2023 AALS Annual Meeting
Administrative Law Section: New Voices in Administrative Law
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Session #1

Carrie Rosenbaum, Visiting Assistant Professor, Chapman University Fowler School of Law
ARBITRARY ARBITRARINESS REVIEW

The Supreme Court's recent immigration law Administrative Procedure Act (APA) jurisprudence demonstrates the anti-democratic potential of this judicial review, which has not yet been explored in scholarly literature. The Court's (or courts') application of the arbitrary and capricious standard potentially curtails the ability of new presidents to carry out policies via agency action. Scholars have argued that when the courts employ arbitrariness review, courts' examination of an agency's reasons for changing a prior administration's policy can stymie change and inhibit the will of the people. Alternatively, arbitrariness review can foster volatility. The Supreme Court's reasoned approach in the Deferred Action for Childhood Arrivals (DACA) case fosters agency accountability. However, the latest chapter in the application of this standard in the Migrant Protection Protocols (MPP) litigation, which concerned discretionary enforcement decisions to make migrants wait for immigration hearings in Mexico, has betrayed the potential for arbitrariness review to itself become arbitrary. The arbitrariness analysis in the MPP case suggests that the use of "hard look" review to incentivize immigration agency accountability is vulnerable to abuse. The problem necessitates a deeper examination of if, when, and how hard look review should address an agency's political reasons for terminating or rescinding a policy.

Accordingly, this Article begins with a description of the DACA and MPP cases and then outlines the literature on arbitrariness review's potential for furthering ossification, accountability, or volatility with respect to the role of politics in agency decisionmaking. It then advances a reasoned approach that avoids inhibiting new administrations from implementing policies while fostering agency reason-giving that furthers transparency and reinforces rule of law principles.

Lauren Roth, Assistant Professor, Touro Law Center
SANITATION: JUDICIALLY-MANDATED INDIVIDUALISM IN PUBLIC HEALTH LAW

On April 18, 2022, in *Health Freedom Defense Fund, Inc. v. Biden*, United States District Judge Kathryn Kimball Mizelle vacated the mask mandate issued by the Centers for Disease Control and Prevention. Following a framework laid out in other decisions restricting CDC actions in response to COVID-19, the court found that the agency lacked statutory authority to protect the public from the virus by requiring mask wearing during travel and at transit hubs because Congress did not intend such a broad grant of power. Countering decades of public health jurisprudence, the federal district court failed to defer to experts and prioritized individual liberties over population health. When considered alongside the Supreme Court's recent focus on the major questions doctrine, this lower court's redefinition of the term "sanitation" away from the meaning it has long held under federal and state jurisprudence and in the public health field is a big step towards reducing the administrative state's control over public health. While not binding on the states, this decision creates a path for state courts to follow when restricting actions taken by public health agencies, allowing judicially-mandated individualism to spread and courts to gain power as they narrow the boundaries of administrative discretion.

Shalev Roisman, Associate Professor, James E. Rogers College of Law, University of Arizona
THE PRESIDENT'S SUBJECTIVE AND OBJECTIVE LEGAL OBLIGATIONS

Congress has granted the President enormous power. This is well known, but how to assess the legality of exercises of such power still is not. Put simply, there is no clear framework to understand the legality of presidential exercises of statutory power. Scholars have noticed this, and, in response, have largely turned to administrative law for guidance. This turn to administrative law is somewhat intuitive, but misguided.

Administrative Law is a highly reticulated body of law that has been developed over decades to regulate executive branch agencies, not the President. It has focused on legitimizing agency power in the face of agencies' lack of electoral accountability, while respecting agency expertise. The President, however, has neither the electoral deficit nor the expertise that have been central to the development of administrative law. For these reasons and others, administrative law is not a good place to start in identifying a legal framework for the President. We ought to focus on the President specifically. But how?

This Article suggests looking in an obvious, but largely overlooked, place: the text. It turns out that the text of the statutes delegating power to the President take two basic forms. One is "objective": it provides the President power when a certain condition exists in the world. The other is "subjective": it provides the President power when the President "finds" or "determines" that a certain condition exists in the world. This distinction exists throughout the U.S. Code, but no one

seems to have noticed it. This Article unearths this distinction and shows how it provides a novel, coherent, and straightforward framework for understanding the legality of the President's conduct.

In brief, subjective conditions require the President to fulfill her subjective duties in "finding" or "determining" that a certain condition exists. But the exercise of power is lawful even if the President is wrong—the power is premised on the "finding" or "determination," not the condition being met in fact. Objective conditions, on the other hand, are only valid if the condition has been met in fact. Understanding this distinction clarifies what is required of the President to exercise statutory power lawfully, provides a straightforward framework for judicial review, and enables Congress to better tailor constraint and discretion when it delegates power to the President going forward.

Christine Kexel Chabot, Interim Director, Institute for Consumer Antitrust Studies and Distinguished Professor in Residence, Loyola University Chicago School of Law

THE PRESIDENT'S APPROVAL POWER

This Article introduces the President's approval power as it was originally understood in the United States. Leading proponents of a unitary executive President have asserted that her absolute power to control subordinate officers includes power to veto or approve subordinates' discretionary actions before they take effect. This Article presents previously overlooked evidence of the originalist foundations of a presidential approval power. My comprehensive analysis of every public act passed by the First Federal Congress shows that the Founding generation never understood Article II to grant the President unitary control or general authority to approve subordinates' decisions. Approval was instead a permissive power that the First Congress withheld in a vast majority of statutes and granted in only a handful of laws. Even when statutes granted the President or superior officers an approval power, moreover, they gained only ex post review without power to force non-removable subordinates to initiate regulatory action implementing their preferred policies.

The approval power has also been undertheorized, and this Article draws on historical understandings to advance the concept of approval as a middle ground in the unitary executive debate. At the Founding, approval offered a partial measure of accountability that could compensate for the failure or absence of removal power. Approval sometimes checked spending and contracting decisions that would not be undone by removing an officer. In other instances approval governed executive adjudications conducted by officials who operated outside formal levers of control established by appointments and removal. The latter category of approval powers provides originalist evidence of an important alternative to formal requirements of plenary removal power and may even facilitate broader theoretical consensus about tenure protections for otherwise supervised inferior officers. As Justice Scalia noted in his *Morrison* dissent, Article II does not require plenary removal power over inferior officers who are supervised by their superiors. The concept of approval as an alternative form of supervision further underscores the folly of challenging tenure-protections for Administrative Law Judges, given that they function as inferior officers whose recommended decisions are subject to plenary review and approval by their agency superiors. A requirement that superior officers maintain control of executive adjudications through approval aligns with understandings of executive power that prevailed at the Founding far better than a requirement of absolute removal power.

Amy Semet, Associate Professor, University of Buffalo School of Law

AN EMPIRICAL STUDY COMPARING PATENT VALIDITY CHALLENGES AT THE PATENT TRIAL AND APPEAL BOARD VERSUS THE FEDERAL DISTRICT COURTS

Using an originally-constructed database of over 12,000 patent decisions heard at the Patent Trial and Appeal Board ("PTAB") over almost ten years from September 2012 through 2021, this Article analyzes how the Patent Trial and Appeal Board ("PTAB") makes decisions on whether to institute an inter partes review ("IPR") as well as whether it ultimately finds a patent invalid assuming the patent's claims have already been instituted. In addition to a database of all the cases, the Article is also based on an originally-constructed database gathered from Freedom of Information Act requests and public sources of the demographics of the several hundred administrative patent judges ("APJs") who preside over IPR proceedings. Reviewing over 7,800 patents assessed at the PTAB over the first decade of the adjudicative tribunal's existence, the Article analyzes whether there are differences in institution rates and final outcomes depending on the type of patentee owner, the technology type, the statutory section challenged, as well as the demographics of the APJs hearing the case in three-judge panels among other variables. The Article also analyzes how the scientific expertise of the judges hearing the case impacts decisions. The findings indicate that biotechnology inventions were less likely to be instituted and found invalid (once instituted) compared to other technology classes. In addition, predictably, patents held by small companies or non-practicing entity had higher institution and invalidation rates. Further, while judge demographics played less of a role, a judge's prior work experience was a statistically significant predictor in some analysis. In addition, the PTAB's tendency to occasionally switch the presiding judge for the merits phrase resulted in a lessened chance of the patent being found invalid.

Shalini Bhargava Ray, Associate Professor, University of Alabama School of Law
THE CHALLENGE OF SELF-REGULATION IN THE IMMIGRATION ENFORCEMENT BUREAUCRACY

From raiding workplaces to deporting long-term residents, the immigration enforcement bureaucracy across presidential administrations has earned a reputation for excess and a lack of discipline. Even under the leadership of presidents who seek to prioritize enforcement efforts, this corner of bureaucracy seldom produces rules or guidance sufficient to constrain its frontline officers. Recent scholarship has highlighted the importance of enforcement priorities in rational implementation of immigration law, but less attention has been paid to why the immigration enforcement bureaucracy produces so little internal administrative law to constrain enforcement discretion—even though such constraints might help the agency better advance its purpose, properly conceived, or enhance its reputation.

The conventional account attributes the lack of restraint to the low status of deportable noncitizens, the objects of enforcement. What incentive would an agency have to "hold back" with respect to people formally excluded from the polity and only weakly protected by the Constitution? Several examples support the conventional account that high-status regulated parties must essentially demand agency restraint. Prominent examples involve agencies that regulate powerful, monied interests, like banks and other financial institutions capable of pressuring agencies through lobbying, the operation of a revolving door between agencies and regulated industries, or threat of suit. Nonetheless, the conventional account is incomplete and inaccurate in important respects. Agencies that regulate people who do not enjoy full citizenship routinely self-regulate, even in an enforcement setting. As a result, the conventional account lacks sufficient explanatory power.

This Article argues that a more complete explanation lies in other factors that shape agency culture and enforcement officials' conception of their mission. These include the dearth of professionals within the agency bound by ethical codes in how they carry out their work and a failure to grapple with tensions within the traditional justifications for immigration enforcement or to recognize the specific history of DHS. Ultimately, immigration enforcement suffers both from legitimacy and coherence deficits. This Article argues that cultivating a capacity for restraint in the immigration enforcement bureaucracy requires addressing these factors—and even then, there is little basis for optimism.

Session #2

Katharine Jackson, Assistant Professor, University of Dayton School of Law
THE PUBLIC TRUST: ADMINISTRATIVE LEGITIMACY AND DEMOCRATIC LAWMAKING

This essay argues that recent U.S. Supreme Court decisions invalidating agency policymaking based upon the major questions doctrine rely on a normatively and empirically mistaken notion of democratic popular sovereignty. Namely, they rely upon a transmission belt model that runs like this: democracy is vindicated by first translating and aggregating voter preferences through elections. Then, the popular will is transposed by members of Congress into the statute books. Finally, the popular will (now codified), is applied mechanically by administrative agencies who should merely "fill in the details" using their neutral, technical expertise. So long as statutes lay down sufficiently "intelligible principle[s]" that permit their application without significant discretionary remainder, regulation will carry democratic legitimacy because they who will the ends – the people – will the means. In addition to a variety of empirical objections, the model carries several unsavory undemocratic implications: e.g., a Schmittian repression of social difference and an abdication of lawmaking authority to judges. The essay then suggests that models of democratic political representation serve as better criteria to assess agency legitimacy because they recognize and take advantage of both the institutional mediation of democratic input and social conflict. It then revitalizes the oft-maligned trustee model of representation as an evaluative standard. Agencies' historical commitment to an inclusive notion of the public good, as well as their dedication to the public interest (qua beneficiary) over the often partial and self-serving commands of elected officials and powerful lobbyists (qua authorizers), make the trustee model an attractive starting point. With some democratic modifications that account for deliberation and debate about the meaning of the public good, the trustee model shows why agency decision-making has some strong democratic credentials. The essay concludes by offering some modifications to the legal doctrine used by courts to assess the legitimacy of agency action.

Amy C. Gaudion, Associate Dean & Professor of Lawyering Skills, Penn State Dickinson Law
SHIFTING THE OVERSIGHT LENS TO REFORM THE U.S. GOVERNMENT'S VULNERABILITIES EQUITIES PROCESS

In May of 2017, the WannaCry attack, later attributed to North Korea, resulted in the loss of billions of dollars for governments and private companies across the globe. A month later, the NotPetya attack, later attributed to Russia, wreaked additional and more devastating havoc, again on a global scale. Both attacks exploited a vulnerability found in Microsoft Windows operating systems. The U.S. government had discovered the same vulnerability more than five years earlier. Rather than notifying Microsoft of the vulnerability so that it could be patched, the U.S. government decided to keep the vulnerability secret so that it could be utilized for national security and intelligence purposes. In assessing whether to

disclose or retain such vulnerabilities, the U.S. government follows an internal executive branch policy called the Vulnerabilities Equities Policy and Process, often referred to as the VEP. The VEP is an interagency mechanism that weighs the benefits of sharing vulnerability information with the private sector - and the public - against the need to retain it for national security, intelligence, or law enforcement purposes. Since its inception, scholars and government officials have warned of the VEP's limitations and loopholes and the need for robust oversight. Despite these warnings, the VEP has remained a policy in the shadows. The timing, however, now appears ripe for reform of this little-known but consequential executive branch policy. A confluence of recent events provides optimal conditions for substantive review and meaningful reform.

Recognizing this opportune moment, this article proposes reforms to the VEP from an unconventional perspective. It rejects the usual calls for increased congressional reporting and codification. Rather, it argues that the traditional congressional oversight tools are poorly matched to the task of checking the executive branch's use of vulnerabilities to accomplish national security or intelligence collection objectives. It shifts the lens to consider how internal oversight mechanisms, including structural reforms and the work of inspectors general within the relevant agencies, may be more appropriately calibrated to this task. Part I examines the VEP's origins in the wake of 9/11 and its subsequent formal acknowledgment, its structures and processes, and its interaction with other efforts designed to encourage information sharing and collaboration with private sector entities and foreign partners. Part II examines the existing legal authorities and oversight mechanisms, and catalogs the shortcomings and loopholes in the current congressional oversight framework. Part III provides a case study of the WannaCry and NotPetya events as a way to understand the equities at stake in VEP decisions. It then summarizes the long-standing calls for reform of the VEP, and identifies the current conditions fostering and, in some instances, necessitating reform of the VEP. Part IV offers recommendations for reforming the VEP to improve oversight and transparency while preserving the U.S. government's need for flexibility in the use of vulnerabilities for offensive and defensive cyber measures. The VEP serves a critical function in a time when cyber capabilities are essential to national defense. It must, however, be pulled from the shadows to effectively serve that function, and reform efforts designed to illuminate the VEP must move beyond the usual congressional reporting frameworks to include internal oversight mechanisms and tools appropriately suited to the task.

Jacob Hamburger, Postdoctoral Associate, Cornell Immigration Law and Research Program
HYBRID-STATUS IMMIGRANT WORKERS

The trend towards precarious work arrangements is one of the dominant features of twenty-first-century political economy. In recent years, both state and federal policymakers have sought solutions to one of the most significant strategies employers have used to weaken their workers' rights and protections under the law: "misclassifying" workers as independent contractors to avoid the obligations associated with employee status. Both legal scholarship and public discourse have paid a great deal of attention to the merits of various legal standards used to define who is an independent contractor, including the "ABC test" adopted by California's recent reform bill and the PRO ACT passed by the House of Representatives. These discussions have nonetheless failed to grapple sufficiently with the implications of these reforms for a particularly vulnerable subset of precarious workers: undocumented immigrants without federal employment authorization.

Immigrant workers often depend on independent contractor status to work. Federal immigration law requires employers to verify that all employees are permitted to work in the United States, but does not require verification of independent contractors' immigration status. As a result, immigrants can work as independent contractors without having to produce false documents, or to seek out unscrupulous employers willing to break the law. Independent contractor work is no less precarious for immigrant workers than for their native-born counterparts, but new reforms may improve their working conditions by extending to them many of the protections of labor and employment law. However, these reforms may also have the unintended consequence of shutting immigrant workers out of the formal economy by defining more work arrangements as "employment."

This Article examines how efforts to combat employee misclassification can include immigrants without federal work authorization. It argues that it is possible to adopt broader legal standards that define immigrant workers as employees for state and federal work law purposes, while immigration law continues to treat these workers as independent contractors under the narrower traditional approach. Allowing this hybrid status to exist between work law and immigration law contexts to coexist will nonetheless likely require action on the part of both state legislatures and federal administrative agencies. Reaching this balance has the potential to foster cooperation between state and federal policymakers seeking to strengthen protections for immigrants and workers.

Haiyun Damon-Feng, Acting Assistant Professor of Lawyering, NYU School of Law
ADMINISTERING RELIANCE

Presidential administrations often effectuate their policy agendas by wielding executive power to direct informal agency action. Such action may generate reliance interests recognized under administrative law, which can then bind subsequent administrations to continue such policies despite the policies originally having little or no formal binding effect. This issue is particularly salient following a change in presidential administration, when an incoming administration seeks to replace their predecessor's policies with their own. The role that reliance interests play in securing the durability of informal agency action is under-developed by courts and under-explored in legal scholarship, but the way that administrations, litigants, and courts view this type of reliance—what I call "administrative reliance"—is highly consequential to an administration's ability to govern. The underdeveloped judicial doctrine surrounding reliance interests leaves it vulnerable to unprincipled and partisan application, as reliance interests can be—and have been—invoked by litigants and courts to delay policy change in the wake of presidential regime change.

This article examines disparate theories of administrative reliance that have been adopted by courts and makes two principal contributions. First, it offers a taxonomy of reliance by identifying and examining certain critical factors underlying administrative reliance, and it applies this taxonomy as an evaluative tool to determine the legal cognizability of the reliance interests asserted. Second, it argues that courts should adopt a more principled approach to reliance interests, in a way that gives due consideration to vested rights and promotes democratic accountability while minimizing the potential for partisan manipulation and delay of policy change.

Laura E. Dolbow, Sharswood Fellow, University of Pennsylvania Carey Law School
BARRING JUDICIAL REVIEW

Whether judicial review is available is one of the most hotly contested issues in administrative law. Recently, statutes that expressly bar judicial review have generated significant debate in the Medicare, immigration, and patent contexts. These debates are likely to continue during implementation of the Inflation Reduction Act, as the Medicare price negotiation laws contain provisions that expressly bar judicial review. In addition to debates about existing review bars, jurisdiction-stripping has been proposed as a reform for an increasingly partisan federal court system. Amidst debates about the removal of judicial review, little is known about how often, and in what contexts, statutes expressly preclude judicial review.

This Article fills that gap by creating a taxonomy of statutes throughout the U.S. Code that expressly preclude judicial review of agency action, i.e., "judicial review bars." It reveals that express preclusion is a phenomenon: 190 statutory provisions expressly bar judicial review of agency actions. Statutes regularly bar review over internal agency management decisions such how to allocate resources and to set priorities. Because judicial review has traditionally been considered a core tool for overseeing agencies, this Article next investigates alternative oversight tools that exist for actions barred from judicial review. Review bar statutes often create structures to facilitate oversight by the political branches and the public. Such structures include requirements to establish internal procedures, to consult with stakeholders, and to publish decisions. Further, many review bars involve government spending programs, which are subject to appropriations oversight.

These findings have several implications for normative debates, statutory interpretation, and reform proposals. The prevalence of alternative oversight tools suggests that judicial review bars are a legitimate institutional design choice to balance efficient implementation of regulatory programs with individual interests and democratic values. A recent example at the Patent Office illustrates how the combination of review bars and alternative oversight tools can serve these goals. Moreover, because alternative oversight tools play a role in preserving democratic values, courts should consider the availability of these tools when interpreting review bars. Finally, judicial review bars and alternative oversight tools could be used in future legislation to foster internal administrative law, to oversee agency adjudications, and to protect agencies against partisan attacks in courts.

Emily R. Chertoff, Academic Fellow, Columbia Law School
ORDER MAINTENANCE AGENCIES

Underpinning much administrative law and scholarship is an assumption about what agencies look like on the inside. Agencies generate their own internal administrative law, a body of guidance and management structures, to keep bureaucrats in line with mandates from elected officials. This "foundational account" of day-to-day agency action rests on assumptions about line administrators' behavior and work that still pervade both scholarship and doctrine.

The foundational account was tailor-made to reflect agencies that primarily do regulation or welfare provision. But a third of the administrative state consists of agencies that spend at least part of their time maintaining order in our society by carrying out basic police functions – activities like making arrests, maintaining discipline in prisons, or patrolling the border. Order maintenance is profoundly different from other types of agency action, and a new generation of scholars has recently turned to examining previously neglected administrative agencies that do order maintenance work. Yet despite similarities

between the work of these agencies, the literature still lacks a theory of order maintenance as a form of agency action that takes place across the administrative state.

This work in progress attempts to fill this gap in the literature by giving the first account in the legal scholarship of order maintenance as a form of agency action. It lays out what makes order maintenance different from other types of agency action, how order maintenance agencies depart from the foundational account, and why it matters. The Article builds a theory of order maintenance out of two bodies of qualitative research: an original, in-depth case study of Immigration and Customs Enforcement's Enforcement and Removal Operations (ICE ERO), an agency that does paradigmatic order maintenance work; and an existing body of decades of social science scholarship on order maintenance work in similar organizations, primarily the police. The case study alone represents a contribution to administrative law scholarship. It builds a picture of the internal environment of ICE ERO out of thousands of pages of agency guidance documents; a set of original, semi-structured interviews with former government officials, litigators, and policy experts; and an archive of primary and secondary sources including FOIA results, government oversight reports, litigation papers, and investigative journalism. Drawing on these materials, the Article uncovers the essential features of order maintenance as a form of day-to-day agency action.

This Article's account of order maintenance has three significant payoffs. To administrative theory, it contributes the first theory of this form of agency action, which was not included in the foundational account but which arguably poses more profound challenges for democracy than other forms of administration. For administrative law, it offers a concrete example of the limitations of trans-substantivity in administrative doctrine. It specifically uncovers a misalignment between, on the one hand, order maintenance; and, on the other, the law's treatment of guidance and the presumption of regularity for administrators. And in the realm of immigration and criminal procedure, it suggests that Fourth and Fifth Amendment exclusionary rules ought to apply robustly to ICE.