board does not accept new evidence on appeal, only permitting oral argument "as an opportunity [for parties] to expand upon . . . a party's written arguments."²⁶³ Finally, there are "unwritten" rules of procedural discretion, including that attorneys may themselves narrow the issues considered by the judge and regarding the amount of time a noncitizen receives before the judge takes the huge step of finding the noncitizen has defaulted on their case.²⁶⁴

All of these approaches are oriented toward improving the speed and efficiency of immigration adjudication, which is a valuable endeavor, given the heavy backlog of immigration

²⁵⁵ *Id.* § 7.4(d)(iii).

²⁵⁶ *Id.* § 7.4(d)(iv)(E).

²⁵⁷ *Id.* § 7.4(d)(iv)(C); *see also id.* ("Accordingly, persons acting on [the non-citizen's] behalf are not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments.").

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST. (Feb. 20, 2020), [https://www.justice.gov/eoir/page/file/1250701/dl?inline=\[https://perma.cc/UAC9-ADFU\]](https://www.justice.gov/eoir/page/file/1250701/dl?inline=[https://perma.cc/UAC9-ADFU]).

²⁶¹ *Id.* §§ 4.10(a), (c).

²⁶² *Id.* § 4.10(b).

²⁶³ *Id.* § 8.7(e).

²⁶⁴ *See Costa, Tsankov & Ghayoumi, supra* note 248, at 30:28.

cases.²⁶⁵ And on the one hand, measures like case consolidation and severability may allow immigration adjudicators to treat like cases alike and direct resources to more legally complex cases. On the other hand, however, denying access to counsel—even counsel obtained by noncitizens themselves—is likely to affect noncitizens’ ability to present strong cases on their own behalf and thereby render outcomes dependent on the strength of advocacy rather than on the substantive legitimacy of claims. Overall, expediency in the form of hastily consolidated cases and reduced process may come at the cost of high-quality and accessible decisionmaking, and may render outcomes unpredictable and arbitrary rather than consistent across cases.

c. *Consumer Protection*

An agency may reduce the rights of institutions and individual petitioners in a manner that either protects or cuts against the interests of needy communities. For example, low-income students are vulnerable vis-à-vis educational institutions, and student loans play a significant role in these dynamics.²⁶⁶ In this context, the Department of Education has made it more difficult for students to bring claims that their loans should be forgiven because they were issued by fraudulent educational institutions.²⁶⁷ However, the Department of Education also has the capacity to limit the process to expedite cases in students’ favor.

Each educational institution and third-party lender is overseen by the Department to ensure that it does not violate the Higher Education Act (HEA);²⁶⁸ “[s]ubstantially misrepresent[] . . . its educational program, its financial charges, or the employability of its graduates; or . . . [i]n the case of a third-party servicer,” substantially misrepresent “the educational program, financial charges, or employability of the graduates of any institution that contracts with the servicer.”²⁶⁹ Note that the HEA “authorizes numerous federal aid programs that

²⁶⁵ See generally STRAUT-EPPSTEINER, *supra* note 96 (finding a backlog of 3.6 million cases in U.S. immigration courts at the end of 2024).

²⁶⁶ See, e.g., Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2148–52.

²⁶⁷ *Id.* (discussing how the Trump Administration has made it more difficult for students to hold fraudulent educational institutions accountable).

²⁶⁸ JOSELYNN H. FOUNTAIN, CONG. RSCH. SERV., R43351, THE HIGHER EDUCATION ACT (HEA): A PRIMER, Summary (2023).

²⁶⁹ 34 C.F.R. § 668.84(a)(1)(ii) (2026).

provide support to both individuals pursuing a postsecondary education and institutions of higher education.”²⁷⁰ When this law is violated, the agency can fine the educational institution,²⁷¹ suspend its participation in an HEA program,²⁷² or even terminate its participation.²⁷³

Educational institutions can request hearings prior to each of these types of decisions,²⁷⁴ but the adjudicator can expedite the process as quickly as she likes.²⁷⁵ Furthermore, in all of these decisions,²⁷⁶

[a]t the discretion of the hearing official, any right to a hearing may be satisfied by one or more of the following: Summary disposition . . . with or without oral argument; an oral evidentiary hearing conducted in person, by telephone, by video conference, or any combination thereof; or a review limited to written evidence.²⁷⁷

This suggests a variability in the way “hearing” is defined that both dilutes the concept and limits whether a hearing in fact provides more fulsome process in this context.

Different educational institutions (and, by extension, the servicers they outsource work to) serve populations of students who borrow federal money at very different rates. Therefore, irregular formality in hearing procedures for different institutions may affect broad groups of students differently. Expediting process could benefit students who have been harmed by service providers, at least to the extent it reduces the provider’s ability to present a strong defense. However, for-profit servicers and educational institutions are likely to have access to high-quality resources and counsel, which may allow them to navigate a speedier adjudicative system more effectively than students.

Another agency that impacts financially vulnerable people, the Office of the Comptroller of the Currency (OCC) is an independent subcomponent of the Department of the Treasury that “charters, regulates, and supervises all national banks, federal savings associations, and federal branches and agencies of

²⁷⁰ FOUNTAIN, *supra* note 268.

²⁷¹ 34 C.F.R. § 668.84(a)(1) (2026).

²⁷² *Id.* § 668.85(a)(1).

²⁷³ *Id.* § 668.86(a)(1).

²⁷⁴ *Id.* §§ 668.84(b)(3), .85(b)(3), .86(b)(3).

²⁷⁵ *Id.* §§ 668.84(c), .85(c), .86(c).

²⁷⁶ *Id.* §§ 668.84(b)(4), .85(b)(4), .86(b)(4).

²⁷⁷ *Id.* § 668.89(a).

foreign banks.”²⁷⁸ The OCC may oversee a thousand plus financial institutions.²⁷⁹ The OCC is also involved in implementing the Community Reinvestment Act (CRA), which “requires the Federal Reserve and other federal banking regulators to encourage financial institutions to help meet the credit needs of the communities in which they do business, including low- and moderate-income . . . neighborhoods.”²⁸⁰

The OCC has given itself broad authority to grant or deny hearing requests²⁸¹ when deciding which institutions will receive a charter or license.²⁸² For example, after accepting comments on whether to issue a new national bank charter,²⁸³ the OCC is not required to hold a hearing to assess whether to grant the charter.²⁸⁴ The lack of an in-person requirement may particularly impact the capacity of the agency to consider the stakes for those who may not have the resources to offer written comments that adequately contend with the interests of powerful entities. In other words, the OCC may not adequately consider whether the institution seeking charter will be responsive to under-resourced communities. This is of particular concern given the OCC can be used to implement the CRA to less effect—for instance, depending on the President’s interests/agenda²⁸⁵—and the quality of process may bear on these decisions.

²⁷⁸ *Who We Are*, U.S. OFF. OF THE COMPTROLLER OF THE CURRENCY, <https://www.occ.treas.gov/about/who-we-are/index-who-we-are.html> [https://perma.cc/SZB9-RUV6] (last visited May 11, 2025).

²⁷⁹ Sung Eun (Summer) Kim, *Bounds in Bank Regulation*, 125 YALE L.J.F. 185, 187 (2015).

²⁸⁰ *Community Reinvestment Act (CRA)*, Bd. OF GOVERNORS OF THE FED. RSRV. Sys. (Mar. 28, 2024), https://www.federalreserve.gov/consumerscommunities/cra_about.htm [https://perma.cc/DE9E-38DR].

²⁸¹ See 12 C.F.R. § 5.11(b) (2026):

Action on a hearing request. The OCC may grant or deny a request for a hearing and may limit the issues to those it deems relevant or material. The OCC generally grants a hearing request only if the OCC determines that written submissions would be insufficient or that a hearing would otherwise benefit the decision-making process. The OCC also may order a hearing if it concludes that a hearing would be in the public interest.

²⁸² See *id.* § 5.11(g)(3) (noting that the APA does not apply to the adjudications in question, which indicates that the adjudications are not formal).

²⁸³ See *id.* § 5.11(a); see also 3B FEDERAL PROCEDURAL FORMS, Westlaw § 8:168 (2026) (discussing this process).

²⁸⁴ See David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. 1397, 1410 (2020).

²⁸⁵ See Thomas J. Curry, *The OCC Under the Trump and Biden Administrations*, 40 REV. BANKING & FIN. L. 813, 813–14 (2021) (noting that the Trump Administration leveraged the OCC to reduce the beneficial effect of the CRA).

d. *Permitting*

Finally, agencies sometimes engage informally with entities that produce or sell certain goods. In this context, businesses that have good relationships with their regulators are likely to be treated more favorably by the government. The Perishable Agricultural Commodities Act governs fair practice in the sale of fresh produce.²⁸⁶ When the Department of Agriculture (USDA) adjudicates cases under this law, which are brought by unpaid sellers, suppliers, producers, or other licensees seeking reparations, there is generally no oral hearing in claims or counterclaims for damages less than \$30,000.²⁸⁷ The examiner may make an exception if a complainant or respondent successfully advocates for a hearing under “peculiar circumstances,”²⁸⁸ which could feasibly include situations where a lack of hearing negatively impacts due process.²⁸⁹ Arguably, adjudicators may be swayed to provide an in-person hearing only when a party to the adjudication is persuasive enough to make a case for the hearing. Overall, an administrative adjudicator disallowing an oral hearing may prejudice those businesses with fewer resources and without an attorney—in other words, petitioners without the resources to successfully request a hearing in the first instance.

In contrast, the Department of the Treasury Alcohol and Tobacco Tax and Trade Bureau (TTB), which regulates and collects taxes on trade and imports of alcohol, tobacco, and firearms, offers an informal approach to adjudication (outside its formal proceedings) that has been constructed to assist petitioners—namely, those whose permits to produce or sell these goods are in danger of being revoked. By regulation, when the TTB officer wants to handle the matter “informally,” without formal proceedings, he may “inform the permittee of the contemplated issuance of an order to show cause [e.g., provide facts showing] why his permit should not be suspended, revoked or annulled.”²⁹⁰

²⁸⁶ Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a–499t; *see also* *Perishable Agricultural Commodities Act (PACA)*, AGRIC. MKTG. SERV., U.S. DEP’T OF AGRIC., <https://www.ams.usda.gov/rules-regulations/paca> [<https://perma.cc/TM3B-GJGY>] (last visited May 12, 2025).

²⁸⁷ 7 C.F.R. § 47.15(a)(1) (2026).

²⁸⁸ *Id.*

²⁸⁹ *See generally* Rules of Practice, 60 Fed. Reg. 8446, 8447 (Feb. 14, 1995) (evinced concern with matters of due process in USDA procedures).

²⁹⁰ 27 C.F.R. § 71.37 (2026).

In addition to specifying that this informal approach should be conducted transparently,²⁹¹ the regulation also makes clear that the informal proceeding is solicitous of the permittee. More specifically, it offers the permittee “an opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment” in defense of their permit prior to the TTB initiating a formal proceeding against them.²⁹² This approach may ultimately benefit those who are better-resourced and who therefore have the capacity to be timely and responsive when the agency reaches out with an informal inquiry in lieu of initiating formal proceedings.²⁹³

B. Gatekeeping Access to and Expediting Adjudication

In addition to creating or changing adjudicatory procedure itself, procedural discretion can alter access to or the overall speed of an administrative hearing. In this way, procedural discretion is not necessarily concentrated within adjudication processes. Rather, it can also happen at the front end of an adjudication, either as a means to *restrict* entry to process in the first instance or to *expedite* it in order to prioritize the needs of particular stakeholders. This section notes how underspecified powers of discretion in informal adjudication—including those limiting the investigation of claims and those expediting process—may impact matters of labor and immigration. Procedural gatekeeping can also reduce the administrative investigation of public land use and civil rights violations, while expedited review may favor the interests of well-resourced medical device companies over individuals.

Arguably, the discretionary gatekeeping of administrative procedure focuses and preserves institutional resources. For instance, in some regulatory schemes, gatekeeping is oriented toward saving the agency from expending resources on adjudicating applications for permits that do not meet threshold requirements.²⁹⁴ However, the gatekeeping of access to procedure

²⁹¹ See *id.* (stating that informal procedures must be conducted “in accordance with section 5(b) of the Administrative Procedure Act”).

²⁹² *Id.*

²⁹³ See *id.* (offering ten days as a baseline “in which to submit proposals of settlement to the appropriate TTB officer”).

²⁹⁴ See, e.g., 21 C.F.R. § 1114.27(b)(1) (2026) (granting the Department of Health and Human Services discretion to conduct a threshold determination to determine if an application to license tobacco products should be reviewed (implementing 21 U.S.C. § 387j)); 50 C.F.R. § 260.39(a) (2026) (giving the Department of Commerce discretion to refuse appeals to decisions regarding whether fisheries

is also shaped by political aims, which favor the government over individuals. This can be due to pressure from Congress or a legislative scheme that shapes or incentivizes adjudicative gatekeeping or expediency, or it can be the result of endogenous executive branch shifts, including presidential pressure or agency choices. As a result, procedural discretion may exclude people from benefits adjudication or adjudication for redress for harms, and politically weighted decisionmaking may result in problematic outcomes.

1. *Legislative Pressure*

a. *Labor*

Along with exercising discretion to reduce the amount of process offered while adjudicating labor claims, the NLRB sometimes keeps workers from bringing unfair labor charges. In addition, the agency expedites claims seeking to limit the power of labor unions. Put another way, the NLRB engages in discretionary regional gatekeeping of access to process, on the one hand, and accelerated enforcement of the law against perceived aggressions by labor unions, on the other. In these ways, the NLRB places limits on claims of unfair labor charges and sets borders around the statutory powers accorded to labor unions.

As noted earlier, bureaucrats in the NLRB are empowered by the NLRA to hear unfair labor claims, including those that legitimize the actions and elections of labor unions.²⁹⁵ In addition, the NLRB Statements of Procedure are guidelines for the exercise of discretion in the implementation of the NLRA.²⁹⁶ Pursuant to this policy, regional directors have significant control over the type and quality of procedure determining whether a union election may be conducted lawfully.²⁹⁷ More specifically, the agency has established a policy of restricting whether those claiming unfair labor practices have access to a hearing, while also allowing for one pathway to expedited review—but only for those arguing that a labor union stepped out of line.²⁹⁸

and fish products are fit for consumption if the appeal is “frivolous or not substantial” (implementing 7 U.S.C. § 1622)).

²⁹⁵ See *supra* section II.A.1.

²⁹⁶ See NAT’L LAB. RELS. BD., *supra* note 176 and accompanying text.

²⁹⁷ See *generally* NAT’L LAB. RELS. BD., *supra* note 176, subpart E.

²⁹⁸ See *infra* notes 304–316 and accompanying text.

Per the NLRB Statements of Procedure, the director and staff of regional NLRB offices have authority to investigate, recommend withdrawal, and unilaterally dismiss unfair labor charges prior to any hearing of the claim.²⁹⁹ Initially, field staff investigate the case, which includes interviewing the parties and “other persons who have knowledge as to the charge, as is deemed necessary.”³⁰⁰ Notably, the regional director “may exercise discretion to dispense with any portion of the investigation,” based on ambiguous factors such “as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest.”³⁰¹ The regional director may also recommend the charge be withdrawn and “[i]f the complainant refuses to withdraw the charge as recommended, the regional director dismisses the charge.”³⁰²

Overall, this discretionary framework allows for the curtailing of investigations into unfair labor practices and other labor violations. Perhaps this approach serves efficiency and resource conservation. However, it also risks reliance on inaccurate “information proxies” or data that is easier or inexpensive to obtain but less accurate,³⁰³ which may lead to the premature shutdown of labor charge investigations that might, in fact, be justified. As a result, some charges might get a more extensive investigation than others. The process of investigation is thus both discretionary and inconsistent. For these reasons, unfair labor practice investigations may be skewed against those who do not have the resources to provide information as quickly and impactfully as possible.

The NLRB also provides regional staff discretion to expedite access to process for those who want to constrain the power of labor unions under a contentious provision of the NLRA. NLRA section 8(b)(7) was controversial as soon as it was enacted,³⁰⁴ having been part of a revision to the NLRA that, while not as anti-union as the preceding Taft-Hartley amendments,³⁰⁵ nonetheless sought to restrict unions in the wake of significant

299 NAT'L LAB. RELS. BD., *supra* note 176, subpart B, §§ 101.4–6.

300 *Id.* § 101.4.

301 *Id.*

302 *Id.* §§ 101.5–6.

303 Shah, *Administrative Subordination*, *supra* note 18, at 1618 (defining “information proxies” as data that is “less expensive and easier-to-obtain”).

304 See Note, *Illegal Picketing Under Section 8(b)(7)—A Reexamination*, 68 COLUM. L. REV. 745, 745 (1968).

305 See *supra* note 179 and accompanying text.

congressional skepticism of the burgeoning labor movement.³⁰⁶ Section 8(b)(7), “one of the most significant limitations on labor’s right to picket,”³⁰⁷ prohibits labor protests under certain circumstances, when the aim of the picketing is “forcing or requiring” an employer to recognize or bargain with the union, or “forcing or requiring” the employees of that employer to select said union as their representative.³⁰⁸

Regional offices investigate charges against labor unions under 8(b)(7).³⁰⁹ Note that “[t]he regional director may exercise discretion to dispense with any portion of the investigation”³¹⁰ and may dismiss the claim subject to appeal to the General Counsel.³¹¹ Indeed, the regional director can also force a labor union election during the investigation to better enforce the NLRA³¹² based on the recommendation of staff.³¹³ Such an election may be preceded by a hearing ordered by the regional director, if one seems necessary to decide certain issues.³¹⁴ Therefore, putting this decision in the hands of a regional NLRB office may facilitate a union election more so than if employees were calling for an election on their own.

Alternatively, however, a charge against a labor union under 8(b)(7) may be investigated in an expedited manner that would allow the claim to be heard and for the labor union to be penalized sooner,³¹⁵ as long as the petition meets the requirements for processing under expedited procedures.³¹⁶ This suggests an institutional interest, undergirded by a unique process, in keeping labor organizing at bay.

Both gatekeeping and expediting are consistent with the ideological legislative battle over labor rights built into the law itself.³¹⁷ This dynamic has also been exacerbated by political

³⁰⁶ Moe, *supra* note 153, at 1096 (observing that due to Republicans taking control of Congress in 1947, “[f]or the first time, then, the NLRB was in the position of having to prosecute and adjudicate charges brought against unions by employers and workers.”); Note, *supra* note 304, at 747.

³⁰⁷ Note, *supra* note 304, at 745.

³⁰⁸ 29 U.S.C. § 158(b)(7).

³⁰⁹ See NAT’L LAB. RELS. BD., *supra* note 176, subpart D, § 101.22.

³¹⁰ *Id.* subpart B, § 101.4.

³¹¹ *Id.* subpart D, § 101.22(b).

³¹² *Id.* subpart D, § 101.23(b).

³¹³ *Id.* subpart D, § 101.23(a).

³¹⁴ *Id.* subpart D, § 101.23(c).

³¹⁵ *Id.* subpart D, § 101.23(a).

³¹⁶ See *id.* subpart D § 101.23(e).

³¹⁷ See *supra* note 179 and accompanying text.

fluctuation between pro- and anti-labor stances. More specifically, these NLRB ground-level policies reflect the tension between the original New Deal legislation empowering the NLRB and reactionary law passed by subsequent Congresses alarmed by the rise of labor protection.³¹⁸

In addition, Congress is not the only political influence on procedural discretion in the NLRB—presidential interests are as well (consistent with other regulatory areas³¹⁹). In the past and today, the restrictive and expedited aspects of procedural discretion reflect an anti-union bias, responsive to the partisanship of both legislators and presidents.³²⁰

In recognition of this bias, the Biden Administration issued a rule³²¹ that revoked provisions of a previous Trump-era regulation³²² that had enhanced further the discretion of regional directors to change and delay aspects of fair labor adjudication in a manner that favored employers.³²³ As it concerns expediting the NLRB's union-busting decisions, however, sections 101.22 to 101.26 in the current Statements of Procedure (issued in 2017), which concern NLRA section 8(b)(7), do not differ substantially from the previous version of the Statement, issued in 1987.³²⁴ This is perhaps because the NLRB's procedural discretion in the implementation of NLRA section 8(b)(7) is aligned with the relatively anti-labor stance of both the

³¹⁸ See Moe, *supra* note 153, at 1096.

³¹⁹ See generally Shah, *Presidential Administrative Discretion*, *supra* note 10.

³²⁰ See Moe, *supra* note 153, at 1103–09; see also KENNETH J. MEIER & JOHN BOHTE, *POLITICS AND THE BUREAUCRACY: POLICYMAKING IN THE FOURTH BRANCH OF GOVERNMENT* 147 (5th ed. 2006).

³²¹ 29 C.F.R. pt. 102 (2023); see also *NLRB Fact Sheet: Representation Case Procedures*, NAT'L LAB. RELS. BD. 1 (Aug. 24, 2023), <https://www.nlr.gov/sites/default/files/attachments/pages/node-9421/2023-r-case-rule-fact-sheet.pdf> [<https://perma.cc/X87E-G5X2>] (noting that the NLRB's 2023 rule “governing representation case procedures is designed to remove unnecessary barriers to the fair, efficient, and expeditious resolution of representation questions”).

³²² 29 C.F.R. pt. 102 (2019).

³²³ *NLRB Representation Case Procedures: Comparison of Prior and New Representation Case Procedures*, NAT'L LAB. RELS. BD. 1–2 (Aug. 25, 2023), <https://www.nlr.gov/sites/default/files/attachments/pages/node-9421/2023-r-case-rule-comparing-prior-and-new-2023-r-case-procedures.pdf> [<https://perma.cc/L35N-HLV6>] (illustrating matters in which regional offices have been accorded less discretion as a result of the 2023 regulation, in comparison to the 2019 rule).

³²⁴ See NAT'L LAB. RELS. BD., *supra* note 176, subpart D; see also *Guidance: Previous Versions of the Rules and Regulations*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/guidance/key-reference-materials/previous-versions-of-the-rules-and-regulations> [<https://perma.cc/VX29-VMZ8>] (last visited May 12, 2025) (listing all versions of the NLRB Statements of Procedure); Time Periods for Responding to Board Action; Revision of Statements of Procedure, 52 Fed. Reg. 23967 (June 26, 1987).

Reagan and the Trump Administrations, which issued the former and current Statements, respectively.³²⁵

b. *Medical Device Approval*

Congress may expedite administrative adjudicative process to pacify special interests. One example concerns Medicare legislation.³²⁶ In 2003, “Congress made additional reforms to the Medicare appeals process. Specifically, the act established expedited judicial review for beneficiaries and, remarkably, the beneficiaries’ providers or suppliers.”³²⁷ Indeed, “[t]his extraordinary provision accommodated the reality that suppliers of new medical devices and providers offering new medical technologies also have important and ongoing interests in disputed coverage issues.”³²⁸ This came on the heels of a similar effort in 2000, during which “Congress enacted major changes in the Medicare appeal process, primarily in response to the concerns of medical device manufacturers.”³²⁹ More recently, these efforts have been further complemented by legislation expediting Food and Drug Administration (FDA) review of “breakthrough” medical devices.³³⁰

Expediting coverage of these devices might create quicker consumer access to technology and a more predictable and efficient process for manufacturers to gain Medicare coverage and FDA approval. However, expediency also has the potential to allow new technologies that have insufficient evidence proving their efficacy, poor effectiveness, or even safety hazards to

³²⁵ Cf. Moe, *supra* note 153, at 1104–06 (discussing similar dynamics resulting from Republican presidents “committed to shifting NLRB performance in a probusiness direction”).

³²⁶ See Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 932, 117 Stat. 2066, 2399–402 (codified as amended at 42 U.S.C. § 1395ff(b)(1)(F)); Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000, Pub. L. No. 106-554, §§ 521–22, 114 Stat. 2763A–463, 2763A–534 to –547 (codified as amended at 42 U.S.C. § 1395ff).

³²⁷ Kinney, *supra* note 136, at 128 (noting that “[e]xpedited review may occur when the ALJ or other adjudicator determines that no material facts are in dispute”).

³²⁸ *Id.*

³²⁹ *Id.* (observing that this legislation “consolidated the beneficiary appeals processes[,] . . . mandated major reforms such as strict deadlines to expedite the process[, and] established an expedited review process for Medicare coverage determinations for beneficiaries with an immediate need for the service”).

³³⁰ See FDA Breakthrough Devices Program (BDP), 21st Century Cures Act of 2016, 21 U.S.C. § 360e-3.

get quick approval and coverage, to the detriment of vulnerable patients, including the elderly.³³¹

2. Executive- or Agency-Led

a. Asylum

The immigration apparatus also gatekeeps access to process—or, understood another way, expedites process to an extent that renders it wholly inaccessible. For example, under pressure from the Trump Administration, EOIR issued a memo last year on “pretermission” that has allowed immigration judges to summarily dismiss thousands of asylum claims. “EOIR’s interpretation of applicable law is that adjudicators may pretermite legally deficient asylum applications without a hearing.”³³² Like decisions in which USCIS adjudicators “now exercise procedural discretion to deny benefits regardless of applicants’ eligibility, and without any justification at all,”³³³ immigration judges can choose to exclude an asylum applicant from appropriate process in the first instance.

While the recent application of pretermission has been unusual, the concept is not new. In the early 1990s, the Attorney General issued regulations that allowed for mandatory denials that one commentator has referred to as “pretermission” because these provisions likewise allowed an immigration judge to deny an asylum application without a hearing.³³⁴ Notably, the regulation in question allowed for pretermission at that time only if the asylum applicant had been “convicted by a final judgment of a particularly serious crime in the” U.S. and constituted “a danger to the community,” was “firmly resettled” in another country, or was a danger to national security.³³⁵ This regulatory provision allowing for mandatory denial was

³³¹ See Kushal T. Kadakia et al., *FDA Authorization of Therapeutic Devices Under the Breakthrough Devices Program*, 185 JAMA INTERN. MED. 996, 1002 (2025); Tanvi Gupte, Tushar Nitave & Jogarao Gobburu, *Regulatory Landscape of Accelerated Approval Pathways for Medical Devices in the United States and the European Union*, FRONT. MED. TECH., May 15, 2025, at 11.

³³² Memorandum from Sirce E. Owen, Acting Dir., to EOIR, PM 25-28: Pretermission of Legally Insufficient Applications for Asylum 1–2 (Apr. 11, 2025), <https://www.justice.gov/eoir/media/1396411/dl?inline> [<https://perma.cc/RWS6-2A25>].

³³³ See Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2153–54; see also *supra* note 243 and accompanying text.

³³⁴ See Robert G. Rooney, Note, *The Power to Pretermite an Application for Asylum: Improper Policy for American Asylum Law*, 5 GEO. IMMIGR. L.J. 641, 644 (1991).

³³⁵ 8 C.F.R. § 208.14(c) (1991).

revoked, however, due to the understanding that no one should be returned to a country where they are in danger of persecution without adequate process.³³⁶

Today, the BIA has ramped up pretermissions³³⁷ based, primarily, on a handful of rationales that are even more difficult to justify as fair or lawful. These include urging immigration judges “to broadly reject asylum claims on technicalities, without considering their merits.”³³⁸ One justification for pretermission is if the applicant’s form is incomplete,³³⁹ notwithstanding the inconsistency of this policy with regulations “mandat[ing] that allegedly incomplete applications must be returned to the applicant to allow an opportunity to correct and resubmit the application.”³⁴⁰ According to one scholar, this new interpretation allows for the dismissal of “an asylum case because an application is missing something as small as an ‘N/A’ in a form.”³⁴¹ Another novel basis for pretermission is if DHS claims that the applicant is subject to a “safe third country” agreement,³⁴² which was created under the first Trump Administration and allows DHS to ship those seeking asylum in the U.S. to a place besides the asylum seeker’s country of origin, such as El Salvador, Honduras, and Guatemala.³⁴³

³³⁶ See Rooney, *supra* note 334, at 649–53 (explaining how pretermission is inconsistent with the language and humanitarian intent of the Refugee Act of 1980); *id.* at 657–62 (explaining that mandatory denials of asylum that do not allow for the exercise of adjudicator discretion are inconsistent with due process).

³³⁷ See Jazmine Ulloa, Allison McCann & Hamed Aleaziz, *Trump Administration Pushes Asylum Seekers to Apply in Other Countries*, N.Y. TIMES (Dec. 20, 2025), <https://www.nytimes.com/2025/12/20/us/trump-asylum-third-countries.html> [<https://perma.cc/U9WH-HCYH>].

³³⁸ See S. Ellie Norton, *Immigration’s Prejudice Problem*, 26 NEV. L.J. 511, 525 (2026).

³³⁹ See *Matter of C-A-R-R-*, 29 I. & N. Dec. 13, 15 (B.I.A. 2025).

³⁴⁰ HUMAN RIGHTS FIRST, PRACTICE ADVISORY ON PRETERMISSIONS 1–2 (Jan. 23, 2026), https://resources.humanrightsfirst.org/wp-content/uploads/2026/01/Pretermissions-Advisory_FINAL-1.22.2026.pdf [<https://perma.cc/3G42-FZVN>] (discussing 8 C.F.R. § 1208.3(c)(3) (2026)); see also NAT’L IMMIGR. PROJECT & CTR. FOR GENDER & REFUGEE STUD., PRACTICE ADVISORY, FIGHTING FOR A DAY IN COURT: UNDERSTANDING AND RESPONDING TO PRETERMISSION OF ASYLUM APPLICATIONS 3–9 (Aug. 27, 2025), <https://nirpnl.org/sites/default/files/2025-07/advisory-avoiding-pretermis-sion.pdf> [<https://perma.cc/G8QN-AGYF>].

³⁴¹ Caroline Kubzansky, *Screws Tightening for Immigrant Detainees Swept Up in Operation Midway Blitz as Arrests Continue*, CHI. TRIB. (Feb. 23, 2026), <https://www.chicagotribune.com/2026/02/23/operation-midway-blitz-immigrant-detainees/> [<https://perma.cc/CXM3-8AG9>] (quoting the head of the Immigrants’ Rights Clinic at the University of Chicago).

³⁴² *Matter of C-I-G-M- & L-V-S-G*, 29 I. & N. Dec. 291, 299 (B.I.A. 2025).

³⁴³ See Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63994, 63995 (Nov. 19, 2019).

Pretermission may prompt an appeal with the Board of Immigration Appeals (BIA), “but people who are seeking to appeal their cases are soon nearly certain to find that route a dead end.”³⁴⁴ This is in part because a set of regulations put into effect immediately declared that BIA appeals will be automatically dismissed within fifteen days of filing the appeal “unless a majority of current Board members vote to consider the appeal on the merits.”³⁴⁵ The new rules also state that immigrants only have ten days to appeal to the BIA, when they previously had a month.³⁴⁶ In addition, legislation passed last year increased the cost of filing an appeal to \$900 from what was previously \$110.³⁴⁷ While a recent court order has put the restricted timelines on hold for now because they were promulgated by an insufficient rulemaking process,³⁴⁸ the fee increases continue to apply.³⁴⁹ Arguably, “under the new rules, the [B]oard is nearly certain to dismiss every appeal it receives.”³⁵⁰ While these new policies constitute harsh barriers to all asylum seekers, gate-keeping access to asylum proceedings is likely to be particularly harmful to noncitizens with the fewest resources and capacity to navigate the immigration system.

b. *Consumer Protection*

Agencies may also limit access to process for individuals seeking recourse in response to violations by service providers or difficulty using public land. The Department of Education allows its Office for Civil Rights (OCR) to exercise discretion

³⁴⁴ Kubzansky, *supra* note 341.

³⁴⁵ Appellate Procedures for the Board of Immigration Appeals, 91 Fed. Reg. 5267, 5270 (Feb. 6, 2026).

³⁴⁶ *Id.*

³⁴⁷ One Big Beautiful Bill Act (“OBBA”), Public Law 119-21, sec. 100013(d)–(e), 139 Stat. 72, 376–78 (2025). The cost could be even greater as a result of additional policies. *See, e.g.*, Memorandum from Sirce E. Owen, Acting Dir., to EOIR, PM 25-36: Statutory Fees Under the One Big Beautiful Bill Act 3–4 (July 17, 2025), https://iptp-production.s3.amazonaws.com/media/documents/2025.07.17_EOIR_-_PM_25-36.pdf [<https://perma.cc/U2P9-EAH5>] (now rescinded, *see EOIR Rescinded Memoranda*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T OF JUST. (May 29, 2026), <https://www.justice.gov/eoir/rescinded-memoranda> [<https://perma.cc/22L4-RALL>]).

³⁴⁸ *Amica Ctr. for Immigr. Rts. v. Exec. Off. for Immigr. Rev.*, 822 F. Supp. 3d 119, 140–41 (D.D.C. 2026).

³⁴⁹ Memorandum from Daren Margolin, Dir., to EOIR, PM 26-01: Annual Asylum Fee (Jan. 2, 2026), <https://www.justice.gov/eoir/media/1422321/dl?inline> [<https://perma.cc/JUL5-ACCE>].

³⁵⁰ Kubzansky, *supra* note 341.

to terminate claims of civil rights violations in education brought under statute³⁵¹ during the investigatory phase of such claims.³⁵² This includes, as directed by the agency's policy manual on processing civil rights cases, the opportunity for OCR to close a claim, rather than offer a hearing, if they determine the claim is unable to be investigated (for instance, because the agency believes the complainant provides insufficient information) or is already being investigated by another federal, state, or local civil rights agency;³⁵³ terminate or suspend an investigation during mediation or negotiations;³⁵⁴ or refer the case to the DOJ to initiate an enforcement action.³⁵⁵ As a result, the Department of Education can dispense with civil rights claims in ways that are difficult for claimants to navigate or overcome. This discretion, combined with the recent dismantling of the Department of Education,³⁵⁶ may incentivize procedural discretion to dismiss valid civil rights claims, particularly in light of the current Administration's hostility to civil rights protections, diversity, equity, inclusion, and belonging ("DEIB") initiatives.³⁵⁷

As noted earlier, the CFTC Reparations Program provides pathways for individuals who cannot afford to go to court to seek damages from fraudulent investment firms.³⁵⁸ The Director of the Office of Proceedings at the CFTC Reparations Program is empowered by the agency to refuse to forward a reparations claim to an administrative judge not only if it is involved in arbitration, civil court, or bankruptcy proceedings,³⁵⁹ but also "if it appears that the matters alleged [in the claim] are

³⁵¹ Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-1 to 2000d-6; 34 C.F.R. § 100.7(d) (2026); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1689.

³⁵² See, e.g., 34 C.F.R. § 100.7(d) (2026).

³⁵³ *Case Processing Manual (CPM)*, U.S. DEP'T OF EDUC., OFF. FOR C.R. 9-13 (Feb. 19, 2025), <https://www.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [<https://perma.cc/73P4-NLKM>].

³⁵⁴ *Id.* at 16.

³⁵⁵ *Id.*

³⁵⁶ See Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2148.

³⁵⁷ See Bijal Shah, *Racial Tyranny Perpetuated by the U.S. President*, in CAMBRIDGE COMPANION ON AUTOCRATIC LEGALISM (Cambridge Univ. Press forthcoming) (manuscript at *8-*11) (on file with author) (describing several Trump Administration initiatives, including executive orders and agency policies, aimed at destroying DEIB policies).

³⁵⁸ See *supra* notes 126-127 and accompanying text.

³⁵⁹ 17 C.F.R. §§ 12.24(c)-(d) (2026).

not cognizable in reparations.”³⁶⁰ Furthermore, both the regulation³⁶¹ and the agency’s public-facing guidance³⁶² fail to clarify what would render such a claim incognizable, which places consumers at a disadvantage in advocating for themselves vis-à-vis brokers.

Finally, the Department of the Interior allows administrative adjudicators by regulation to call “prehearing conferences” that limit the issues discussed in and even access to public land use hearings.³⁶³ Prehearing conferences may streamline land use hearings. In addition, limiting the scope of public land use hearings via prehearing gatherings may also improve public participation by decreasing the impact of overrepresented voices and allowing greater room for expertise.³⁶⁴ This suggests that procedural discretion could benefit progressive interests. Then again, restricting the scope of land use hearings in advance also carries the risk of reducing valuable public input, undermining transparency, and causing due process issues. In addition, the agency may further restrict the inquiry by predetermining the issues that will be discussed in a prehearing conference, which can disadvantage marginalized groups with concerns outside the agency’s purview and reduce the public’s ability to engage meaningfully in land use decisions.³⁶⁵

III

IMPROVING DISCRETIONARY ACCOUNTABILITY

In agency adjudication, consistent procedure is hailed as a defense against unfairness and as the guarantor of accountability, which are cornerstones of administrative legitimacy.

³⁶⁰ *Id.* § 12.15(b).

³⁶¹ *See id.*

³⁶² *See, e.g., Determine if Your Case Is Eligible for the Reparations Program*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/LearnAndProtect/ReparationsProgram/DetermineYourEligibility> [<https://perma.cc/8P4S-Q8YP>] (last visited May 13, 2025); *Reparations Program Brochure*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/sites/default/files/2023-05/cpreparationsprogrambrochure.pdf> [<https://perma.cc/9NDY-HW4K>] (last visited May 13, 2025); COMMODITY FUTURES TRADING COMM’N, *How to File a Reparations Complaint with the CFTC* (YouTube Feb. 20, 2013), <https://www.youtube.com/watch?v=FDVdN-0HuxNs> [<https://perma.cc/G392-7647>] (also located on official CFTC website); *Submit a Tip*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/complaint> [<https://perma.cc/YA8F-2NTB>] (last visited May 13, 2025).

³⁶³ 43 C.F.R. § 4.430 (2026).

³⁶⁴ *Cf. Anika Singh Lemar, Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083, 1137–38 (2021).

³⁶⁵ *Cf. Patricia E. Salkin, Environmental Justice and Land Use Planning and Zoning*, 32 REAL EST. L.J. 429, 435–37 (2003).

In other words, good process is supposed to ensure that adjudicatory outcomes are free from capture, reasoned, and just. Indeed, proceduralism is assumed to be so stalwart as to be ossifying, standing as an obstacle to the flexibility agencies need to accomplish important goals.³⁶⁶ However, as the previous Part observed, procedural discretion undercuts the assumption of consistency in administrative procedure.

Theoretically, due process protections constitute a reliable mechanism for ensuring adequate administrative process. Both formal and informal adjudication are constrained by the Fifth Amendment's Due Process Clause.³⁶⁷ However, many informal adjudications are not covered by due process protections,³⁶⁸ likely because they do not involve protected property or liberty interests. Indeed, since *Mathews v. Eldridge*, "the Supreme Court's willingness to recognize new procedural rights for individuals [in] agency adjudication [has] dissipated,"³⁶⁹ including in ways that now prioritize the institutional interests of the agency that employs the adjudicator.³⁷⁰

Beyond the guarantees of administrative due process³⁷¹—such as they are³⁷²—few requirements of process apply to exercises of procedural discretion. Perhaps the most notable requirement is that of a partially independent and unbiased decision maker,³⁷³ but the previous Part illustrates how procedural

³⁶⁶ See *supra* notes 14–17 and accompanying text.

³⁶⁷ See Shah, *The President's Fourth Branch?*, *supra* note 11, at 508.

³⁶⁸ See Verkuil, *supra* note 34, at 779–80 (examining wide variations in the procedures offered by a number of informal adjudication programs, as measured by the ten procedural ingredients in the high-watermark procedural due process case of *Goldberg v. Kelly*).

³⁶⁹ David Ames et al., *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 5 (2020) (recognizing that "the Due Process Revolution of the 1970s" has long since "crested").

³⁷⁰ See Shah, *Administrative Subordination*, *supra* note 18, at 1658 (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, *Uncovering Coordinated Interagency Adjudication*].

³⁷¹ See *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976).

³⁷² See Shah, *Administrative Subordination*, *supra* note 18, at 1638 (noting that today, administrative due process calculations may be skewed against the provision of sufficient procedure).

³⁷³ See Shah, *The President's Fourth Branch?*, *supra* note 11, at 508; Pierce, *supra* note 6, at 481–82:

[C]ourts have identified three situations that clearly give rise to impermissible agency bias, and have announced appropriate prohibitions. First, the decisionmaker cannot have a direct and significant financial interest in the outcome of an adjudicatory dispute. Second, the

discretion may be exercised in response to political pressure. For the most part, procedural discretion is also untouched by the APA, except in the catch-all framework of arbitrary and capricious review.

Part III suggests that intra-agency and judicial oversight could play a role in making procedural discretion more accountable. Overall, institutional reform efforts should focus on increasing oversight, imposing constraints, and identifying ways to channel administrative discretion to strengthen accountability and legitimacy in procedural choices. The goal is not to eliminate procedural discretion, but to equip institutions with tools to guide and discipline how it is exercised. A realistic version of procedural discretion could respond to the specific needs of petitioners while promoting the overall efficacy of adjudicatory process. While procedural requirements are unlikely on their own to stabilize procedural discretion, a turn to administrative and judicial review could be a fruitful way to encourage the good possibilities of procedural discretion³⁷⁴ and mitigate its harm.

First, this Part asserts that procedural discretion might be improved by administrative quality assurance. Second, it explores bespoke approaches to intra-agency appeals processes. Third, it considers options based in the Court's ongoing interest in constraining agencies. These measures could foster the potential benefits of procedural discretion and manage situations in which discretion renders procedure less stable or accessible, including when it limits or eliminates legal representation. These approaches might motivate agencies to exercise procedural discretion in a manner that improves access to and the outcomes of administrative decisionmaking. While this Part offers examples from several regulatory contexts, the suggested prescriptions are not limited to those settings alone. The goal of implementation would be to examine best practices

decisionmaker cannot have a friendship with or animosity toward a party to an adjudicatory dispute, if that friendship or animosity has an unofficial origin. Finally, the decisionmaker cannot prejudice contested adjudicative facts, if that prejudgment has an unofficial source.

(footnotes omitted).

³⁷⁴ See, e.g., *supra* notes 177–78 and accompanying text (discussing NLRB efforts to improve labor access to union contracts); *supra* notes 266–77 and accompanying text (discussing how the Department of Education can fast-track hearings to evaluate whether institutions committed fraud against student loan holders); *supra* notes 290–93 (discussing agency efforts to assist firearm permit holders).

and extrapolate them to additional areas of administrative adjudication on a case-by-case basis.

Finally, insofar as procedural discretion rests on some form of expertise, such as knowledge about the appropriate level of process in informal adjudication given institutional or resource constraints, proceduralism itself could help render procedural discretion accountable. Ultimately, procedural discretion could be shaped by process that ensures it is exercised on the basis of expertise,³⁷⁵ and by extension, be held accountable by intra-administrative and judicial oversight of said process.

A. Quality Assurance

Scholars have argued that quality assurance within agencies could take the place of *Goldberg*-like due process.³⁷⁶ According to one commentator, oversight by “higher-level agency officials” is a more reliable check on “line personnel” than judicial review.³⁷⁷

This section proposes that administrative quality assurance measures may shape procedural discretion for the better. The judiciary controls administrative decisionmaking only “at the margins.”³⁷⁸ Accordingly, overseeing officials in Congress³⁷⁹ and agencies themselves³⁸⁰ could improve administrative institutional design to align bureaucratic incentives with and reduce agency resistance to fulsome process. First, the legislature could ensure high-quality procedural discretion in agencies’ implementation of the law. Second, administrative officials could encourage or direct agency adjudicators to emphasize petitioners’ interests, rather than defaulting to institutional goals such as efficiency. Third, bureaucrats could restrain their own exercises of discretion.

1. Legislative Oversight

Procedural discretion regimes, including those that allow for gatekeeping or expediency in adjudication, may be instituted

³⁷⁵ See Rodriguez, *supra* note 71, at 448–49.

³⁷⁶ See JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 15, 149 (1983); Ames et al., *supra* note 369, at 28–30.

³⁷⁷ Nabavi-Noori, *supra* note 235, at 1329–30.

³⁷⁸ Ames et al., *supra* note 369, at 28.

³⁷⁹ Shah, *Administrative Subordination*, *supra* note 18, at 1677–79.

³⁸⁰ *Id.* at 1683–86.

by Congress,³⁸¹ including in formal adjudication.³⁸² Indeed, Congress has reduced access to process for petitioners, such as those seeking Social Security,³⁸³ by statute. Congress could counteract the fallout of its procedural priorities. For example, evidence suggests that expediting agency review of medical devices may have drawbacks; Congress might rescind existing legislation³⁸⁴ allowing this loophole. Congress could also bolster administrative process. For instance, per statute, agency appeals of National Park Service decisions regarding concession contracts that determine eligibility to provide visitor services on federal land³⁸⁵ must be made in writing.³⁸⁶

Congress might also reinforce agency discretion to improve procedure. For example, Congress has encouraged USDA decisionmakers to obtain additional witness accounts, records, memoranda, and even in-person testimony,³⁸⁷ while investigating unfair and deceptive practices in connection with the sale of commercial agricultural commodities.³⁸⁸ Likewise, Congress could counteract agency regulations granting adjudicators procedural discretion, including as it pertains to informalizing the oversight of manufacturers and sellers of produce and firearms.³⁸⁹ Labor is a context in which legislative fights have filtered down into procedural discretion at the level of regional NLRB activity. Congress could take a proactive stance on favoring workers by passing legislation that reduces the discretion to restrict process exercised by regional NLRB directors. Doing so would also have the benefit of quelling regulatory back-and-forth on the matter.³⁹⁰

Beyond legislating, Congress also “directs agency activities in the form of . . . extensive committee reports, and formal and

³⁸¹ See generally *supra* subpart II.B.

³⁸² See generally *supra* subpart I.C.

³⁸³ See *supra* notes 166–167 and accompanying text.

³⁸⁴ See *supra* sections II.A.1 & II.B.1.

³⁸⁵ 36 C.F.R. § 51.1 (2026) (implementing 54 U.S.C. §§ 101901–101926 and title IV of the National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497, 3503 (codified as amended at 16 U.S.C. §§ 5951–5966 (repealed 2014))).

³⁸⁶ 36 C.F.R. § 51.47(c) (2026).

³⁸⁷ 7 U.S.C. § 499m(e).

³⁸⁸ *Id.* § 499b.

³⁸⁹ See generally *supra* subsection II.A.2(d); cf. *Baiardi Food Chain v. United States*, 482 F.3d 238, 241 (3d Cir. 2007) (noting that Congress amended the Perishable Agricultural Commodities Act in 1984 to add a section providing for a statutory trust to benefit unpaid suppliers of fresh produce).

³⁹⁰ See *supra* notes 321–25 and accompanying text.

informal communications between congressional committees and their staffs and agencies.”³⁹¹ These tools could be used to offset agency incentives to reduce process. For instance, the legislature could investigate the quality of administrative adjudication³⁹² and require that agencies disclose data regarding decisionmaking.³⁹³ While comprehensive immigration reform has been hard to come by, Congress should employ these tools to oversee agencies to ensure they properly implement current statutory requirements for process that are likely inconsistent with growing executive reliance on the pretermission of asylum applications.³⁹⁴

2. *Administrative Quality Review*

Quality assurance can be deployed within agencies to center petitioner-focused values in agency decisionmaking. Broadly, agencies could aim explicitly to balance speed and quality in administrative adjudication.³⁹⁵ There is some evidence that agency managers dislike “conferring discretionary authority on agency adjudicators [due 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.”³⁹⁶ Accordingly, agencies could impose constraints via regulations, policy manuals, and binding internal guidance on front-line officials, including adjudicators.³⁹⁷ Such an approach can also serve as a failsafe for governmental

³⁹¹ David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1489 (2015).

³⁹² See Ames et al., *supra* note 369, at 69–70.

³⁹³ *Id.* at 72.

³⁹⁴ See *supra* subsection II.B.2(a).

³⁹⁵ For example, the Transitional Coverage for Emerging Technologies pathway aims to balance rapid access with patient safety by including ongoing evidence collection and safety safeguards. See *Fact Sheet: Final Notice — Transitional Coverage for Emerging Technologies (CMS-3421-FN)*, U.S. CTRS. FOR MEDICARE & MEDICAID SERVS. (Aug. 7, 2024), <https://www.cms.gov/newsroom/fact-sheets/final-notice-transitional-coverage-emerging-technologies-cms-3421-fn> [<https://perma.cc/KY9Y-J5PA>]; Steven A. Farmer, Lori M. Ashby & Jonathan D. Blum, *Medicare’s New Pathway for Transitional Coverage for Emerging Technologies*, JAMA HEALTH F. (Nov. 22, 2024), <https://jamanetwork.com/journals/jama-health-forum/fullarticle/2826271> [<https://perma.cc/PN8T-9MVU>]; see also *supra* subsection II.B.1(b) (discussing expedited Medicare and FDA approval of technological innovation on behalf of service providers, at the possible expense of patients).

³⁹⁶ See *id.* at 1331.

³⁹⁷ Nabavi-Noori, *supra* note 235, at 1330.

review of third-party actions,³⁹⁸ including service providers and other entities that impact the public. Oversight within an agency might also ensure that procedural discretion reflects legislative expectations for the kind of procedure that agencies must provide.³⁹⁹ Quality assurance review could also grapple directly with issues of adjudicator bias.⁴⁰⁰

One goal is to go beyond programs that count and compare caseloads.⁴⁰¹ For instance, EOIR, after engaging in “near-total neglect of quality assurance,”⁴⁰² quickly replaced perhaps its first quality assurance review program “with a set of quantitative measures of court performance that focus on case completion goals.”⁴⁰³ Prior to that, there was a controversial push for “streamlining”⁴⁰⁴ that still endures today.⁴⁰⁵ Instead, a more tailored approach could avoid the inaccuracy that plagues data-driven quality assurance review,⁴⁰⁶ as well as reduce incentives to inflate favorable metrics in presenting such programs to legislators and other stakeholders.⁴⁰⁷ Binding guidance could also constrain adjudicatory discretion for purposes of improving the quality and accessibility of decisionmaking by offsetting politicians’ desire “to closely control agency discretion to advance their policy aims.”⁴⁰⁸

³⁹⁸ See, e.g., 45 C.F.R. § 147.136(d) (2026) (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).

³⁹⁹ See A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 787–89 (1987).

⁴⁰⁰ See Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 85–86 (2020) (supporting the contention that insulated agency oversight can root out implicit bias); Ames et al., *supra* note 369, at 37 (noting that the Social Security Administration failed to do so as part of its notorious Bellmon Review program, a failed system of ALJ quality assurance).

⁴⁰¹ See Ames et al., *supra* note 369, at 38–40 (describing successful Social Security Administration quality assurance programs that focus on these approaches).

⁴⁰² *Id.* at 30.

⁴⁰³ *Id.* at 41.

⁴⁰⁴ *Id.* at 41–42.

⁴⁰⁵ See Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 643–45 (2019) [hereinafter Shah, *Civil Servant Alarm*].

⁴⁰⁶ See, e.g., Ames et al., *supra* note 370, at 45–46 (describing the Board of Veterans’ Appeals attempt at utilizing data-driven review).

⁴⁰⁷ See, e.g., *id.* at 56 (explaining that the Board of Veterans’ Appeals’ error rate is reported annually to Congress).

⁴⁰⁸ Nabavi-Noori, *supra* note 235, at 1332.

Immigration adjudicators, for example, could be encouraged to prioritize the humanitarian values or otherwise exercise their discretion to curtail process judiciously. For example, agency guidance can have an “extraordinarily strong” impact on USCIS’s otherwise “significant” and “politically sensitive” discretionary power.⁴⁰⁹ Similarly, USCIS training materials—another form of guidance—could be designed to increase responsiveness to humanitarian crises, including those at the border, rather than to restrict it.⁴¹⁰ Furthermore, where immigration judges have the discretion to engage petitioners in person more often,⁴¹¹ guidance could elucidate options and provide incentives to exercise this discretion in favor of additional procedure. In national security review, adjudicators should be encouraged by higher-ups to default to oral hearing options as often as possible, given the high stakes for individuals who are designated a threat.⁴¹²

In regard to labor, NLRB adjudicators already exercise influence to prioritize certain labor cases over others in the face of congressional power;⁴¹³ they might likewise be directed by agency leaders to ensure adequate process despite other forms of political influence, including presidential pressure. Indeed, the “expedited” investigation and adjudication of 8(b)(7) claims against labor unions⁴¹⁴ reflects not only the anti-labor bent of reactionary changes to labor law enacted during the New Deal,⁴¹⁵ but also the consistent resistance to labor rights from presidential administrations across party lines.⁴¹⁶ In this context, supervisors could empower regional NLRB officials to engage in procedural discretion that neutralizes a political, anti-labor stance. Perhaps if sections 101.22 to 101.26 of the NLRB Statements of Procedure⁴¹⁷ are revised under more pro-labor condi-

⁴⁰⁹ *Id.*

⁴¹⁰ Notably, training materials have been used to render USCIS adjudicators less flexible and receptive to the needs of refugees. *See* Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2157–59 (citing immigration regulations, DOJ memoranda, and USCIS asylum officer training).

⁴¹¹ 8 C.F.R. § 1240.17(f)(2) (2026) (“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.”).

⁴¹² *See supra* subsection II.A.2(a).

⁴¹³ *See supra* notes 177–78 and accompanying text.

⁴¹⁴ 29 C.F.R. § 101.25 (2026).

⁴¹⁵ *See supra* section II.A.1.

⁴¹⁶ *See* Moe, *supra* note 153, at 1104–06.

⁴¹⁷ *See supra* notes 324–25 and accompanying text.

tions,⁴¹⁸ regional offices' discretion to investigate violations of 8(b)(7) in an expedited manner could be likewise constrained.

Agencies can also guide their adjudicators to advocate for petitioners, particularly in immigration, where a lack of representation can break a case. As a general matter, immigration policymakers should always encourage the presence of advocates in adjudication, even when adjudicators are empowered to exclude representatives. Both the Board of Immigration Appeals (BIA) and immigration judges have some discretion, by regulation, to permit representation for the "mentally [in]competent"⁴¹⁹ and minors.⁴²⁰ These adjudicators could be advised by agency guidance to allow for generous interpretations of mental incompetence⁴²¹ that would increase access to these protections, particularly in light of earlier gross violations of mentally incompetent individuals in immigration proceedings.⁴²² Complementarily, immigration judges might be directed to exercise their discretion to call status conferences⁴²³ more liberally in the adjudication of unrepresented noncitizens' cases, particularly given the bias toward limiting the presence of lawyers in immigration court.⁴²⁴ The caveat here is that the institutional tendency toward political responsiveness and emphasis on efficiency may render immigration judges reluctant to exercise discretion to augment procedure in the current climate.

3. *Civil Service Self-Restraint*

Finally, bureaucrats could "voluntarily constrain their [own] discretion,"⁴²⁵ to adhere better to administrative process. More specifically, to the extent political forces lead to excessive exercises of restrictive procedural discretion, civil servants

⁴¹⁸ See, e.g., Moe, *supra* note 153, at 1104–06 (discussing how Democratic presidents have moved the NLRB in a more pro-labor direction); *supra* note 304 and accompanying text.

⁴¹⁹ See 20 C.F.R. § 802.201(b) (2026); 8 C.F.R. § 1240.4 (2026).

⁴²⁰ See 20 C.F.R. § 802.201(b) (2026); 8 C.F.R. § 1003.25 (2026).

⁴²¹ See, e.g., Matter of M-A-M-, 25 I. & N. Dec. 474, 477–84 (B.I.A. 2011), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3711.pdf> [<https://perma.cc/6EV7-WP2B>] (defining standards for mental incompetence in immigration proceedings).

⁴²² See Shah, *Uncovering Coordinated Interagency Adjudication*, *supra* note 370, at 817–19 (describing failures in treatment of mentally incompetent persons in proceedings).

⁴²³ See *supra* notes 246 and accompanying text.

⁴²⁴ See *supra* notes 257–59 and accompanying text.

⁴²⁵ Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860 (2009) (emphasis omitted).

can resist. In addition, front-line officers may be uncomfortable “with exercising that controversial discretion without guidance.”⁴²⁶ Accordingly, decisionmakers themselves may also be open to limiting spontaneous procedural changes due to the “worry[] that any discretionary departures from established agency guidance would lead to personal culpability for the consequences of their departure.”⁴²⁷ Notably, ground-level DOJ and EOIR bureaucrats have engaged in discretion both to further a progressive presidential agenda⁴²⁸ and to resist regressive political policies in the past.⁴²⁹ For example, the immigration judges’ union has pushed back against court understaffing, case quotas, and political influence over decisionmaking.⁴³⁰

Resistance⁴³¹ could interfere with the efficacy of administration. Still, situations where bureaucrats develop and apply technocratic or other forms of expertise—or emphasize important values that should endure regardless of shifts in political leadership—could benefit from civil service resistance. As to the former, for example, governmental experts could choose to engage in more searching review of medical devices⁴³² to ensure their safety for users. As to the latter, officials in charge of ensuring equality in access to education⁴³³ as well as those involved in land use decisions⁴³⁴ could exercise discretion to ensure that vulnerable communities’ civil rights and access to public participation in agency decisionmaking processes, respectively, are adequately protected. Adjudicators could also prioritize due process interests by choosing to provide petitioners more process, particularly in decisions involving national security

⁴²⁶ Nabavi-Noori, *supra* note 235, at 1329–30.

⁴²⁷ *See id.* at 1330–32.

⁴²⁸ *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 deporting individuals who would fail a marriage exemption due to DOMA).

⁴²⁹ *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).

⁴³⁰ *See Shah, Civil Servant Alarm, supra* note 405, at 643–45.

⁴³¹ Ames et al., *supra* note 369, at 60–61 (discussing the possibility of ALJ backlash to an internal regime of control).

⁴³² *See supra* subsection II.B.1(b).

⁴³³ *See supra* subsection II.B.2(b).

⁴³⁴ *See supra* notes 363–65 and accompanying text.

matters—including inclusion on the DHS “No Fly List”—which can have significant consequences for individuals.⁴³⁵

B. Intra-Agency Appeals

Intra-agency appeals boards can play an important role in improving agency adjudication, including in informal adjudication.⁴³⁶ Agency adjudicators, “compared to federal judges, . . . may develop deeper ‘expertise in reconciling and accounting for conflicting evidence and arguments, disciplinary perspectives, political demands, and legal commands,’” for instance, in areas such as immigration.⁴³⁷ Administrative processes tend to be more efficient than judicial review as well.⁴³⁸

This section suggests that another way to manage procedural discretion is through systemic opportunities for administrative oversight of discretionary decisionmaking by administrative appellate boards. More specifically, it suggests agencies consider multiple pathways of appellate review based on public needs, implement process that boosts vulnerable petitioners’ interests vis-à-vis the government, and instigate agency-head review when appropriate and sufficiently nonpartisan. In general, agencies could experiment with adjudicatory procedures within the boundaries established by law. And, to the extent that changes to intra-agency appeals lead to overarching policy, such appeals may also encourage the agency to take a more uniform approach to determining decisionmaking outcomes.

1. *Bespoke Process and Appeals Options*

Agencies sometimes offer multiple pathways for the adjudication of claims or for intra-agency appeals in order to balance

⁴³⁵ See *supra* notes 209–18 and accompanying text.

⁴³⁶ For example, the Trademark Trial and Appeal Board hears appeals from any final decision of examiners concerning the registration of marks. 15 U.S.C. § 1070.

An appeal may be taken to the Trademark Trial and Appeal Board from any final decision of the examiner in charge of the registration of marks or a final decision by an examiner in an *ex parte* expungement proceeding or *ex parte* reexamination proceeding upon the payment of the prescribed fee. The Director may reconsider, and modify or set aside, a decision of the Trademark Trial and Appeal Board under this section.

⁴³⁷ Wadhia & Walker, *supra* note 84, at 1223.

⁴³⁸ See Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 356 (1991).

efficiency and depth of review depending on the petitioner's preferences. For instance, the U.S. Forest Service, which is part of the USDA, has established a flexible intra-agency appeals process for denials of permits for grazing, mining, and other private use of federal land.⁴³⁹ It is worth noting that discretionary intra-agency review in that context might favor more powerful private parties for permits. Nonetheless, agency hearings and appellate review may also allow less resourced parties better access to appealing denials.

For example, the CFTC Reparations Program⁴⁴⁰ offers three types of proceedings.⁴⁴¹ The first, formal procedure, can only be accessed by those with more than \$30,000 in damages and allows for a decision by a Judgment Officer who may, in his discretion, engage in written proceedings or hold an in-person hearing.⁴⁴² This approach allows for appeal to the CFTC and courts of appeals as well.⁴⁴³ The second, which must involve claims of \$30,000 or less in damages, allows for a decision by a Judgment Officer who may, in his discretion, engage in written proceedings or hold an oral hearing by telephone.⁴⁴⁴ This approach allows for appeal to the CFTC and the federal judiciary.⁴⁴⁵ The third is quickest and may pertain to any amount of damages, but does not "involve a hearing or allow for appeals."⁴⁴⁶

In this vein, for most of its existence, the Department of Veterans Affairs (VA) offered only its "legacy" appeals process, by which a claimant who disagrees with the decision of an

⁴³⁹ See 36 C.F.R. § 214.7(b) (2026).

(1) Appeal decisions issued by Forest or Grassland Supervisors, Regional Foresters, or the Chief are eligible for discretionary review. If a Forest or Grassland Supervisor is the Appeal Deciding Officer, discretionary review is conducted by the Regional Forester. If a Regional Forester is the Appeal Deciding Officer, discretionary review is conducted by the Chief. If the Chief is the Appeal Deciding Officer, discretionary review is conducted by the Under Secretary for Natural Resources and Environment. (2) Decisions made by the Chief that fall into one of the categories enumerated in 36 CFR 214.4 are eligible for discretionary review by the Under Secretary for Natural Resources and Environment.

⁴⁴⁰ See *supra* notes 126–27 and accompanying text.

⁴⁴¹ See *Select the Right Proceeding for Your Issue*, COMMODITY FUTURES TRADING COMM'N, *supra* note 130.

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

adjudicator at a regional office could appeal the decision to the Board of Veterans' Appeals (BVA) for de novo review⁴⁴⁷ made by formal adjudication.⁴⁴⁸ However, it took an average of six years to receive a decision from when a claimant filed an appeal.⁴⁴⁹ Furthermore, the claimant could not appeal to the Court of Appeals for Veterans Claims until the BVA issued a decision.⁴⁵⁰

Today, as the result of new legislation,⁴⁵¹ the VA offers a modernized review system⁴⁵² with three separate tracks for pursuing intra-agency reconsideration.⁴⁵³ One of these options includes the conventional appeal before the BVA,⁴⁵⁴ which involves a hearing⁴⁵⁵ and limited opportunity for oral argument.⁴⁵⁶ Notably, claimants are limited to filing an appeal within a year after their initial claim was decided, which limits how many of these paths any one claimant might take.⁴⁵⁷ The middle-of-the-road approach is an informal "higher-level

⁴⁴⁷ Robert Chisholm, *An On-Ramp to the Future of VA Appeals*, 43 ADMIN. & REGUL. L. NEWS 6, 6 (2018).

⁴⁴⁸ 38 C.F.R. § 20.103 (2026). Note that the BVA conducts formal adjudication under a statute that structures adjudication in a manner aligned with the APA. 38 U.S.C. § 7104. Similarly, the Veterans Court reviews Board decisions not under the APA, but under the Veterans Judicial Review Act (VJRA) of 1988, which is modeled on the APA. Compare 38 U.S.C. § 7261, with 5 U.S.C. § 706. Indeed, the judiciary imports APA caselaw into the interpretation of the judicial scope of review under the VJRA. See, e.g., *Euzebio v. McDonough*, 989 F.3d 1305, 1322 (Fed. Cir. 2021) (referring to caselaw interpreting the APA in interpreting the court's scope of review under the VJRA).

⁴⁴⁹ Chisholm, *supra* note 447, at 6; see also U.S. DEP'T OF VETERANS AFFS., BD. OF VETERANS' APPEALS, ANNUAL REPORT, FISCAL YEAR 2024 39 (2025) (Legacy system appeals still take six years as of Fiscal Year 2024).

⁴⁵⁰ 38 U.S.C. § 7252(a).

⁴⁵¹ Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, §§ 5104B–C, 5108, 131 Stat. 1105, 1107–09; see also *Who and What Is the Board of Veterans' Appeals?*, U.S. DEP'T OF VETERANS AFFS., BD. OF VETERANS' APPEALS (May 14, 2025), <https://department.va.gov/board-of-veterans-appeals/> [<https://perma.cc/7QKP-A8QC>] ("In 2017 the AMA was passed and took effect in February 2019. AMA created a new decision review process allowing Veterans to choose from three lanes to determine the path their appeal will follow. The three lanes to choose from are supplemental claim, higher-level review, and appealing to the Board of Veterans' Appeals.").

⁴⁵² See *Who and What Is the Board of Veterans' Appeals?*, *supra* note 451.

⁴⁵³ See *VA Decision Reviews and Appeals*, U.S. DEP'T OF VETERANS AFFS. (Nov. 19, 2024), <https://www.va.gov/decision-reviews/> [<https://perma.cc/P2YT-4H5Y>].

⁴⁵⁴ See *Board Appeals*, U.S. DEP'T OF VETERANS AFFS. (Apr. 2, 2025), <https://www.va.gov/decision-reviews/board-appeal/> [<https://perma.cc/U68Y-WH97>].

⁴⁵⁵ 38 C.F.R. § 20.103 (2026).

⁴⁵⁶ *Id.* § 20.701 (stipulating that only the appellant or their representative can present argument in support of appeal).

⁴⁵⁷ *Board Appeals*, *supra* note 454.

review,”⁴⁵⁸ in which a reviewer who is not on the BVA will adjudicate the claimant’s appeal within one year of their initial decision or the filing of a supplemental claim, and offer a final decision ostensibly within four to five months for non-health-care-related claims.⁴⁵⁹ This approach offers more flexibility of filing than the conventional approach,⁴⁶⁰ and a faster decision time,⁴⁶¹ but with less process than a conventional appeal to the BVA.⁴⁶² Finally, claimants may also file supplemental claims if they have new and relevant evidence or if they want their claims to be decided after a change in the law.⁴⁶³ The VA’s goal for completing these claims is 125 days, and it comes fairly close to achieving this.⁴⁶⁴

According to a study of the pilot program implementing this new regime, those claimants who opted for an avenue besides appeal to the BVA—for instance, either a mid-level review or supplemental claim—were over twenty-five percent more likely to have their claims approved.⁴⁶⁵ One reason for this might be that the formal system, while providing consistent process, is not as nimble and responsive to claimants as the other pathways. Perhaps another, complementary reason is that Veterans Law Judges burdened by overwhelming caseloads within the conventional appeals process⁴⁶⁶ may similarly be less amenable to appeals of the agency’s decisions as a general matter. While some veterans may prefer to have their in-person “day in court” via the conventional appeals pathway, quicker process and higher claims approvals seem beneficial to the veterans who otherwise struggle to navigate the VA system.

⁴⁵⁸ Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, § 5104B, 131 Stat. 1105, 1107.

⁴⁵⁹ *Higher-Level Reviews*, U.S. DEP’T OF VETERANS AFFS. (Apr. 2, 2025), <https://www.va.gov/decision-reviews/higher-level-review/> [<https://perma.cc/ST4T-DVZE>].

⁴⁶⁰ See *supra* note 457 and accompanying text.

⁴⁶¹ See *supra* note 449 and accompanying text.

⁴⁶² See *supra* notes 454–56 and accompanying text.

⁴⁶³ Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, § 5108, 131 Stat. 1105, 1109.

⁴⁶⁴ *Supplemental Claims*, U.S. DEP’T OF VETERANS AFFS. (May 9, 2025), <https://www.va.gov/decision-reviews/supplemental-claim/> [<https://perma.cc/89HW-ZK9T>] (noting that 124.8 days was the “[a]verage time to complete a Supplemental Claim for disability compensation or pension benefits in April 2025”).

⁴⁶⁵ Chisholm, *supra* note 447, at 7.

⁴⁶⁶ Ames et al., *supra* note 369, at 17 (noting the “explo[sion]” of cases and significant backlog faced by Board of Veterans’ Appeals judges). Note that BVA adjudicators are referred to as Veterans Law Judges, not ALJs under the APA, although the function and structure of the two are very similar.

For these reasons, the CFTC Reparations Program and the VA's new approach could serve as a model for other regulatory settings where exceedingly informal initial decisions could benefit from multiple pathways of review. For example, rather than appealing only to the overburdened Board of Immigration Appeals,⁴⁶⁷ denials of relief from deportation made by immigration judges⁴⁶⁸ might benefit from multiple levels of review or opportunities to provide additional evidence. These additional processes could occur prior to or perhaps in lieu of the Board of Immigration Appeals. Perhaps counterintuitively, a more adaptive approach to intra-agency review could be more inclusive of marginalized and vulnerable communities, even if it is accompanied by less process, because it could offer petitioners options that are consistent with their interests (like a speedier decision timeline).

2. Appeals Privileging Petitioners

Intra-agency appellate review could also counteract the tendency of procedural discretion to favor the agency by implementing procedures that support vulnerable communities. Agencies have made such efforts to enhance notice-and-comment rulemaking.⁴⁶⁹ Likewise, agency adjudication could adopt procedural innovations that increase transparency and accessibility, rather than further institutionalist priorities.⁴⁷⁰ For example, USCIS refusals to grant nonimmigrant visas must be reviewed by Department of State consular supervisors, who offer an opportunity for the submission of additional evidence that could illustrate why the applicant is, in fact, eligible for a visa.⁴⁷¹ The provisions relating to rejected applicants for immigrant visas are similar.⁴⁷² These steps allow

⁴⁶⁷ See Appellate Procedures for the Board of Immigration Appeals, 91 Fed. Reg. 5267, 5270 (Feb. 6, 2026) (to be codified at 8 C.F.R. pts. 1003, 1208, 1240) (discussing the board's increased case load).

⁴⁶⁸ See *supra* note 244 and accompanying text.

⁴⁶⁹ Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee's White Space*, 32 J. LAND USE & ENV'T L. 523, 524 (2017) (observing that the Environmental Protection Agency and FERC "have exploited their considerable freedom to experiment with process," in some instances of rulemaking, for the better of those interested in progressive environmental and energy regulation).

⁴⁷⁰ See, Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 390 (2021) (noting agencies may "design procedures beyond the minimum (and often minimal) requirements imposed by statute and constitutional due process").

⁴⁷¹ 22 C.F.R. § 41.121(c) (2026) (implementing 8 U.S.C. § 1104).

⁴⁷² See generally *id.* § 42.81.

noncitizens additional opportunity to advocate for their interests within a system that is otherwise biased against them.

Process privileging the petitioner in agency review could be extended to other immigration settings. The Board of Immigration Appeals (BIA) currently adjudicates appeals from the agency against a noncitizen granted relief from deportation by an immigration judge, as well as from a noncitizen who has been denied status or relief. One potential shift could be to limit BIA appeals to only those made by noncitizens.⁴⁷³ In addition, the standard of review could be raised to *de novo* for all appeals from noncitizens.⁴⁷⁴ Arguably, this would improve “justice in these immigration proceedings, remove the biases that presently favor the government, and provide greater fairness and equity across the circuits to immigrants seeking relief from deportation.”⁴⁷⁵

Administrative appeals boards could also provide petitioners with the opportunity to engage in person, particularly when issues of fairness are at stake and there exists the potential for overlooking important interests. For example, while considering appeals of decisions made by ALJs under the Black Lung Benefits Act, the Longshore and Harbor Workers’ Compensation Act, and other related acts,⁴⁷⁶ the Benefits Review Board could exercise its discretion to provide additional procedure to a “party . . . who is not represented by an attorney,”⁴⁷⁷ including by offering oral communication that could support the unrepresented party. Similarly, the U.S. Forest Service encourages intra-agency review⁴⁷⁸ of controversial denials of petitions for the private use of federal land.⁴⁷⁹ During these appeals, “oral presentation” is allowed, as well as the introduction of new information, “if it would be unfair and prejudicial to exclude it.”⁴⁸⁰

⁴⁷³ Jayanth K. Krishnan, *Facts Versus Discretion: The Debate over Immigration Adjudication*, 37 GEO. IMMIGR. L.J. 1, 23–25 (2022).

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.* at 2.

⁴⁷⁶ See *supra* notes 141–49 and accompanying text.

⁴⁷⁷ 20 C.F.R. § 802.220 (2026).

⁴⁷⁸ See *supra* note 439 and accompanying text.

⁴⁷⁹ 36 C.F.R. § 214.19(b) (2026) (“In deciding whether to conduct discretionary review, the Discretionary Reviewing Officer should, at a minimum, consider the degree of controversy surrounding the decision, the potential for litigation, and the extent to which the decision establishes precedent or new policy.”).

⁴⁸⁰ *Id.* § 214.16(c) (“Oral presentations shall be conducted in an informal manner and shall be limited to clarifying or elaborating upon information that has already been filed with the Appeal Deciding Officer. New information may be presented only if it could not have been raised earlier in the appeal and if it would be unfair and prejudicial to exclude it.”).

Similar efforts could be made to augment the decisionmaking processes of the plethora of formal⁴⁸¹ and informal adjudications⁴⁸² in which adjudicators have moved away from offering oral hearings.

3. *Agency-Head Review*

Finally, agency-head review could offer quality assurance and stabilize procedural discretion under optimal conditions. In the immigration⁴⁸³ and trademarks⁴⁸⁴ contexts, for instance, agency-head review is possible. On the one hand, these settings exemplify the fact that agency-head review is more likely to be politically responsive than to improve agency adjudicators' resolution of "technical, case-specific matters."⁴⁸⁵ Appellate adjudication by the agency head—who is generally a political appointee—may intensify problems associated with top-down procedural discretion, including the politicization of technical decisionmaking that leads to unfair process or outcomes. As a result of agency-head control, appellate boards could also be influenced by political directives or expectations, given they have "only a qualified right to decisional independence."⁴⁸⁶ Agency-head review could increase political accountability⁴⁸⁷ but may also lead to concerning outcomes resulting from unfair or idiosyncratic review.⁴⁸⁸

⁴⁸¹ See *supra* subpart I.C.

⁴⁸² See *supra* Part II.

⁴⁸³ See *supra* note 186 and accompanying text.

⁴⁸⁴ 15 U.S.C. § 1070 ("The Director may reconsider, and modify or set aside, a decision of the Trademark Trial and Appeal Board under this section.").

⁴⁸⁵ See Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 61–62 (2023).

⁴⁸⁶ Shah, *The President's Fourth Branch?*, *supra* note 11, at 526. For instance, under the APA, the agency—and often the agency head—may review an ALJ with "all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b).

⁴⁸⁷ See Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2134 (explaining the majoritarian-adjacent reasoning behind support for unitary executive theory).

⁴⁸⁸ See generally *id.* (illustrating some drawbacks of presidential and political influence over agency decisionmaking); Shah, *Administrative Subordination*, *supra* note 18 (arguing that political influence can impinge on agencies' pursuit of their mandates); Shah, *The President's Fourth Branch?*, *supra* note 11 (noting arguments that constitutional appointments requirements can render formal administrative adjudication more biased); Shah, *The Attorney General's Disruptive Immigration Power*, *supra* note 186, at 134–39 (discussing the harms of Attorney General review of immigration decisions).

On the other hand, multiple levels of intra-agency review, including agency-head review, could form a safety net that improves process and outcomes overall. For example, in the labor context, the gatekeeping of access to process⁴⁸⁹ may be appealed to the General Counsel.⁴⁹⁰ And, like agency-head review of immigration adjudication,⁴⁹¹ it is up to the General Counsel how much or little process is allotted to the appellant of an unfair labor charge dismissal.⁴⁹² If the General Counsel grants the appeal, this offsets the regional director's discretionary decision to dismiss the charge.

Furthermore, the risk that agency-head decisionmaking is biased could be mitigated by transparency and impartiality, which generally combat agency self-bias.⁴⁹³ Accordingly, agency-head review could be limited by more formal procedural requirements⁴⁹⁴ requiring an agency head to adhere to process under the APA and to be more forthcoming about the political aims driving case outcomes. Agency heads might also encourage consistency among lower-level adjudications that reduces the impact of politics on procedural discretion.⁴⁹⁵

C. Article III Review

Courts oversee the exercise of discretion across all agency activities⁴⁹⁶ and may be better at doing so than agency lawyers for purposes of ensuring compliance with the law in general.⁴⁹⁷

⁴⁸⁹ See *supra* notes 299–302 and accompanying text.

⁴⁹⁰ 29 C.F.R. § 101.6 (2026); see also *General Counsel*, NAT'L LAB. RELS. BD., <https://www.nlrb.gov/bio/general-counsel> [https://perma.cc/T69E-5FQG] (last visited Aug. 16, 2026) ("The General Counsel, appointed by the President to a 4-year term, is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases.").

⁴⁹¹ See, e.g., Shah, *The Attorney General's Disruptive Immigration Power*, *supra* note 186, at 131–42 (illustrating that the Attorney General has significant discretion over the amount and quality of process available to individuals whose cases are appealed to the agency head).

⁴⁹² NAT'L LAB. RELS. BD., *supra* note 176, subpart B, § 101.6.

⁴⁹³ See Eisenberg & Mendelson, *supra* note 485, at 65–66.

⁴⁹⁴ See, e.g., Kim & Semet, *infra* note 505, at 637–39 (suggesting this in the immigration setting).

⁴⁹⁵ See, e.g., David K. Hausman et al., *Executive Control of Agency Adjudication: Capacity, Selection, and Precedential Rulemaking*, 39 J.L. ECON. & ORG. 682, 700–04 (2023) (noting how the Attorney General's precedential decisionmaking may impact how immigration judges apply the law more so than when they choose to discretionarily/administratively close an unresolved immigration adjudication).

⁴⁹⁶ See generally 5 U.S.C. § 706(2).

⁴⁹⁷ See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1161–62 (1990).

Judicial review is presumed to be more procedurally sound than administrative process,⁴⁹⁸ However, the “relative weakness of ex post judicial review” has allowed frontline officials “more room to exercise discretion over regulated parties,”⁴⁹⁹ for better or for worse.

Recently, though, “the Court has significantly constrained administrative autonomy in the execution of statutory law,”⁵⁰⁰ and the judiciary’s anti-administrativist turn could be leveraged to set incremental boundaries for procedural discretion. Just as judicial review can increase accountability in independent agencies,⁵⁰¹ it may likewise improve the independent exercise of procedural discretion by influencing procedural norms in administrative adjudication.⁵⁰² The key is perhaps to encourage targeted forms of judicial review rather than endorsing judicial administration.⁵⁰³

Courts could draw on the APA arbitrary and capricious standard or the abuse of discretion standard⁵⁰⁴ to review procedural discretion. However, these forms of review may be

⁴⁹⁸ *Id.* (noting a presumed “difference in security of judicial over administrative process” (citing *Crowell v. Benson*, 285 U.S. 22, 61 (1932))).

⁴⁹⁹ Nabavi-Noori, *supra* note 235, at 1329–30.

⁵⁰⁰ See Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2143 (footnotes omitted).

⁵⁰¹ See generally Jennifer L. Selin & Pamela J. Clouser McCann, *Constraining the Executive Branch: Delegation, Agency Independence, and Congressional Design of Judicial Review*, 119 NW. U. L. REV. 1273 (2025).

⁵⁰² See Scott Limbocker, William G. Resh & Jennifer L. Selin, *Anticipated Adjudication: An Analysis of the Judicialization of the US Administrative State*, 32 J. PUB. ADMIN. RSCH. & THEORY 610, 623 (2022) (arguing that “agencies can, indeed, predict with some degree of certainty the preferences of the courts through how they structure procedure and the personnel professionalized to carry out those procedures”).

⁵⁰³ Judicial administration, in brief, involves the Court taking on a policymaking role generally reserved for administrative agencies. See generally Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119 (2021) (arguing that courts engage in administration); see also Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 767–68 (2022).

⁵⁰⁴ 5 U.S.C. § 706(2)(A) (noting that an Article III court “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); see Shah, *A Critical Analysis of Separation-of-Powers Functionalism*, *supra* note 19, at 1061–66; Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 471 (1986) (noting that administrative discretion is generally reviewed “by either the arbitrariness standard or the abuse of discretion standard”); see, e.g., Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1748 (2021) (noting the benefits of APA arbitrary and capricious review in a few recent immigration cases); Shapiro, *supra* note 67, at 1488–89.

explicitly denied by statute.⁵⁰⁵ Furthermore, even when available, these forms of review focus primarily on whether resulting policy is adequately based in the agency's expertise,⁵⁰⁶ as opposed to the robustness of the decisionmaking process or other factors. Arguably, judicial oversight of technical expertise⁵⁰⁷ is somewhat inapposite to courts' managing discretionary decisions about process. The former involves courts examining the quality of the administrative expertise on which an agency based its decision. The latter requires consideration of whether the agency's process was adequate not only for building expertise within the agency, but also for gathering pertinent information from the particular parties impacted by the adjudication as well as with an eye toward procedural fairness and transparency.

Therefore, judicial oversight of procedural discretion may require a different application of the APA or benefit from another standard of review altogether.⁵⁰⁸ For example, judicial review of procedural discretion could look beyond the quality of expertise by aiming its sights at a poor/incomplete record, utilizing the substantial evidence standard,⁵⁰⁹ reducing pretextual policies with shifting process,⁵¹⁰ considering the protection of

⁵⁰⁵ See, e.g., Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 639 (2020) (noting that the Immigration and Naturalization Act "purports to deny Article III judicial review to a large swath of removal decisions, including those involving criminal aliens or an exercise of administrative discretion").

⁵⁰⁶ 5 U.S.C. § 706(2)(A) (noting that an Article III court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Shapiro, *supra* note 67, at 1490–93 (noting how abuse of discretion review focuses on the expertise underlying the action).

⁵⁰⁷ See *supra* notes 64–69 and accompanying text; see also Cooper, *supra* note 29, at 593 (decrying comprehensive judicial oversight "in utter disregard of the unique character of [administrative] discretion" and "regardless of [judicial] competency to handle or solve the technical problems of . [sic] governmental administration.").

⁵⁰⁸ See *supra* note 504 and accompanying text.

⁵⁰⁹ See Shah, *A Critical Analysis of Separation-of-Powers Functionalism*, *supra* note 19, at 1061–66.

⁵¹⁰ The that the Supreme Court has constrained handful of policies furthered by the first Trump Administration that had pretextual rationales or that entirely lacked justification. See Shah, *Envisioning a Protective Administrative Law Framework*, *supra* note 234 at 369–71; see, e.g., *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912–13 (2020); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2574–76 (2019); *Trump v. Hawaii*, 585 U.S. 667, 704–06 (2018); see also Shah, *Statute-Focused Presidential Administration*, *supra* note 20, at 1261–63.

reliance interests,⁵¹¹ or even expanding review of administrative due process. As a result of these approaches, judicial review might even encourage agencies to experiment with procedural discretion in a manner that improves existing procedures.

Judicial review of procedural discretion is most important when vulnerable communities are involved and should be available when the related adjudicatory outcomes have high stakes. This section considers possibilities for judicial review of procedural discretion in limited capacity and with a focus on reducing the most harmful forms of procedural discretion, as well as on transparency and constitutionality in proceduralism. More specifically, it explores options for judicial review of procedural discretion that limits petitioners' access to representation and impacts their constitutional rights in administrative adjudications.

Broader justifications for judicial review of procedural discretion could include the furtherance of participatory democracy and inclusion, functional constraint of the administrative state, or perhaps even an emphasis on the formal separation of powers. These values could be advanced by arguing before the court that policy manuals and guidances governing procedural discretion are procedurally deficient because they were not subjected to notice-and-comment process. Alternatively, challenges could focus on claims that procedural discretion produces agency adjudication that violates constitutional due process provisions or undermines the separation of powers by allowing agencies to exercise discretion beyond the bounds of executive power.

1. *Right to Representation*

Representation is important to petitioners, including non-citizen children and those seeking restitution for harms suffered in the workplace. Representation is not provided by the government in administrative adjudication. In some cases, it is also not allowed even when procured by the petitioner herself—for instance, in certain immigration proceedings.⁵¹² When procedural discretion reduces access to representation, this may be particularly harmful to vulnerable claimants.

⁵¹¹ See Shah, *Statute-Focused Presidential Administration*, *supra* note 20, at 1261–63. The Court might also be concerned about reliance interests that are implicated by variable procedure. See *Regents*, 140 S. Ct. at 1909–10, 1913–14; Haiyun Damon-Feng, *Administrative Reliance*, 73 DUKE L.J. 1743, 1787–89 (2024).

⁵¹² See *supra* notes 257–259 and accompanying text.

A 2013 class action lawsuit initiated “the single most important advancement in the rights of noncitizens with mental health disabilities facing deportation”⁵¹³—and it did so as the result of a court confronting a lack of access to representation for noncitizens. For the first time, the judiciary issued an injunction that required the right—and not merely access—to legal representation for certain noncitizens including immigration detainees not mentally competent to represent themselves in detention or deportation proceedings.⁵¹⁴

As a result of this decision—and a subsequent appointed-counsel program administered by EOIR—“[t]housands of detained individuals have been given lawyers, bond hearings, and other accommodations as they face the horrors of our deportation system.”⁵¹⁵ While the program has been inconsistently applied in areas outside the circuit in which it was decided,⁵¹⁶ it is nonetheless evidence that the judiciary may encourage, or even require, the exercise of procedural discretion that benefits, as opposed to disadvantages, marginalized communities. In this vein, adjudicators should encourage access to representation for individuals facing national security sanctions,⁵¹⁷ deportation,⁵¹⁸ or civil rights violations.⁵¹⁹

2. *Constitutional Protections*

Finally, the courts have a role to play in constraining procedural discretion via procedural due process and other constitutional requirements. For instance, the federal judiciary was important to “precipitat[ing] limited reform in the [highly discretionary No Fly List] watchlisting process,”⁵²⁰ despite an enduring governmental interest in elevating matters of national

⁵¹³ Amelia Wilson, *What's the Matter with Franco-Gonzalez?*, 57 U.C. DAVIS L. REV. 1267, 1267 (2023).

⁵¹⁴ *Franco-Gonzalez v. Holder*, No. CV-10-02211, 2013 WL 8115423, at *1 (C.D. Cal. Apr. 23, 2013) (partial judgment and permanent injunction); *see also* *Franco-Gonzalez v. Holder*, No. CV-10-02211, 2014 WL 5475097, at *2 (C.D. Cal. Oct. 29, 2014) (order further implementing the permanent injunction).

⁵¹⁵ Wilson, *supra* note 513, at 1272.

⁵¹⁶ *See id.* at 1273.

⁵¹⁷ *See supra* subsection II.A.2(a).

⁵¹⁸ *See supra* subsection II.A.2(b).

⁵¹⁹ *See supra* notes 351–57 and accompanying text.

⁵²⁰ Chachko, *supra* note 187, at 1107. *See also supra* notes 212–18 and accompanying text (explaining the DHS Traveler Redress Inquiry Program (TRIP)).

security at the expense of individuals.⁵²¹ More specifically, in this case,⁵²² 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.”⁵²³ 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”).⁵²⁴ The court “held that the plaintiffs had a constitutionally protected interest in international air travel and in defending their reputation [and that] the TRIP procedure created a high risk of erroneous deprivation of these interests.”⁵²⁵

“According to the court, judicial review was an insufficient safeguard because the plaintiffs were denied any access to the administrative record. Finally, the court concluded that additional procedures like notice and a hearing would have had significant probative value.”⁵²⁶ Ultimately, this decision “led to a revision of the DHS TRIP redress procedure,”⁵²⁷ per which DHS established⁵²⁸ that “[a]n order to maintain an individual on the list must state the basis for the decision, subject to national security constraints.”⁵²⁹

In another case, the Supreme Court opined that the government cannot be trusted to adjudicate whom to include on the No Fly List consistently and correctly.⁵³⁰ After being detained and tortured by the FBI and its agents as a result of being included on the list, the petitioner in this case fled and brought suit against the government alleging a violation of “his rights to procedural due process” and that he was put “on the list for constitutionally impermissible reasons, including his race, national origin, and religious beliefs.”⁵³¹ More specifically, the petitioner contended—and the government did not

⁵²¹ See generally Shirin Sinnar, *The Supreme Court & the Unaccountable Racialized Security State*, 154 DÆDALUS 106 (2025).

⁵²² See generally *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014).

⁵²³ Chachko, *supra* note 187, at 1107.

⁵²⁴ *Id.*

⁵²⁵ *Id.*; see also *supra* notes 212–218 and accompanying text (explaining the DHS Traveler Redress Inquiry Program (TRIP)).

⁵²⁶ Chachko, *supra* note 187, at 1107.

⁵²⁷ *Id.* at 1108.

⁵²⁸ *Id.* at 1107–08 (noting that “the court left it to the government to devise new, adequate procedures without jeopardizing national security”).

⁵²⁹ *Id.* at 1108.

⁵³⁰ See Shah, *Presidential Administrative Discretion*, *supra* note 10, at 2191 (discussing *Fikre v. FBI*, 144 S. Ct. 771, 775 (2024)).

⁵³¹ *Id.* at 2191.

contest—that he was placed “on the No Fly List for constitutionally impermissible reasons, including his religious beliefs” as a Muslim.⁵³² In response, the Court decided that the petitioner’s claim was not moot due to unease with the government’s lack of a substantiated decisionmaking process. In doing so, the Court suggested as well that redress for incorrect placement is haphazard and unreliable. (Note, however, that courts have resisted additional litigation against these DHS No Fly List review policies, which suggests limits to judicial review as a bulwark against overly restrictive procedure.⁵³³)

The courts should extend this case law to other forms of high-stakes agency adjudication, including asylum decisions.⁵³⁴ Even under previous “mandatory denial” provisions, there were reasonable arguments that the pretermission was neither firmly based in statute nor consistent with due process.⁵³⁵ Today, pretermission⁵³⁶ is inconsistent with statutory requirements stating that the noncitizen “shall have a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen’s] own behalf, and to cross-examine witnesses presented by the Government.”⁵³⁷ The judiciary should also find that pretermission provisions violate due process because applicants are not given any notice that pretermission will happen; pretermission may constitute the retroactive application of a new standard, particularly for applications issued prior to the recent memorandum; and pretermission denies asylum applicants the opportunity to be heard.⁵³⁸

More broadly, in situations where there is a protected interest, procedural due process offers an opportunity for the plaintiff to consult with the decisionmaker, even in situations where there is no access to an oral hearing.⁵³⁹ This approach

⁵³² *Id.*

⁵³³ *See, e.g.,* *Kashem v. Barr*, 941 F.3d 358, 364 (9th Cir. 2019); *Latif v. Lynch*, No. 10-cv-00750-BR, 2016 WL 1239925, at *27 (D. Or. Mar. 28, 2016).

⁵³⁴ *See supra* subsection II.B.2(a).

⁵³⁵ *See supra* notes 334–336 and accompanying text.

⁵³⁶ *See supra* subsection II.B.2(a).

⁵³⁷ 8 U.S.C. § 1229a(b)(4)(B).

⁵³⁸ HUMAN RIGHTS FIRST, PRACTICE ADVISORY ON PRETERMISSIONS, *supra* note 340, at 8–9.

⁵³⁹ *See, e.g.,* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (holding that a tenured employee cannot be dismissed without an “opportunity to present his side of the story”); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 22 (1978) (finding that customers must have opportunity to discuss a contested bill with utility official prior to termination of services); *Goss v. Lopez*,

could be used to improve the plethora of situations where an adjudicator may otherwise forgo in-person requirements in favor of a paper-based adjudication. Examples of this include hearings before the NLRB;⁵⁴⁰ decisions concerning the designation of national security threats;⁵⁴¹ and beneficial and punitive immigration decisions.⁵⁴² Here, procedural due process review may offset, at least to some extent, the agency's tendency to penalize certain ethnic and religious communities as a result of amorphous and xenophobic fears about the origins of national security threats.⁵⁴³ Opportunities for claimants to connect with the agency could also improve decisions made by the Departments of Education and Treasury,⁵⁴⁴ as well as the USDA and TTB,⁵⁴⁵ all of which impact the ability of people to access government protection or affirmation of their financial or business interests. In each of these settings, allowing for some form of consultation could allow petitioners to introduce important information and better participate in the adjudication of their cases.

CONCLUSION

Reducing procedural constraints on agency action is arguably a necessary defense against both the Supreme Court's expansion of presidential power over formal adjudication and its anti-administrativist turn. But this account—as well as the view of those with faith in the formal adjudicatory requirements of the APA and in administrative due process—overlooks the fact that the bulk of what happens in the administrative state is informal adjudication and underestimates the immense discretion that bureaucrats continue to exercise.

This Article sheds light on “procedural discretion,” which agencies engage to depart from consistent process within many areas of informal adjudication. In a moment where administrative discretion is believed by some progressives to be both reliable and problematically constrained, it is valuable to examine

419 U.S. 565, 581 (1975) (holding that a high school student has to be given an opportunity to present his side of the story before suspension for participating in a disturbance, although school officials need not conduct a full-scale adversarial hearing).

⁵⁴⁰ See *supra* section II.A.1.

⁵⁴¹ See *supra* subsection II.A.2(a).

⁵⁴² See *supra* subsections II.A.2(b) & II.B.2(a).

⁵⁴³ See *supra* note 224 and accompanying text.

⁵⁴⁴ See *supra* subsection II.A.2(c).

⁵⁴⁵ See *supra* subsection II.A.2(d).

the exercise of procedural discretion, which is neither limited to resolving statutory ambiguity nor necessarily justified by science and expertise, and often exercised opaquely. Indeed, administrators' power to create variable administrative procedure seems inconsistent with the expectations of stable and reliable structures of internal accountability on which the legitimacy of administrative adjudication is founded.

Procedural discretion can be responsive and reformist. However, procedural discretion also sometimes allows administrators to better adhere to institutional and political goals rather than remain accountable to the public, even when it originates in efforts to improve efficiency, and may favor the government and corporate stakeholders over individuals. Procedural discretion also operates unchecked by oversight. Notably, it may be marginalized and under-resourced communities—such as workers and noncitizens—who are more likely to be disadvantaged by the fluctuating and politically informed nature of procedural discretion. This indicates an overall decline in procedural rights and the proliferation of procedural practices that benefit ease of administration and political interests at the expense of vulnerable people.

The study of procedural discretion both broadens the generalized understanding of how administrative discretion operates and should alter longstanding, conventional frameworks of technical oversight of informal adjudication. Given administrators' flexibility to reduce or eliminate procedure, even in agency adjudications that come with the expectation of established process, the possibility and implications of procedurally bereft adjudication should be confronted head-on by those that advocate for a robust administrative state. The response to ongoing procedural discretion is not its elimination, but rather to improve institutional structures in order to constrain the problematic and encourage the positive possibilities of variations in administrative adjudication process.