THE YALE LAW JOURNAL

ALEXANDER NABAVI-NOORI

Agency Control and Internally Binding Norms

ABSTRACT. Lower courts have consistently held that agencies may not issue guidance that purports to bind the public. In their parlance, guidance cannot create a "binding norm" on regulated parties. The courts have been far less clear, however, on the extent to which guidance can appropriately bind the issuing agency or its staff. Courts have approached this issue in widely divergent ways, and some have held that guidance cannot even bind low-level agency officials.

In the shadow of this uncertainty, agencies continue to use guidance as an important tool for internal administration. Guidance facilitates bureaucratic supervision of frontline officials, enables agency administrators to exercise the agency's discretion transparently, and communicates the agency's interpretations of the law to both internal and external actors. To serve these functions, guidance must impose some binding norms on agency staff. Despite the importance of guidance to the internal operations of the administrative state, little empirical work exists to shed light on how agencies design and deploy these policies and whether their practices comport with the assumptions of the binding-norm doctrine.

To fill this gap, this Note conducts a comparative assessment of the guidance practices at three agencies: the Equal Employment Opportunity Commission, the Occupational Safety and Health Administration, and U.S. Citizenship and Immigration Services. Drawing on employee manuals, briefings in response to litigation, and interviews with agency insiders, I evaluate how these agencies use guidance to manage the discretion and work of agency staff. I find that officials at each agency believe that guidance must necessarily be capable of binding internal agency actors, particularly frontline officials, to effectuate consistent and transparent internal administration. These findings reveal a disconnect between the actual practices at these agencies and recent judicial decisions invalidating agency guidance. To resolve this discrepancy, I propose a new contextual approach to judicial review of guidance that encourages courts to distinguish between the internal and external binding effects of guidance. This approach weighs the underlying authority of the agency to act absent the guidance, the power of the agency generally to create indirect binding effects on regulated parties, the agency's internal procedures for contesting guidance, and the audience for the guidance to determine whether the guidance is appropriate or simply a substitute for a legislative rule.

AUTHOR. Yale Law School, J.D. 2021; University of California, Los Angeles, B.A. 2017. Special thanks to Nicholas Parrillo for supervising this project and for his invaluable support and guidance throughout its development. I am also indebted to Michael Beechert, Monica Bell, Nathaniel Donahue, Blake Emerson, Lucas Guttentag, James Linnell, Christopher Otmar, Cristina Rodríguez, Simone Seiver, and Melody Wang for their insightful comments and support, and to the participants in the Spring 2021 *Yale Law Journal* Student Scholarship Workshop for their helpful suggestions. I am grateful to Jackson Busch, Joe Linfield, Rachel Sommers, and the editorial staff of the *Yale Law Journal* for their excellent suggestions throughout the publication process. Finally, I thank my mother, Skarlete Nabavi-Noori, for her endless support in all my endeavors. All errors are my own.

NOTE CONTENTS

INTRODUCTION

Administrative agencies carry out their missions, delegated to them by Congress, in part by issuing legislative rules. Agency legislative rules (also referred to as "regulations") vastly outpace the legislative output of Congress and, together with ordinary statutes, create a web of requirements that regulated parties must adhere to. Still, these legislative rules and statutes often leave many unanswered questions about what the law requires and consequently leave agencies with significant discretion in enforcing their mandates. As a result, agencies also generate significant amounts of "guidance": general statements of policy or interpretations of existing law that advise the public—and agency staff—on how the agency intends to exercise this discretion.

Scholars, practitioners, and courts have long sought to develop a reliable means of distinguishing agency legislative rules from agency guidance.[1] Though a seemingly mundane distinction, the stakes involved in setting boundaries around guidance documents are high. Although guidance documents, unlike legislative rules, cannot formally bind regulated parties, they comprise the vast majority of the regulatory output of the administrative state and collectively play a central role in structuring agency action and discretion.[2] These documents can determine, for example, the procedures that workplace-safety inspectors dutifully follow in carrying out their on-site safety inspections, or whether a frontline immigration officer will favorably exercise discretion to provide an individual with relief from removal.[3]

The fundamental distinction between agency guidance documents and legislative rules is grounded in the Administrative Procedure Act of 1946 (APA). To promulgate new legislative rules, the APA ordinarily requires that agencies undergo a set of time-consuming and resource-intensive procedures, including notice and comment, which allow regulated parties and interested members of the public to play a role in shaping eventual regulations.[4] These legislative rules carry the force of law and can create new rights for or obligations on regulated parties.

---

1. *Cf.* Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, J.) ("An important continuing project for the Executive Branch, the courts, the administrative law bar, and the legal academy—and perhaps for Congress—will be to get the law [regarding guidance] into . . . a place of clarity and predictability.").
2. The sheer number of guidance documents, though not easily knowable, dwarfs the body of substantive regulations and statutory law. *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468-69 (1992).
3. For these and other examples of agency guidance in action, see *infra* Section I.A.
4. *See* 5 U.S.C. § 553(b), (c) (2018).

By contrast, agencies can issue guidance documents with few procedural requirements at all thanks to the APA's exemptions for "general statements of policy" and "interpretative rules."[5] Consequently, agencies can issue guidance documents in far greater volume, at a much faster pace, and with far less accountability than they can promulgate legislative rules. Agencies therefore use guidance to rapidly respond to their experience with regulations in the real world and to ease the burden of implementing large, complex policy initiatives.[6]

Unlike legislative rules, however, guidance documents lack formal legal force. In the language of the courts, agencies may not use these documents to establish a "binding norm."[7] Instead, guidance must satisfy two criteria. First, it must "act[] prospectively," proceeding carefully so as not to "impose any [new] rights and obligations" on a regulated party.[8] Second, and more controversially,

---

5. *Id.* § 553(b)(A). Although the Administrative Procedure Act (APA) formally refers to "interpretative" rules, this Note will use the briefer term "interpretive" when referring to these rules. Both terms are widely used in the literature on the guidance exemption.

   It is also important to briefly note the scope of the APA's guidance exemption to the notice-and-comment requirement. The guidance exemption, in full, covers "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* The former two categories cover all varieties of agency guidance. The APA does not further define or distinguish what separates "interpretative rules" from "general statements of policy." The *Attorney General's Manual on the Administrative Procedure Act* offers one set of definitions, describing policy statements as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," while defining interpretive rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." TOM C. CLARK, U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947). Nevertheless, the APA, by its structure, does not necessarily imply that these different forms of guidance should be treated differently for purposes of evaluating their validity. Regardless, the courts have generally coalesced around the idea that interpretive rules can sometimes be binding—even if policy statements cannot be. *See* Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 315-51 (2018); *see also infra* Section I.B.1 (elaborating on the binding-norm test applied by courts).

6. *See* Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 815 (2010).

7. Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974). The D.C. Circuit's analysis in *Pacific Gas & Electric Co.* supplies a classic formulation of the binding-norm test. In that case, the court describes a general statement of policy as "not finally determinative of the issues or rights to which it is addressed." *Id.* Instead, the general policy merely "announces the agency's tentative intentions for the future," which the agency "must be prepared to [later] support . . . as if the policy statement had never been issued." *Id.* This analysis remains authoritative, though the precise formulation of the binding-norm test and its requirements have evolved over time. *See* Levin, *supra* note 5, at 291.

8. Am. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980) (quoting Texaco, Inc. v. Fed. Power Comm'n, 412 F.2d 740, 744 (3d Cir. 1969)).

the guidance must "leave[] the agency and its decision-makers free to exercise discretion."[9] To enforce this test, the courts engage in a legal fiction, determining that agency guidance that inappropriately creates such a binding norm is not guidance at all, but instead a procedurally invalid legislative rule that should have undergone notice-and-comment rulemaking. So, to qualify for the APA's guidance exemption from notice-and-comment procedures, guidance documents may only telegraph what an agency *might* do in a certain scenario, leaving room for alternative approaches proposed by regulated parties and allowing agency staff to exercise discretion.

The paradigmatic use case for permissible guidance under this test arises where a statute or regulation leaves businesses, individuals, or other regulated parties uncertain exactly how to achieve compliance, either because it does not anticipate a particular factual scenario or because the relevant requirements are vague, leaving room for competing interpretations. An agency might then choose to issue guidance to address these ambiguities. The guidance would offer regulated parties insight into how they might achieve compliance with regulatory mandates in the face of this uncertainty, while emphasizing that the agency's view is tentative and remains open to alternatives. In other words, the guidance is not "binding" on the regulated parties; it is merely a suggestion.

Much of the existing scholarship on agency guidance and the binding-norm test is preoccupied with the *external* effects of guidance documents—that is, their effects on regulated parties. Scholars have, for example, long been skeptical that agencies use guidance as merely a tool to clarify existing regulatory obligations. Instead, these scholars argue that agencies regularly use guidance to create new obligations without having to undergo notice and comment. As a result, much has been written to address the question of just when agencies go too far over the line in writing guidance that is unlawfully "binding" on regulated parties—and whether agencies do so regularly and with malicious intent to subvert otherwise necessary procedures.[10] Recently, however, a new body of empirical research has begun to challenge this simplistic view of guidance, elucidating the

9. *Id.*

10. *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1315 (1992) ("[A]gencies often inappropriately issue [guidance] with the intent or effect of imposing a *practical* binding norm upon the regulated or benefited public."); *see also* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 260 (2014) ("When agencies want to impose restrictions they cannot openly adopt as administrative rules, and that they cannot plausibly call 'interpretation,' they typically place the restrictions in guidance, advice, or other informal directives. Of course, they cannot enforce this under-the-table administrative legislation as easily as more aboveboard administrative legislation, and they therefore often turn to under-the-table threats of an executive or judicial nature.").

subtler practical realities that define the relationship between agencies and regulated parties. Most notably, a recent study by Nicholas R. Parrillo on behalf of the Administrative Conference of the United States (ACUS) identifies structural and institutional factors that help explain why regulated entities may choose to comply with guidance—and, in fact, even request that agencies produce more guidance to help them achieve compliance—rather than ignore it.[11] Nevertheless, the existing doctrine and its emphasis on rooting out impermissibly "binding norms" are still rooted in the traditional skepticism of guidance's external effects.

There is, however, another important function for agency guidance that has received far less scholarly attention in connection with the binding-norm test: how agencies use guidance *internally* as a tool for managing the work of their staffs. Like supervisors at any complex organization, agency administrators need to direct and control the work of lower-level employees. In addition to the important role guidance documents play in structuring the relationship between agencies and regulated parties, they also represent a crucial mechanism through which agency administrators communicate with agency staff about how to exercise the agency's often considerable discretion. This communication often happens in the form of enforcement guidelines, field guidance, policy manuals, and a range of other documents that agency supervisors use to encourage the consistent and transparent exercise of the agency's discretion by frontline officials.

On its face, the binding-norm test poses a serious challenge for the internal functioning of agency guidance. As often written and recited by the courts, the test emphasizes that guidance must leave the "agency *and its decision-makers* free to exercise discretion" without distinguishing between staff at different levels of the agency hierarchy or further elaborating on where this decision-making flexibility must be located.[12] The test therefore suggests that an agency cannot compel its own frontline employees, who must routinely make decisions and exercise discretion on behalf of the agency, to follow the agency's own guidance documents. At least some courts have adopted this position, insisting that even frontline officials must be free to exercise individual enforcement discretion unbound

11. Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective*, ADMIN. CONF. U.S. 7-22 (Oct. 12, 2017) [hereinafter Parrillo, *An Institutional Perspective*], https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf [https://perma.cc/SKX9-KLUZ]. These factors depart from the conventional wisdom that agency officials consciously engage in bad-faith efforts to coerce regulated parties while circumventing APA procedures. *See id.* at 5; Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 174 (2019) [hereinafter Parrillo, *An Empirical Study of Agencies and Industries*].

12. *Am. Bus Ass'n*, 627 F.2d at 529 (emphasis added).

by guidance promulgated by the agency head[13] — a result that would significantly undermine agencies' ability to engage in bureaucratic supervision of low-level staff. A more modest view would suggest that so long as the agency itself remains free to exercise discretion to depart from guidance, either through the agency head or through appeal to supervisors within the agency, then the guidance can avoid creating an impermissible binding norm.[14] But the question of which of these views, if any, reflect the empirical realities of how agency administrators expect guidance to operate within the agency, or, for that matter, how frontline agency officials expect to carry out their roles has yet to be explored.

Indeed, the everyday internal workings of agency guidance documents are "rife with 'unknown unknowns.'"[15] As a result, important questions remain as to how agencies train and instruct frontline personnel to consistently apply the agency's view of the law without impermissibly running afoul of the binding-

13. Notable recent examples of this trend come from the Fifth Circuit. In one case, *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019), the appeals court invalidated the U.S. Equal Employment Opportunity Commission's (EEOC) guidance on employers' use of criminal records in hiring because it bound the agency and its staff to a position that produced legal consequences, even though the guidance could legally have no binding effect on state employers. The Fifth Circuit and its district courts have also taken this view in the many challenges to the various immigration deferred-action programs for childhood arrivals and their parents, even though guidance in this space merely communicates and formalizes how the government will exercise its existing enforcement discretion with respect to these populations. *See* Texas v. United States, 809 F.3d 134, 175-76 (5th Cir. 2015) (holding unlawful the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) memorandum in part because the court could not identify evidence that individual immigration adjudicators retained case-by-case discretion to depart from the memorandum's criteria for enforcement); Texas v. United States, No. 18-CV-00068, 2021 WL 3025857, at *21 (S.D. Tex. July 16, 2021) (holding unlawful the Deferred Action for Childhood Arrivals (DACA) memorandum because the program does not allow frontline immigration officials to "vary from the [memorandum's] imposed criteria" for exercising enforcement discretion), *appeal filed*, No. 21-40680 (5th Cir. Sept. 16, 2021).

14. *See* Levin, *supra* note 5, at 305-06 ("[A]n agency should be allowed, without resorting to notice-and-comment, to issue a guidance document that is binding on its staff if persons affected by the document will have a fair opportunity to contest the document at a later stage in the implementation process."); Administrative Conference of the United States: Adoption of Recommendations, 82 Fed. Reg. 61,728, 61,736 (Dec. 29, 2017) (Administrative Conference Recommendation 2017-5: Agency Guidance Through Policy Statements) ("Although a policy statement should not bind an agency as a whole, it is sometimes appropriate for an agency, as an internal agency management matter, and particularly when guidance is used in connection with regulatory enforcement, to direct some of its employees to act in conformity with a policy statement. . . . For example, a policy statement could bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize action that varies from the policy statement.").

15. Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 ADMIN. L. REV. 57, 67 n.38 (2019).

norm test. How do agencies promote or discourage flexibility in implementing guidance at different levels of the agency's decision-making hierarchy? How much rigidity do agencies expect from frontline staff in implementing agency guidance? If guidance is nominally binding at one level of the agency, are there easily accessible mechanisms through which regulated parties can request departure from higher-ups? And to what extent does the agency's managerial hierarchy impact the force of guidance within the agency? These questions are crucial to understanding whether the application of the binding-norm test to internal guidance is consistent with how agencies practically administer internal guidance, and whether the benefits of the binding-norm test outweigh the potential costs to agencies' ability to engage in legitimate internal administration.[16]

Answers to these questions have doctrinal, theoretical, and practical implications. Doctrinally, the binding-norm test has frequently been referred to as "enshrouded in considerable smog"[17] and may be one of the "most frequently litigated and important issue[s]" of administrative law before the courts today.[18] The test is often applied to guidance that purportedly binds *regulated parties*, but in recent years courts have increasingly invoked it in circumstances where the primary effect of the guidance is to create internal uniformity among *agency staff* in their exercise of the agency's discretion.[19] Although nearly every guidance document will have effects on both external regulated parties and internal agency actors, these recent applications of the binding-norm test threaten to erase the distinction between these two effects. Erasing this distinction has resulted in courts prohibiting agencies from binding their own decision makers in pursuit of policing the permissible effects of guidance on regulated parties, but without regard for the consequences that such decisions have on internal agency administration. Although scholars and courts are engaged in continuing efforts to clarify the distinction between guidance and legislative rules as they relate to regulated parties, the case law on whether and how guidance may purport to bind

16. *Cf.* Cass R. Sunstein, *"Practically Binding": General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491, 499-504 (2016) (arguing that assessments of the benefits and costs of the "practically binding" test "depend on empirical conjectures on which we lack good evidence").

17. Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (quoting Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975)); *see also* Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. 1, 4 n.13 (1994) (citing cases using the "smog" aphorism).

18. Levin, *supra* note 5, at 265.

19. *See* cases cited *supra* note 13.

agency staff remains hotly contested and theoretically murky.[20] The issue also remains live, attracting continuous litigation and producing an unresolved 4-4 split at the Supreme Court.[21]

Theoretically, understanding how agency administrators deploy guidance internally implicates important questions about the "meaning and boundaries of law itself in the administrative state."[22] From the perspective of traditional skeptics of guidance documents, even guidance that is only internally binding can create avenues for agencies to skirt procedural rules and engage in substantive regulation without undergoing the costly notice-and-comment process.[23] From the agency's perspective, however, these documents are part of the bread-and-butter toolset used to carry out the agency's mission and can collectively contribute to the agency's "internal law" of administration. They facilitate accountable bureaucratic supervision of agency staff by focusing and directing the agency's discretion from the highest, most politically accountable levels; ensure uniform and fair application of the underlying regulatory or statutory requirements across agency staff; and communicate the agency's internal views to the public.

Finally, the debate about the proper role of agency guidance—including within agencies as a tool of agency administration—has become a deeply political one with significant practical implications for the operation of the administrative state. Congress, the President, and the courts continue to lend credibility to the skeptical view of guidance as a potentially dangerous tool that enables runaway

---

20. *See, e.g.*, Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1283 (2017) ("[T]o the extent an agency's internal pronouncements appear to do the work of internal law—to establish norms that bind agency actors, or confine, structure, and constrain the agency's discretion—they risk creating grounds for external judicial review of the agency's compliance."); Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation:* CNI v. Young *and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 153-54 (1992); *see also infra* Sections I.B.1, I.B.2 (discussing judicial constraints on internal agency guidance).

21. *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016).

22. Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2128 (2019).

23. This is the position of scholars, including, notably, Robert A. Anthony, who warned that, in practice, the distinction between guidance that was supposed to be treated as prospective or tentative and a coercive legislative rule broke down. This would result in guidance documents that had no formal legal authority over regulated parties still having a "practical binding effect" on them. *See* Anthony, *supra* note 10, at 1328-32. This is a functional approach to the guidance / legislative rule distinction that has helped to collapse the analyses of internal and external binding effects, with a greater emphasis on the potential binding effects on regulated parties.

administrative overreach.[24] In recent years, these concerns have grown louder in conservative circles, particularly after the Obama Administration's issuance of controversial guidance documents that effected changes in education,[25] immigration,[26] and employment discrimination.[27] Consequently, the Trump Administration was active in not only rescinding guidance documents from the Obama Administration,[28] but also openly questioning the proper role of guidance within

24. *See, e.g.*, H.R. REP. NO. 106-1009, at 1 (2000) (noting that guidance documents can allow agencies to skirt procedures that "protect citizens from arbitrary decisions and enable citizens to effectively participate in the process"); *Examining the Use of Agency Regulatory Guidance, Part II: Hearing Before the Subcomm. on Regul. Affs. & Fed. Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affs.*, 114th Cong. (2016); *Examining the Use of Agency Regulatory Guidance: Hearing Before the Subcomm. on Regul. Affs. & Fed. Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affs.*, 114th Cong. (2015); Truth in Regulations Act of 2017, S. 580, 115th Cong. § 2(e) (making notice and comment the default for any guidance with exemptions to be made by the agency in consultation with the Office of Management and Budget (OMB)); Truth in Regulations Act of 2016, H.R. 6283, 114th Cong. § 2(d) (same); Article I Regulatory Budget Act, H.R. 5319, 114th Cong. § 4(b) (2016) (requiring notice and comment for any "significant" guidance by the OMB definition); Article I Regulatory Budget Act of 2016, S. 2982, 114th Cong. § 4(b) (same).

25. *See, e.g.*, C.R. DIV. & OFF. FOR C.R., U.S. DEP'T JUST. & U.S. DEP'T EDUC., DEAR COLLEAGUE LETTER FROM ASSISTANT SECRETARY FOR CIVIL RIGHTS CATHERINE E. LHAMON & PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS VANITA GUPTA (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/JR89-ZLPE].

26. *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs. & John Morton, Dir., U.S. Immigr. & Customs Enf't (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/QQM3-QGFE] (regarding the exercise of prosecutorial discretion through the Obama Administration's DACA program for undocumented children); Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't & R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf [https://perma.cc/643A-7EKW] (regarding the exercise of prosecutorial discretion through the Obama Administration's DAPA program for the parents of undocumented children).

27. OFF. OF LEGAL COUNS., U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT (Apr. 25, 2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [https://perma.cc/H6C8-DZHD] (issuing guidance on the use of arrest-and-conviction records in employment).

28. *See, e.g.*, Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf't, Kevin K. McAleenan, Acting Comm'r, U.S. Customs & Border Prot., Joseph B. Maher, Acting Gen. Couns., James D. Nealon, Assistant Sec'y,

the administrative state generally[29] and proposing new rules that would have significantly curbed the ability of agencies to produce any guidance at all.[30] Many agency officials, by contrast, see limitations on issuing guidance that binds agency staff as a threat to their ability to carry out their regulatory mission.[31]

This Note responds to these debates and contributes to the empirical literature on agencies' use of guidance documents. It turns inward to examine internal agency practices, with a special focus on how agencies of various designs use guidance to manage staff discretion in light of the binding-norm test. To this end, I have chosen three agencies — the U.S. Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA), and U.S. Citizenship and Immigration Services (USCIS) — spanning a core cross section of the administrative state for a comparative assessment of their practices.[32] For each agency, I draw on employee manuals, document descriptions from the agency websites, briefings in response to litigation on guidance, and interviews with agency officials and industry attorneys to evaluate how

Int'l Engagement & Julie M. Kirchner, Ombudsman, U.S. Citizenship & Immigr. Servs. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/8TJY-BFXF] (attempting to rescind the Obama Administration's DACA guidance, an action that was later struck down by the Supreme Court in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020)).

29. *See, e.g.*, Memorandum from Att'y Gen. to Dep't of Just. Components, Prohibition on Improper Guidance Documents 1 (Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012271/download [https://perma.cc/VPS5-VXY9] (prohibiting the U.S. Department of Justice (DOJ) from "issu[ing] guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch"); *see also* Memorandum from Assoc. Att'y Gen. to Heads of Civ. Litigating Components & U.S. Att'ys, Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Jan. 25, 2018), https://www.justice.gov/file/1028756/download [https://perma.cc/2FEP-M5ZG] (taking a similar approach to DOJ's management of affirmative civil enforcement).

30. *See* Exec. Order No. 13,891, §§ 3-4, 84 Fed. Reg. 55,235, 55,236-37 (Oct. 15, 2019) (attempting to bring guidance under increased presidential — and, therefore, political — control, by increasing the scope of White House review of these documents). As an example of just how politically fraught these seemingly obscure controls on agency guidance have become — and how important each administration finds them to its desired function of the administrative state — the Biden Administration rescinded the Trump order on its very first day in office. *See* Exec. Order No. 13,992, § 2, 86 Fed. Reg. 7,049, 7,049 (Jan. 25, 2021); Joseph R. Biden, Jr., *Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-revocation-of-certain-executive-orders-concerning-federal-regulation [https://perma.cc/UB8K-ADL5] (announcing the Biden Administration's first-day orders concerning federal regulation).

31. *See infra* Part II.

32. *See* Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 354 & n.20 (2017) (noting that agencies dedicated to civil rights, health and safety, national security, and the environment comprise the core "security state").

these agencies deploy guidance to manage the discretion and work of agency staff.

This analysis reveals crucial differences between the internal and external binding effects of agency guidance that remain unrecognized by the current binding-norm test. Namely, agency officials depend on internal guidance as an important tool to cabin the discretion of frontline employees and ensure uniform application of the law—purposes that stand in tension with the binding-norm test as applied by the courts. These differences lead to a doctrinal mismatch: although the binding-norm test may make sense where courts are concerned about impermissible regulation of external parties without the benefit of notice-and-comment procedural protections, it does not reflect how or why agencies use guidance internally. A stringent application of the binding-norm rule against frontline agency decision makers without a deeper examination of agency practice and structure fails to account for the realities of internal agency administration.

The remainder of this Note is organized as follows. Part I discusses the role of guidance within agencies' internal administration and the judicial controls on this practice. Next, Part II analyzes how three agencies with diverse organizations and missions formulate and implement guidance within their hierarchies. Finally, in Part III, the Note concludes by proposing a new contextual approach to judicial review of guidance that encourages courts to consider the internal and external binding effects of guidance separately. This approach calls for courts to weigh the underlying authority of the agency to act absent the guidance, the power of the agency generally to create indirect binding effects on regulated parties, the agency's internal procedures for contesting guidance, and the audience for the guidance to determine whether the guidance is appropriate or simply a substitute for a legislative rule.

I. THE ROLE AND LIMITS OF GUIDANCE IN INTERNAL ADMINISTRATIVE LAW

In this Part, I examine the background against which agencies develop, structure, and implement guidance in administering their regulatory missions. Section I.A begins by advancing a theoretical account of the central role agency guidance plays in shaping the internal law of administrative agencies. To that end, it surveys the internal effects of guidance—how it allows agency officials to instruct staff, control discretion, and create coherent justifications for agency action—and how these internal effects are theoretically distinct from the external effects of guidance on regulated parties. Section I.B then briefly canvasses the

current limitations on agencies' use of guidance—namely, doctrinal limits imposed through the binding-norm test and the doctrine on agency exercise of enforcement discretion.

A. Guidance as a Tool for Administration

Agency guidance documents come in an almost endless variety of forms. They vary based on their audiences, the agencies from which they originated, and the ways in which they are implemented. And they go by many names, including compliance manuals, field manuals, enforcement guidance, policy guidance, policy statements, management directives, enforcement memoranda, standard interpretations, and fact sheets, among other names.[33] The multiplicity of forms these documents take makes it difficult to tell a single story about the everyday use and role of guidance.

The classic use case for guidance involves regulations and statutes that fail to clarify how exactly to achieve compliance, either because they do not anticipate a particular factual scenario or because they are vague, leaving room for multiple competing interpretations. To address these ambiguities, agencies issue guidance (sometimes at the behest of regulated parties)[34] to clarify how to comply with the law.

Take, for example, OSHA's workplace-sanitation regulations. These regulations require, among other things, that "toilet facilities . . . be provided in all places of employment in accordance" with the regulations.[35] But what if an employer provides adequate toilet facilities and then introduces barriers that limit how much time employees can spend using them? Can these barriers be so re-

---

33. As I note above, the umbrella term "guidance" typically encompasses both general statements of policy and interpretive rules, two types of informal rules that the APA specifically exempts from notice-and-comment rulemaking. *See* 5 U.S.C. § 553(b)(3)(A) (2018); *supra* note 5 and accompanying text. In this Note, I explore agency guidance broadly without distinguishing whether the agency categorized such guidance as an interpretation or as a statement of policy. In interviews, I asked participants whether the distinction mattered. I also asked participants to contextualize how the agency internally distinguishes between different forms of guidance, and whether the interpretive rule / policy statement dichotomy matters for their practice. Often, the participants reported that this distinction does not have any practical significance. Participants explained that it is the duty of agency lawyers to take the agency's desired policy goal and then determine the form in which that goal can best be accomplished. For more on these findings, see, for example, *infra* text accompanying notes 198-199.

34. *See* Parrillo, *An Institutional Perspective*, *supra* note 11, at 35-37.

35. 29 C.F.R. § 1910.141(c)(1)(i) (2020).

strictive that the employer has, in effect, failed to "provide" the appropriate facilities? To answer this question, OSHA has issued a guidance memorandum interpreting the word "provide" to include "timely access" to toilet facilities.[36]

Take another example, this time from the immigration laws, which are riddled with vague requirements. The Immigration and Nationality Act imposes serious consequences for a noncitizen's unlawful presence. Commonly referred to as the "three- and ten-year bars," these restrictions provide that a noncitizen who has been unlawfully present for a single period of more than 180 days but less than one year, and then departs, is inadmissible for three years.[37] If they have been unlawfully present for a single period of one year or more, and then depart or are removed, a ten-year bar applies.[38] The grave consequences attached to the bars make it crucial to know how unlawful presence is accrued. For example, the statute specifies that no time spent while under the age of eighteen counts toward a noncitizen's unlawful presence.[39] But what about individuals who remain in the United States after having been granted deferred action? These individuals lack lawful status and are merely beneficiaries of temporary prosecutorial discretion.[40] The statute and relevant regulations are silent on this question. Instead, noncitizens seeking to calculate their accrued unlawful presence must consult agency guidance—in this case the USCIS Policy Manual and the Adjudicator's Field Manual—to clarify the issue.[41] Together, these guidance documents fill the gap left by the statute and subsequent regulations, explaining that for purposes

36. Memorandum from John B. Miles, Jr., Dir., Directorate of Compliance Programs, to Reg'l Adm'rs & State Designees (Apr. 6, 1998), https://www.osha.gov/laws-regs/standardinterpretations/1998-04-06-0 [https://perma.cc/BPP6-9UTN].

37. 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2018).

38. *Id.* § 1182(a)(9)(B)(i)(II).

39. *Id.* § 1182(a)(9)(B)(iii)(I).

40. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *Consideration of Deferred Action for Childhood Arrivals (DACA): Frequently Asked Questions* (Aug. 31, 2021), https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions [https://perma.cc/99ZZ-6P94] ("[D]eferred action does not confer lawful status upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.").

41. U.S. Citizenship and Immigration Services (USCIS) centralizes its guidance for adjudicators in the USCIS Policy Manual. This Manual is the successor to the earlier Adjudicator's Field Manual (AFM), the USCIS Immigration Policy Memoranda website, and other policy repositories, with the goal of creating a single location for all agency guidance in a more organized and accessible format. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL (Jan. 25, 2022), https://www.uscis.gov/policy-manual [https://perma.cc/XA2Z-RCJP]. Certain portions of the AFM, however, continue to be authoritative and have not yet been integrated into the new Policy Manual, including the provisions on accrual of unlawful presence. *See id.*

of USCIS adjudication, "an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect."[42]

As both examples illustrate, guidance can be a powerful tool to communicate with external regulated actors about how to comply with vague or incomplete regulations and statutes. The centrality of guidance has spawned an extensive body of research investigating how exactly agencies formulate and deploy guidance, and the effects these documents have on regulated parties. Indeed, volumes have been written attempting to answer key questions about the practical effects of agency guidance. Do agencies inappropriately use guidance to create novel regulatory requirements in the absence of legally binding rules?[43] In light of their potential for abuse, should the public be able to participate in the guidance-issuing process as they can with rulemaking?[44] And, what is the role of guidance both within the administrative state and beyond as a source of legally nonbinding but nonetheless authoritative and persuasive reason-giving?[45] Other studies have demonstrated the extent to which guidance is a crucial ingredient in the relationship between agencies and regulated parties, promoting both cooperation and contestation. In some cases, industries want—and even actively demand—guidance to help clarify vague legislative rules.[46] In other cases, industry and regulated parties decry guidance as inappropriately legislative, imposing

42. *Adjudicator's Field Manual*, U.S. CITIZENSHIP & IMMIGR. SERVS. ch. 40.9.2 (May 6, 2009), https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm40-external.pdf [https://perma.cc/8ZMU-3ESC]; *see also* U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 40 ("[A]n individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect.").

43. *See, e.g.*, Anthony, *supra* note 10, at 1315; Parrillo, *An Empirical Study of Agencies and Industries*, *supra* note 11, at 170.

44. *See, e.g.*, Jamie Conrad, *The Solution to Regulatory Ossification May Be Regulatory Cartilage*, YALE J. ON REGUL.: NOTICE & COMMENT (May 10, 2019), https://www.yalejreg.com/nc/the-solution-to-regulatory-ossification-may-be-regulatory-cartilage-by-jamie-conrad [https://perma.cc/TB3X-UWWL] ("[A]gencies should be required to provide notice and an opportunity to comment on drafts of sufficiently momentous guidance documents."); Parrillo, *An Institutional Perspective*, *supra* note 11, at 137-38. *See generally* Parrillo, *supra* note 15 (assessing the value of public participation in guidance issuance through an empirical study and concluding that participation decisions should be made on a document-by-document or agency-by-agency basis).

45. *See, e.g.*, Emerson, *supra* note 22.

46. *See* Parrillo, *An Institutional Perspective*, *supra* note 11, at 35-37.

novel requirements without notice and comment.[47] This latter view and its emphasis on binding effects on regulated parties have been particularly influential in the scholarly literature on guidance,[48] and this skepticism of guidance continues to influence policymakers to act to curb abuses of guidance.[49]

Notwithstanding the volume of scholarly writing, litigation, and political debate over the proper role of agency guidance, the everyday realities of how guidance documents operate *within* agencies and the central role they play in their internal administration often get short shrift. More than merely clarifying vague legislative rules to parties external to the agency, guidance also plays a crucial role in communicating to agency frontline staffers expectations on how they are to conduct inspections, adjudications, or enforce relevant regulations. For instance, the USCIS Policy Manual claims that it is specifically aimed at "assist[ing] immigration officers in rendering decisions."[50] The manual includes specific instructions to adjudicators on how to process claims and render decisions consistent with the official positions of the agency.[51] Although this information is useful for regulated parties who wish to predict the outcome of their cases, its primary stated purpose—and arguably its most significant impact—is in directing the work and influencing the discretion of frontline staff. The resulting document is a compilation of interpretations and discretionary decisions made by USCIS leadership that are then communicated to frontline staff with the authoritative weight of the agency behind them. In this context, guidance is

47. *See id.* at 187; *see also, e.g.*, *infra* notes 218-219 and accompanying text (discussing a challenge to an Occupational Safety and Health Administration (OSHA) interpretive memorandum by a regulated party).

48. *See supra* note 10 and accompanying text.

49. *See, e.g.*, Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (Oct. 9, 2019) (prohibiting agencies from enforcing rules set out in guidance documents that were not made publicly available beforehand); Memorandum from Att'y Gen. to Dep't of Just. Components, *supra* note 29, at 1 (emphasizing that guidance should not "create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements"); Memorandum from Assoc. Att'y Gen. to Heads of Civ. Litigating Components & U.S. Att'ys, *supra* note 29, at 1 (warning that DOJ should not issue guidance that "purport[s] to create rights or obligations binding on persons or entities *outside the Executive Branch*" (emphasis added)).

50. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 41.

51. Taking another example from immigration law, the Immigration and Nationality Act (INA) sometimes conditions relief from removal on an applicant's demonstrating "good moral character." *See, e.g.*, 8 U.S.C. § 1229b(b)(2)(A)(iii) (2018) (regarding the cancellation of removal and adjustment of status for certain nonpermanent residents). In helping to define that term, the USCIS Policy Manual instructs adjudicators to "consider the totality of the circumstances" and to weigh certain enumerated factors including family ties, background, education, employment history, and community involvement in adjudicating claims of good moral character. 12 U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 41, pt. F, ch. 2.

not just about tipping off regulated parties or the public about what the agency *might* do; it is about telling agency staff what *to* do.

As administrative-law scholars have long recognized, guidance is a tool that agency administrators use to control the everyday internal operations of the agency.[52] These tools, which together structure and order the inner workings of the bureaucracy, comprise the "internal" administrative law of agencies. While the traditional "external" law of the agencies comprises easily recognizable and traditionally legislative actions, the "paradigmatic form of internal administrative law is the set of processes, guidelines, and organizational forms that an administrative agency adopts to structure the actions of its own officials."[53] Over time, internal administrative law has grown to include the "directions, orders, memoranda, bulletins, and circulars from central executive branch actors . . . [that] direct, guide, and inform how agencies operate."[54] These instruments are crucial to the operation of agencies because they "bind and are perceived as binding by agency officials" and "encourage consistency, predictability, and reasoned argument in agency decisionmaking."[55] That is, while legislative rules promulgated by the agency may communicate what the regulations formally require, it is the internal administration of these regulations that defines how a regulatory regime plays out in practice.

To be sure, every guidance document is likely to have both internal effects within the agency and external effects on regulated parties. Even guidance documents nominally directed at internal actors will see spillover effects on regulated parties.[56] Take again the example from USCIS above. The internal effect of the USCIS Policy Manual is to constrain the independence of the agency's army

---

52. *See, e.g.*, BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS 14 (1903) ("The internal law governs the processes by which the laws in general are carried into execution by the officers of the administration."); *see also* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 15 (1983) ("Might there not be an internal law of administration that guides the conduct of administrators? And might not that law be capable of generalization, critique, improvement . . . ?").

53. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law Before and After the APA*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 163, 164 (Nicholas R. Parrillo ed., 2017).

54. *Id.*

55. Metzger & Stack, *supra* note 20, at 1244; *see also* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 808 (2001) ("Citizens are better off if they can know about these instructions and rely on agency positions, with the assurance of equal treatment such central advice permits, than if they are remitted to the discretion of local agents and to 'secret law.'").

56. *See* Parrillo, *An Institutional Perspective*, *supra* note 11, at 26-27 (observing that even guidance nominally addressed to internal agency officials may have practically binding effects on regulated parties).

of frontline immigration officers, who may to various degrees be bound to follow the instructions of their superiors as set out in the guidance. But even though the Policy Manual is nominally directed at agency staff, it can still clearly have an externally binding effect on immigration applicants. If the agency instructs immigration officers to only consider certain types of evidence submitted by applicants, then that will necessarily affect an applicant's ability to seek relief from removal—even more so if they have no means of appealing an immigration officer's decision. USCIS guidance thus binds both the frontline agency officials who are expected to follow the views of their agency on how to exercise discretion and the applicants for immigration status who must comply with the requirements of the USCIS Policy Manual to have their applications considered.

But these spillover effects are not uniform, and the extent to which an internally directed guidance document will have externally binding effects depends on its context. A provision of the OSHA Field Manual that dictates the procedures that OSHA field inspectors must follow when carrying out their inspections—for instance, the provision in the manual requiring inspectors to "present their credentials whenever making contact with management representatives, employees (to conduct interviews), or organized labor representatives"[57]—is unlikely to have any discernable "binding effect" on employers who are subject to inspection, even though it clearly creates a binding requirement on the conduct of internal OSHA staff.

The doctrine, which I survey in Section I.B, ignores these distinctions. It by and large focuses on external effects and only incidentally references the issues that arise when the binding-norm test is applied to the agency staff themselves. Moreover, the doctrine fails to distinguish internal and external binding effects altogether, often lumping them together.[58]

Despite courts' lack of sustained attention to the internal effects of agency guidance, these internal dynamics are a distinct object of analysis worthy of attention. Before turning to the specific practices of particular agencies, I outline and examine three ways that agencies across the administrative state use guidance as an internal tool for administration.

---

57. Occupational Safety & Health Admin., CPL 02-00-164, Field Operations Manual 3-6 (Apr. 14, 2020), https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-164_1.pdf [https://perma.cc/HG8F-43CF].

58. *See infra* note 116 and accompanying text.

1. *Bureaucratic Supervision*

At the highest level of generality, one of the most obvious reasons for agency leadership to rely on guidance internally is to supervise subordinate staff in the course of executing the agency's mission.[59] In the classical Weberian description of a hierarchical bureaucracy, agency leadership supervises the work of frontline staff through "a clearly established system of supervision and subordination in which there is a supervision of the lower offices by higher ones" with the "possibility of appealing, in a precisely regulated manner, the decision of a lower office to the corresponding superior authority."[60] This ideal of perfect hierarchical control over agency frontline staff is, of course, more complicated in practice, and frontline staff can and do make many discretionary decisions in the course of implementing the agency's programs.[61] These decisions, however, are subject to supervision throughout the agency hierarchy,[62] and in this scheme of supervision, guidance documents play a central role.[63]

Bureaucratic supervision and agency self-regulation can be aimed at both the substantive and procedural discretion of lower-level agency officials and can be implemented through both legislative rules and guidance documents. Substantive self-regulation can include measures such as the adoption of enforcement guidelines, which specify how the agency will exercise its enforcement discretion and when it will bring enforcement actions.[64] Sometimes, these policies cabin

---

59. *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1879 (2015) (arguing that the Take Care Clause of the Constitution "impl[ies] a hierarchical structure for federal administration, under which lower government officials act subject to higher-level superintendence"). This was a consistent theme underlying the interviews discussing the various use cases across the agencies I studied. *See infra* Part II.

60. MAX WEBER, ECONOMY AND SOCIETY 957 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 2013) (1922).

61. *See* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 13-18 (2d prtg. 2010); Elizabeth Magill, Foreword, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 885 (2009).

62. *See* Magill, *supra* note 61, at 886 (noting that an "agency might instruct lower-level decisionmakers how to make their decisions").

63. Jerry L. Mashaw, Foreword, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 992 (2010) ("[I]n many ways, it is the internal law of administration—the memos, guidelines, circulars, and customs within agencies—that mold most powerfully the behavior of federal officials."); *see also* Metzger, *supra* note 59, at 1847 ("Agency managers adopt rules and requirements that bind agency personnel and also oversee lower-level decisionmaking through more informal guidance or revisable plans.").

64. *See* Magill, *supra* note 61, at 866-67.

the exercise of the government's discretion beyond even what the law itself requires.[65] Similarly, agency leadership can standardize and regulate the procedures by which lower-level officials conduct investigations or structure their decision-making.[66] Each of these mechanisms provides some level of agency self-constraint that controls the delegations of power from the agency leadership to the agency frontline officials.[67]

2. *Creating a "Law" of Internal Discretion*

Agencies often have cause to engage in particularly close bureaucratic supervision of delegated authority to frontline staff when managing the exercise of agency discretion. Opportunities for the exercise of agency discretion can come from a host of different sources. Generally, agencies often retain significant discretion to pursue or forbear enforcement and consequently delegate this discretion to frontline and midlevel decision makers.[68] Other times, agencies are empowered to make discretionary judgments by statute. For example, many immigration benefits, including adjustment of status, are contingent on not only specific statutory requirements but also a favorable exercise of discretion by the agency administering the benefit.[69]

Consequently, agency leadership often uses guidance to supervise frontline staff in exercising this discretion. Broadly speaking, an agency could approach the exercise of its discretion in one of two ways. It could decide to allow its discretion to be decentralized—that is, exercised informally and by frontline staff based on the equities of each case. This approach, however, would make it harder for the agency to ensure consistent, coherent, and transparent exercise of its discretion.[70] Alternatively, the agency could establish uniform policies and principles for exercising its discretion that were binding on subordinate staff.[71] Formalized policies detailing these delegations and constraints would create an

65. *See id.* at 867.

66. *See id.* at 868-69.

67. *See id.* at 884-86.

68. *See supra* Section I.A.1.

69. *See* 8 U.S.C. § 1255(a) (2018); 7 U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 41, pt. A, ch. 10 (providing guidance on the favorable exercise of discretion for adjustment of status).

70. *Cf.* Chen, *supra* note 32, at 353 ("[C]oherency, consistency, and coordination . . . are the internal tasks of administration and they are inextricably related to the success and effectiveness of policies . . . .").

71. *Cf.* Magill, *supra* note 61, at 887 (noting that in making enforcement decisions, an agency may choose either to pursue an enforcement strategy informally as a matter of practice or to "transform that practice into a self-regulatory rule to advance the same policy objective").

internal "law" of the agency that benefits bureaucrats who often "prefer to enforce rules written down to an amorphous set of informal practices."[72] It would also benefit external actors who desire information about how the agency will behave in the future.[73]

3. Privileged Reason-Giving

Finally, beyond the formal, binding nature of guidance documents as directives from agency management to agency staff, guidance also provides a vehicle for agency leadership to "privilege" a given position or view of the law over alternatives. As Blake Emerson argues in his article exploring the appropriate scope of the guidance exemption, the existence of guidance creates a "presumptively valid reason for officials to act within the policy domain it describes" and a compelling reason for agency staff down the chain of hierarchy to act in accordance with it.[74] In doing so, the position the guidance outlines, although not formally binding, becomes one that "cannot be lightly dismissed by officials in the agency [and] across the executive branch."[75]

This privileging affects both internal and external actors. Internally, guidance acts as a coordination device. The hierarchical nature of the bureaucracy and its interest in providing "consistent answers to contested questions that arise in similar cases" encourage agency actors to follow guidance to ensure that the agency's "legal rules retain the generally applicable character of rules on their way from statute, to regulation, to guidance, to a discrete act of adjudication or enforcement."[76] This is particularly true for frontline officials who are subordinate to higher-level decision makers and exercise the least policy discretion, for whom guidance therefore offers a "*presumptively overriding (or presumptively primary) reason* for action."[77] This phenomenon explains why frontline agency adherence to guidance can be high while still leaving room for individual discretion or, more importantly, for the agency itself to later depart from the guidance.[78]

---

72. *Id.*

73. *See id.* at 887-88.

74. Emerson, *supra* note 22, at 2133.

75. *Id.* at 2149.

76. *Id.* at 2150.

77. Metzger & Stack, *supra* note 20, at 1257; *see* Emerson, *supra* note 22, at 2150-52.

78. Blake Emerson makes this observation in the context of the DAPA litigation, arguing that the district court's finding that deferred-action status was rarely denied does not support the conclusion that the policy was inappropriately binding. Instead, those facts "might only show that any reasons for granting or denying deferred action other than those delineated in the

Privileging a certain view within the agency also creates external effects. Most formally, courts engaging in *Skidmore* deference give some weight to agency interpretations as a matter of comity, even though they are nonbinding.[79] Private parties are not so formally compelled to respect agency interpretations, but guidance can nonetheless alter private parties' "conceptions of their legal interests and liabilities such that they adjust their conduct to conform to the position stated in the guidance."[80] Thus agencies may also choose to publicly express their "'internal point of view' of the law so that private parties understand, and in some cases adopt, this view," even if they do not intend to formally bind those parties to that view.[81]

* * *

Although the above justifications are not exhaustive or even mutually exclusive, they nevertheless demonstrate the distinct normative justifications that exist for allowing agencies to use guidance to bind internal actors despite the prohibition on their using guidance to bind external actors. They also demonstrate how binding internal effects, though distinct from binding external effects, can still influence the behavior of regulated parties. Together, these justifications supporting an agency's ability to create guidance that binds internally challenge the traditional view that the only reason an agency would wish to do so is to subvert the APA's procedural requirements and inappropriately bind third parties.

As it stands, however, courts have insufficiently grappled with these considerations in applying the binding-norm test to guidance that only purports to bind certain internal agency actors. Failure to engage with these considerations has led to a mismatch between the doctrine and actual internal agency practices, which I explore in the next Section.

memorandum would rarely overcome the overriding, but not truly exclusionary, reasons endorsed by the memorandum." Emerson, *supra* note 22, at 2151. The district court also failed to consider that, even if frontline officials were bound to grant deferred action whenever the requirements of the guidance were met, this would be an appropriate exercise of the agency's supervisory authority over frontline officials and that what binds the *agency* is a separate issue from what binds *frontline officials*. *See id.*

79. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons."); Emerson, *supra* note 22, at 2149 (discussing *Skidmore* in this context).

80. Emerson, *supra* note 22, at 2157.

81. *Id.* at 2135.

B. Limits and Controls on Internal Guidance

As Section I.A identified, guidance documents play an indispensable role in the internal administration of agencies. Guidance can facilitate bureaucratic supervision of frontline officials, encourage agencies to exercise discretion more transparently and predictably, and allow agencies to communicate their views to both internal and external stakeholders. The doctrinal limitations on guidance developed by the courts, however, have failed to sufficiently consider the internal role of guidance as distinct from its effect on private actors. This has left open questions about how agencies can permissibly use guidance within their own decision-making hierarchies and who, if anyone, within an agency can be appropriately bound to follow that guidance. This Section will briefly outline these limitations—including the binding-norm test and the tests for determining the reviewability of agency exercises of enforcement discretion—while identifying the ways in which the doctrine fails to provide clarity, given how guidance operates internally among agency staff.

1. Binding-Norm Test

Regardless of the facial purpose of an agency policy statement—be it to instruct staff through a training manual or to advise the public on how to achieve compliance in a fact sheet—courts have generally approached the question of whether a particular guidance document is procedurally proper by determining whether it establishes a "binding norm."[82] Whereas a legislative rule promulgated after notice and comment can be binding, a policy statement in a guidance document cannot. In a canonical restatement of this principle, the D.C. Circuit noted that an agency policy statement merely "announces the agency's tentative intentions for the future . . . [which] it must [later] be prepared to support . . . as if the policy statement had never been issued."[83] Later cases further clarify what it means for an agency policy statement to merely announce the agency's "tentative" views. One case describes the test as requiring that the policy statement both "act[] prospectively"[84] and not "impose any [new] rights and obligations."[85] In general, the case law supports the proposition that an agency statement of general policy "can qualify for the [guidance] exemption [to the

82. Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

83. *Id.*

84. Am. Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980).

85. *Id.* (quoting Texaco, Inc. v. Fed. Power Comm'n, 412 F.2d 740, 744 (3d Cir. 1969)).

APA's notice-and-comment procedures] if the agency articulates it in non-binding terms and also refrains from treating it as dispositive in practice."[86]

The binding-norm test is usually applied to agency guidance that is alleged to inappropriately bind regulated parties—that is, cases where guidance allegedly sends the message to "affected private parties . . . that failure to conform will bring adverse consequences."[87] The most prominent retelling of the binding-norm test as applied to such cases appears in *General Electric Co. v. EPA*.[88] In that case, the D.C. Circuit announced that it would look to whether the policy statement "appears on its face to be binding . . . or is applied by the agency in a way that indicates it is binding."[89] This bifurcated approach encourages the reviewing court to look at both the language of the guidance document and the underlying practices of the agency in implementing the document for evidence of an inappropriately binding norm. In the former analysis, courts look for mandatory language that seems to leave no room for flexibility or reconsideration of the agency position.[90] In the latter analysis, courts look to whether the agency actually uses the document against regulated parties in a binding or coercive fashion.[91]

On this point, Ronald M. Levin has argued that enforcing the test "requires a court to draw subtle—sometimes elusive—distinctions regarding the meaning of 'binding effect.'"[92] Often this analysis "turns on whether [the agency] gave

---

86. Levin, *supra* note 5, at 286.

87. Gen. Elec. Co. v. Env't Prot. Agency, 290 F.3d 377, 383 (D.C. Cir. 2002) (quoting Anthony, *supra* note 10, at 1328).

88. *Id.*

89. *Id.* at 383 (citations omitted).

90. *Compare* CropLife Am. v. Env't Prot. Agency, 329 F.3d 876, 881 (D.C. Cir. 2003) (invalidating an agency guidance document in the form of a press release for using "clear and unequivocal language, which reflect[ed] an obvious change in established agency practice, [and] create[d] a binding norm that is finally determinative of the issues or rights to which it is addressed" (internal quotation marks omitted)), *with* Nat'l Mining Ass'n v. Sec'y of Lab., 589 F.3d 1368, 1372 (11th Cir. 2009) (upholding an agency letter that referred to factors that district managers "should" or were "strongly encouraged" to follow).

91. *Compare* U.S. Tel. Ass'n v. Fed. Commc'ns Comm'n, 28 F.3d 1232, 1234-35 (D.C. Cir. 1994) (invalidating agency guidance based in part on the fact that the agency applied it in over 300 cases and only departed from it in 8 cases), *with* Sierra Club v. Env't Prot. Agency, 873 F.3d 946, 952 (D.C. Cir. 2017) (upholding an agency guidance document based in part on evidence that the agency deviated from the guidance and was therefore open to considering alternative approaches), *and* Pros. & Patients for Customized Care v. Shalala, 56 F.3d 592, 599-600 (5th Cir. 1995) (refusing to invalidate an agency guidance document simply because the agency included the guidance in warning letters to regulated parties and used the guidance to help identify potential violations).

92. Levin, *supra* note 5, at 296.

[the] affected person a fair opportunity to contest the document and responded meaningfully to significant arguments—either by reaffirming the analysis in the guidance document or by supplementing it on points not previously addressed."[93] Despite longstanding critiques bemoaning the "baffling" or "smoggy" doctrines underlying the guidance exemption,[94] Levin nevertheless argues that courts have generally come to agreement on the basic criteria of the binding-norm test.[95] For example, although courts still diverge in their treatment of the binding nature of interpretive rules,[96] the D.C. Circuit and other

93. *Id.* at 297. Ronald M. Levin notes that this still allows a guidance document to "play an *influential* role that does not rise to the level of being 'binding.'" *Id.*

94. *See, e.g.*, Anthony, *supra* note 17, at 4 n.10.

95. *See* Levin, *supra* note 5, at 315.

96. In contrast to policy statements, which everyone accepts cannot establish a binding norm under current doctrine, courts and commentators alike are even more divided on whether guidance documents styled as "interpretive rules" can have a binding effect. The separate lines of analysis for policy statements and interpretive rules arise from the fact that the literature and case law on the guidance exemption have historically tracked APA section 553's distinction between "interpretative rules" and "general statements of policy." *See* 5 U.S.C. § 553(b)(A) (2018). Typically, the analysis courts follow for interpretive rules differs from the analysis for policy statements. The "prevailing standard for distinguishing legislative and interpretive rules can be described as the 'legal effect' test. If a rule explaining the meaning of language actually makes 'new law,' as opposed to merely interpreting 'existing law,' it is legislative." Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 394. Scholars have long complained of the difficulty of deploying this test in practice. *See, e.g.*, Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1705 (2007); Levin, *supra* note 5, at 316-17; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1435 (2004). Courts remain similarly divided on whether this test requires that interpretive rules, like policy statements, be nonbinding. *Compare* Ass'n of Flight Attendants-CWA v. Huerta, 785 F.3d 710, 716 (D.C. Cir. 2015) (noting that just like policy statements, interpretive rules "are binding on neither the public nor the agency" (quoting Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997))), Am. Tort Reform Ass'n v. Occupational Safety & Health Admin., 738 F.3d 387, 395 (D.C. Cir. 2013) ("Like agency policy statements, 'interpretative rules' that do not establish a binding norm are not subject to judicial review under the APA." (quoting HARRY T. EDWARDS, LINDA A. ELLIOTT & MARIN K. LEVY, FEDERAL STANDARDS OF REVIEW 161 (2d ed. 2013))), Viet. Veterans of Am. v. Sec'y of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988) (concluding that an interpretive rule may not bind the agency), *and* Nat'l Latino Media Coal. v. Fed. Commc'ns Comm'n, 816 F.2d 785, 788 (D.C. Cir. 1987) ("[A]n interpretative rule does not have the force of law and is not binding on anyone . . . ."), *with* Cent. Tex. Tel. Coop., Inc. v. Fed. Commc'ns Comm'n, 402 F.3d 205, 214 (D.C. Cir. 2005) ("[A]n agency may use an interpretive rule to transform 'a vague statutory duty or right into a sharply delineated duty or right.'" (quoting Health Ins. Ass'n of Am. v. Shalala, 23 F.3d 412, 423 (D.C. Cir. 1994))), *and* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1111 (D.C. Cir. 1993) (observing that the binding-norm test is different than the inquiry for interpretive rules whose "binding effect is limited in practice by the fact that agency personnel at every level act under the shadow of judicial review").

circuits regularly apply consistent versions of the binding-norm test to guidance that purports to bind external regulated parties.[97]

The question of how—or whether—courts should apply the binding-norm test when a guidance document purports only to bind the issuing agency and its personnel is more conceptually difficult, however, and the courts have addressed the issue in divergent ways.[98]

In a canonical case addressing guidance that primarily binds internal agency actors, *Community Nutrition Institute v. Young* (*CNI*),[99] the D.C. Circuit concluded that the notice-and-comment exemption for general policy statements does not apply if the policy *practically binds* the agency to a certain legal position.[100] There, the Food and Drug Administration (FDA) adopted "action levels" to guide field inspectors in assessing whether specific foods should be seized from manufacturers and destroyed for noncompliance. The guidance stated that the FDA would not bring enforcement proceedings against manufacturers that kept the concentration of certain chemicals at or below twenty parts per billion. However, Community Nutrition Institute, a public-interest organization com-

97. *See, e.g.*, Elec. Priv. Info. Ctr. v. Dep't of Homeland Sec., 653 F.3d 1, 7 (D.C. Cir. 2011); Nat. Res. Def. Council v. Env't Prot. Agency, 643 F.3d 311, 321 (D.C. Cir. 2011); Cohen v. United States, 578 F.3d 1, 6-7 (D.C. Cir. 2009); Iowa League of Cities v. Env't Prot. Agency, 711 F.3d 844, 861-63 (8th Cir. 2013) (referencing D.C. Circuit binding-norm case law for determining whether a guidance document is procedurally valid); River Runners for Wilderness v. Martin, 593 F.3d 1064, 1071 (9th Cir. 2010).

98. *Compare* Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 948 (D.C. Cir. 1987) (concluding that policy statements that practically bind the agency must go through notice and comment), *with* Erringer v. Thompson, 371 F.3d 625, 631 (9th Cir. 2004) (arguing that the correct inquiry in judging guidance is whether the decision was binding on persons *outside* the agency), *and* Splane v. West, 216 F.3d 1058, 1064 (Fed. Cir. 2000) (declaring that the question of whether a rule has the force and effect of law refers to "the binding effect of [a] regulation on tribunals *outside* the agency, not on the agency itself"). For additional discussion of these cases, see Levin, *supra* note 5, at 300-02.

99. 818 F.2d 943 (D.C. Cir. 1987).

100. *Id.* at 947 (finding that the agency guidance had a "present, binding effect"). For an extended discussion of the various ways that the binding-norm test has been applied to agencies themselves, see Sunstein, *supra* note 16. Cass R. Sunstein distinguishes between two kinds of cases where an agency may issue guidance that effectively binds itself. The first kind of case is where the government "announces that *it will not take action in certain contexts*." *Id.* at 497. This case mirrors the situation that the D.C. Circuit faced in *Community Nutrition Institute*. The second kind of case is where an agency issues guidance in which it "states that *it will take action in certain contexts*." *Id.* at 498. This latter case is more closely aligned with the situation in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), in which the D.C. Circuit invalidated a guidance document that required agency staff to use a multifactor analysis in deciding whether a regulated entity's activity complied with governing law. *Id.* at 1028.

posed of consumer representatives, challenged this guidance as an unlawful legislative rule. In reviewing the guidance, the D.C. Circuit seemed to acknowledge that these action levels had no real binding effect on the manufacturers themselves—they merely set a cutoff below which the agency would decide not to exercise its enforcement discretion.[101] Nevertheless, the court reasoned that because the FDA had "bound *itself*" in the exercise of its prosecutorial discretion, the action levels were unlawful.[102]

This line of reasoning has become influential, particularly in cases seeking to overturn agency guidance as a tool for instructing frontline staff on how to exercise prosecutorial discretion or conduct enforcement. Most notably, the Fifth Circuit referenced the reasoning in *CNI* in hearing a challenge to the Deferred Action for Parents of Americans (DAPA)[103] program in *Texas v. United States*.[104] The Obama Administration's DAPA memo announced that the U.S. Department of Homeland Security (DHS) would take applications from certain groups of unlawfully present immigrants for a protected status that would shield them from deportation. The memo included a nonexhaustive list of criteria that USCIS adjudicators would use in evaluating such applications.[105] The district court hearing the challenge deployed reasoning that was similar to the binding-effect analysis applied in *General Electric Co.*, looking to the agency's practice in implementing the memo and concluding that although DHS purported to "review applications on a case-by-case basis and exercise discretion," the agency would in reality routinely grant applications that met the program's criteria.[106] The court therefore found that the memo had inflexibly cabined DHS's discretion. The Fifth Circuit later affirmed, emphasizing that agency policy statements must "genuinely leave[] the agency *and its decision-makers* free to exercise discretion,"[107] which suggests that under this view of the binding-norm test, guidance

101. *Cmty. Nutrition Inst.*, 818 F.2d at 948 (noting that the "action level[s] . . . do[] not bind food producers in the sense that producers are automatically subject to enforcement proceedings for violating the action level" but that nevertheless the "cabining of an agency's prosecutorial discretion can in fact rise to the level of a substantive, legislative rule").

102. *Id.* (emphasis added).

103. Memorandum from Jeh Charles Johnson to León Rodríguez, *supra* note 26.

104. 809 F.3d 134, 207 (5th Cir. 2015).

105. Memorandum from Jeh Charles Johnson to León Rodríguez, *supra* note 26, at 4 (setting out factors such as continuous residency, physical presence, absence of characteristics making the individual an enforcement priority for the agency, and the absence of any "other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate").

106. *Texas*, 809 F.3d at 172-76.

107. *Id.* at 171 (emphasis added) (quoting *Cmty. Nutrition Inst.*, 818 F.2d at 946); *id.* at 176 (affirming the district court's binding-effect analysis).

documents cannot bind agency decision makers at any level, including at the level of an individual frontline adjudicator. A federal district court in Texas has since deployed the same reasoning against the Deferred Action for Childhood Arrivals (DACA) program.[108]

The application of the binding-norm test to invalidate agency guidance purporting to direct and manage the agency's own discretion has not come without resistance and criticism from legal commentators. In response to the original *CNI* holding, Richard M. Thomas observed that the D.C. Circuit's rule would create perverse incentives for agencies, arguing that "the more unstructured, variable and undisciplined the agency's prosecutorial approach, the more shielded an agency's prosecutorial discretion will be from public participation and, ultimately, judicial review."[109] Others, including Peter L. Strauss, have also argued that by expanding judicial review into an agency's decisions to channel their prosecutorial discretion, the courts may prevent agencies from structuring their decision-making in ways that promote "government regularity."[110] Instead, he argues that judicial review of this kind would encourage agencies to constantly qualify their policies in a "charade, intended to keep the proceduralizing courts at bay while the affected parties are given to understand that it is these threats of vacillation rather than the announced policies that stand empty."[111] The decision in *CNI* is an exemplar of the "inherent tension of a joint internal and external [administrative] law regime," with "judicial enforcement of agency internal law dramatically constricting the room available for internal law, in both its agency-specific and more centralized forms."[112]

---

108. Texas v. United States, No. 18-CV-00068, 2021 WL 3025857, at *19, *21 (S.D. Tex. July 16, 2021) (noting that a policy statement must "genuinely leave[] the agency *and its decisionmakers* free to exercise discretion" (emphasis added) (quoting Pros. & Patients for Customized Care v. Shalala, 56 F.3d 592, 595 (5th Cir. 1995))), *appeal filed*, No. 21-40680 (5th Cir. Sept. 16, 2021).

109. Thomas, *supra* note 20, at 155.

110. Strauss, *supra* note 2, at 1485.

111. *Id.*; *see also* Metzger & Stack, *supra* note 20, at 1249 ("Under these doctrines, the more that agencies articulate norms of internal law and management in a way that sounds binding or mandatory, the more they invite external judicial review of their actions. Agencies thus have an incentive to engage in subterfuge . . . ."). A related—though far less common—critique is that the "practically binding" test is yet another judicial doctrine that lacks support in the APA and thus imposes more obligations than required by law in violation of the *Vermont Yankee* principle. *See* Sunstein, *supra* note 16, at 506 (arguing that the "doctrine plainly lacks support in the APA"); *see also* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 523-25 (1978) (outlining the principle).

112. Metzger & Stack, *supra* note 20, at 1245, 1246.

Notwithstanding these criticisms, courts rarely engage critically with the complexities that arise from applying the binding-norm test to the internal practices within agencies. Not only that, but the exact parameters of the binding-norm test and how it should be applied to internally directed guidance remain unclear for at least two reasons.

First, despite its insistence that an agency may not bind itself or its decision makers, the binding-norm test does not specify *where* in the hierarchy of agency administration a binding norm becomes unlawful. In his comprehensive article on the APA's guidance exemption, Levin argues that "an agency should be allowed, without resorting to notice-and-comment, to issue a guidance document that is binding on its staff if persons affected by the document will have a fair opportunity to contest the document at a later stage in the implementation process."[113] This view is consistent with a recommendation adopted by ACUS, which argues that "a policy statement could bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize action that varies from the policy statement."[114]

These views, however, appear to go beyond what is permissible under current D.C. Circuit case law, which does not explicitly allow for any flexibility in the binding-norm test for guidance that only binds frontline officials.[115] Indeed, the court rarely lingers on the difference between internal and external binding effects, issuing blanket prohibitions against "binding" guidance instead.[116] And

---

113. Levin, *supra* note 5, at 305; *see also id.* at 306 (arguing that an agency's ability to bind subordinate personnel means that the APA also allows agencies to bind administrative-law judges to the views found in guidance documents).

114. Administrative Conference of the United States: Adoption of Recommendations, 82 Fed. Reg. 61,728, 61,734 (Dec. 29, 2017); *see also* Administrative Conference of the United States: Adoption of Recommendations, 57 Fed. Reg. 30,101, 30,104 (July 8, 1992) (arguing that an agency should be able to "mak[e] a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence").

115. *See* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 39 (D.C. Cir. 1974) ("When the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy."); *see also* Viet. Veterans of Am. v. Sec'y of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988) ("A binding policy is an oxymoron.").

116. Often, the cases simply restate the common refrain that an agency may not bind private parties or the agency itself in the same breath, leaving to the reader or the agency to determine just what it means for the agency to be bound. *See, e.g.*, Catawba Cnty. v. Env't Prot. Agency, 571 F.3d 20, 33 (D.C. Cir. 2009) ("[W]hether an agency action is the type of action that must undergo notice and comment depends on 'whether the agency action binds private parties *or the agency itself* with the "force of law."'" (emphasis added) (quoting Gen. Elec. Co. v. Env't Prot. Agency, 290 F.3d 377, 382 (D.C. Cir. 2002))); Am. Bus Ass'n v. United States, 627 F.2d

the empirical question of *how* agencies balance management of personnel with the judicial mandate to not unlawfully bind the discretion of the agency has received minimal treatment, leaving several questions unanswered.[117] For example, can agency leadership use guidance to bind frontline officials to the views of the agency? Can they bind supervisors? Regardless, do they routinely do so in practice?

525, 529 (D.C. Cir. 1980) (noting that to qualify for the guidance exemption a policy statement must "genuinely leave[] the agency *and its decision-makers* free to exercise discretion" (emphasis added)).

117. Much of the existing literature on how agency guidance specifically operates to bind frontline enforcement officials has focused on the law and bureaucracy of immigration. For example, Michael Kagan placed the DACA program in the context of "a struggle within the Executive Branch" over immigration policy that "placed, on one side, the President and his appointed agency heads, who have sought to use prosecutorial discretion to shield many unauthorized immigrants from deportation," and, on the other side, "frontline immigration enforcement officers and their union representatives who do not agree with the President's agenda." Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 666-67 (2016). Similarly, Jill E. Family has written about the role of agency guidance in practically binding the ways that immigration officials in USCIS adjudicate applications for immigration benefits. *See* Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and* Not Really *Binding Rules*, 47 U. MICH. J.L. REFORM 1 (2013). Other scholars have examined agency guidance from the perspective of the agencies themselves outside of litigation, but none of these articles has considered the precise question here regarding the binding nature of guidance as a tool for managing agency personnel. *See, e.g.*, Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L. L. REV. 291 (2014) (exploring the use of guidance at the Office of Civil Rights and EEOC as a tool for advancing minority rights, especially those of linguistic minorities, before the courts); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (exploring the use of guidance as part of the President's supervision of the immigration bureaucracy); Lars Noah, *Governance by the Backdoor: Administrative Law(lessness?) at the FDA*, 93 NEB. L. REV. 89 (2014) (arguing that the Food and Drug Administration (FDA) has shifted to using guidance in place of legislative rules as a procedural shortcut for regulation); Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 91 (2016) (discussing briefly Environmental Protection Agency guidance in the regional administration of its programs); Erica Seiguer & John J. Smith, *Perception and Process at the Food and Drug Administration: Obligations and Trade-Offs in Rules and Guidances*, 60 FOOD & DRUG L.J. 17 (2005) (discussing perceptions within FDA of the choice between using legislative rules and more informal tools such as guidance); Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523, 539-49 (2014) (exploring the use of guidance by Department of Labor agencies, including OSHA); Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 LAW & SOC. INQUIRY 666 (2014) (discussing guidance in the context of implementing prosecutorial discretion in the immigration bureaucracy).

Second, some courts continue to draw on the same skepticism with which they approach guidance directed at external regulated parties even when reviewing guidance that primarily binds only internal agency actors, creating a conceptual mismatch between the doctrine and its application. This skepticism, however, ignores the differing normative justifications for the internal binding effects of guidance and inappropriately elides agencies' administrative and policymaking functions. It also has consequences for the legitimacy of internal administrative law. As Ming H. Chen argues, "the conflation of internal administration and external administration of law exacerbates chronic concerns about the legitimacy of . . . administrative action" and judicial and popular suspicion of ordinary tools of agency administration "imposes unfair demands on agency operations."[118] Courts currently fail to credit an agency's interest in supervising subordinate staff, establishing transparent criteria for the exercise of its discretion, and communicating those views to agency actors in their binding-norm analysis. Instead, courts continue to review these documents only through the lens of regulated parties' interest in being free from binding guidance rather than as a tool for internal administration. The result is a gap between the requirements of an uncertain doctrine and the practical expectations of agency officials, which I explore further in Part II.

2. *Agency Enforcement Discretion*

Like the binding-norm test, judicial review of agency exercise of enforcement discretion and settlement authority is also sometimes implicated by agencies' use of internally directed guidance documents. Though judicial review of this kind does not directly touch on the authority of agencies to promulgate internally binding guidance documents without notice and comment, guidance documents often incidentally raise issues concerning the scope of an agency's enforcement discretion and the extent to which the exercise of that discretion is reviewable or must be accomplished by a legislative rule.[119] For example, in *CNI* itself, the guidance involved the agency's attempt to demarcate a threshold level of a certain unavoidable contaminant at which point the agency would seek enforcement.[120] Similar issues are implicated in the DACA and DAPA lawsuits. Those programs reflected the practical reality that the sheer size of the unauthorized

---

118. Chen, *supra* note 32, at 358.

119. For more discussion on the interaction between the binding-norm rule as found in *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987), and the traditional leeway given to agencies exercising nonenforcement discretion, see Thomas, *supra* note 20.

120. *Cmty. Nutrition Inst.*, 818 F.2d at 947-48.

immigrant population prevents the executive branch from achieving perfect enforcement against it,[121] prompting the executive branch to create a set of enforcement priorities that guaranteed nonenforcement to a subset of that population: certain childhood arrivals and their parents.

Since *Heckler v. Chaney*, the Court has recognized that agency nonenforcement decisions are committed to the agency's unreviewable discretion.[122] Although *Heckler* involved a decision by the FDA not to pursue enforcement in a specific case, agencies sometimes use guidance to deploy their enforcement discretion across large swaths of the agency's work or by mass settling many claims. This was the case in the DACA and DAPA lawsuits, where the government solicited applications for deferred action and promised nonenforcement against entire categories of eligible unlawfully present immigrants who met certain criteria. In cases like this, some courts, including the D.C. Circuit,[123] have extended *Heckler*'s logic to cover not only the agency's refusal to bring enforcement actions in individual cases, but also agency affirmative agreements to settle or abstain from enforcement with potential enforcement targets.

In *Department of Homeland Security v. Regents of the University of California*,[124] the Supreme Court generated some uncertainty about the precise scope of agency affirmative-settlement authority, particularly when agencies take applications for settlement. In *Regents*, the Court clarified that affirmative-settlement programs, like the one at issue in DACA, were not simply "a passive non-enforcement policy."[125] Rather, these programs amounted to effective adjudications because they required the "affirmative act of approval" by the agency in response to a formal application by regulated parties for deferred action.[126] Regardless of the underlying reviewability of the agency's settlement authority through the DACA program, the majority in *Regents* entirely avoided addressing

121. *Cf.* Cox & Rodríguez, *supra* note 117, at 130-35 (detailing the phenomenon of "de facto delegation" in immigration, which is the "result of a profound mismatch between the law on the books and reality on the ground," including a large number of individuals who would be subject to deportation).

122. 470 U.S. 821, 831-32 (1985) ("[A]n agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion.").

123. *See* Schering Corp. v. Heckler, 779 F.2d 683 (D.C. Cir. 1985).

124. 140 S. Ct. 1891 (2020).

125. *Id.* at 1906. Prior to this decision, D.C. Circuit precedent had suggested that an agency could solicit applications for settlement of claims while still benefiting from the presumption that the exercise of prosecutorial discretion not to pursue enforcement is generally free from judicial review. *See* Ass'n of Irritated Residents v. Env't Prot. Agency, 494 F.3d 1027 (D.C. Cir. 2007).

126. *Regents*, 140 S. Ct. at 1906 (quoting *Chaney*, 470 U.S. at 831).

the issue of whether the DACA memorandum itself was inappropriately binding guidance, a legislative rule, or something else.[127] The takeaway from this seems to be that agency settlement and prosecutorial discretion not to enforce continue to be committed to agency discretion, and that the DACA program was reviewable not purely by virtue of its administration through guidance, but rather because it involved an affirmative-application system, the "creation of [which]—and its rescission—is an 'action [that] provides a focus for judicial review.'"[128] Although the question remains open, it appears by the terms of *Regents* that an enforcement- or settlement-discretion guidance document may still benefit from the Court's reluctance to review the exercise of prosecutorial discretion so long as it does not create such an application system.[129]

As I argued in Section I.A, agencies may be motivated to issue internally binding guidance as part of their supervision of lower-level agency staffers and to help impose consistency and predictability in their exercise of the agency's discretionary authority. It is thus no surprise that agencies frequently issue guidance that directs these lower-level officials on when to exercise the agency's considerable enforcement discretion. Given the scope of this discretion and the desire of some bureaucrats to issue decisions grounded in firm agency policies rather than through more informal case-by-case adjudication, agency nonenforcement decisions provide a broad pool of agency discretion that could be channeled or focused through internal guidance documents. Doing so through published guidance also has the benefit of transparently indicating to the public how the agency expects its staff to exercise that discretion.

II. AGENCY GUIDANCE WITHIN THE AGENCY HIERARCHY

This Part analyzes the guidance practices of agencies in three different regulatory regimes—employment discrimination, workplace safety, and immigration adjudication—with different structures, powers, and missions. EEOC is a small, litigator-dominated agency headed by a Commission with limited rulemaking authority. OSHA is a large executive agency with a significant field-inspection

---

127. The dissent, however, appeared to believe that DACA was inappropriately binding and argued that the program should at minimum have been invalidated as a procedurally defective legislative rule that should have been subject to notice and comment. *Id.* at 1926-27 (Thomas, J., concurring in the judgment in part and dissenting in part).

128. *Id.* at 1906 (majority opinion).

129. The Court also made note of the fact that the "benefits attendant to deferred action provide further confirmation that DACA is more than simply a non-enforcement policy," further justifying the availability of judicial review of the program. *Id.* However, the opinion suggests that even without such attendant benefits, the DACA program's application system would continue to provide an object for judicial review.

staff and monitoring responsibilities but is often regarded as having little meaningful enforcement power. Finally, USCIS has a massive field staff and oversees the adjudication of millions of immigration benefits in complex cases across the country, with significant power—by virtue of its ability to grant or deny benefits—over the people whom it regulates. Together, a study of these three agencies demonstrates the varied ways in which agencies deploy guidance internally and the influence that organizational design, mission, and capabilities have on these practices.

To determine how each of these agencies formulates and implements guidance within their respective hierarchies, I drew on employee manuals, document descriptions from the agency websites, briefings in response to litigation on guidance, and interviews with agency officials and industry attorneys.[130] This

130. Interviews were conducted by telephone and ranged in length from thirty minutes to over an hour. The interviews were semistructured, with a common set of questions forming the basis of each conversation but leaving open opportunities to explore additional topics or issues raised by the interview participants. *See* Svend Brinkmann, *Unstructured and Semi-Structured Interviewing*, *in* THE OXFORD HANDBOOK OF QUALITATIVE RESEARCH 277, 286-89 (Patricia Leavy ed., 2014). Typewritten notes were recorded simultaneously. Occasionally, I would follow up with interview participants over email or in subsequent phone calls to clarify or expand upon the information they provided in the initial interview. Interviews were aimed at uncovering actual agency practices rather than the opinions of the individual interview subjects themselves. As a result, this was not human-subjects research and received an exemption from Institutional Review Board review.

In total, I conducted twelve interviews: five with individuals from EEOC, four from OSHA, and three from USCIS. Because these agency officials are a low-visibility population and because of other barriers to identifying interview subjects—including the COVID-19 pandemic and the change in administration—subjects were located using a chain-referral process, beginning with a small set of familiar individuals at the agencies of interest. Interview participants were also granted anonymity to promote candor, and citations refer to anonymous subjects by their institutional affiliations. After each interview, I asked each interview subject for the names and contact information of further individuals who could speak to the internal experience of agency guidance, interviewed those individuals, and then asked for further names, and so forth. *See* JOHN LOFLAND, DAVID A. SNOW, LEON ANDERSON & LYN H. LOFLAND, ANALYZING SOCIAL SETTINGS: A GUIDE TO QUALITATIVE OBSERVATION AND ANALYSIS 43 (4th ed. 2006) (discussing "'chain-referral' sampling: a method for generating a field sample of individuals possessing the characteristics of interest by asking initial contacts if they could name a few individuals with similar characteristics who might agree to be interviewed"); Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOCIO. METHODS & RSCH. 141, 144 (1981) (discussing low-visibility populations as a prominent use case for snowball sampling).

To compensate for the small number of interview subjects, I focused on finding individuals who operated within different levels of an agency's hierarchy in seeking out additional interview subjects. For example, at EEOC, I interviewed a member of the Commission, a counsel to the commission, a field investigation manager, and a field attorney, covering the full range

analysis reveals that, despite their differences, each agency produces guidance that effectively binds staffers—more than incidentally, and often by design—in executing their agency's mission.

A. Interpretive Consistency and the U.S. Equal Employment Opportunity Commission

EEOC is an independent agency that administers federal civil-rights laws against workplace discrimination.[131] The agency's main function is to investigate complaints alleging workplace discrimination based on race, pregnancy, national origin, religion, sex, age, disability, sexual orientation, gender identity, genetic information, and retaliation for reporting or opposing a discriminatory practice, or participating in a complaint process.[132] The primary means through which EEOC conducts these investigations is through employee-initiated complaints.[133]

EEOC is a litigator-dominated agency and has no significant affirmative monitoring or investigatory mission,[134] enforcing its statutory mandate primarily through adversarial court proceedings or recommendations for litigation as

---

of the agency's vertical operations as well as the enforcement, investigation, and litigation sides of the agency.

131. EEOC is commonly referred to as an independent agency, and it often characterizes itself as such. *See, e.g.*, *What You Should Know: ABCs of the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 20, 2015), https://www.eeoc.gov/eeoc/newsroom/wysk/abcs.cfm [https://perma.cc/YTZ5-YQ4Z]. However, since 1983, the executive branch has in fact considered EEOC to be an executive agency. *See* Litig. Auth. of the Equal Emp. Opportunity Comm'n in Title VII Suits Against State & Loc. Governmental Entities, 7 Op. O.L.C. 57, 65 (1983). As a result, EEOC regularly must go through OMB review of its substantive rules in the areas in which it has rulemaking authority, such as the Americans with Disabilities Act of 1990 (ADA) and the Age Discrimination in Employment Act of 1967 (ADEA). Telephone Interview with Participant #2, Att'y, Off. of Legal Couns., U.S. Equal Emp. Opportunity Comm'n (Mar. 5, 2020). Nevertheless, the agency retains many of the structural indicators of agency independence, such as its multimember head, specified tenure, partisan balance requirements, and independent litigation authority for suits brought on behalf of private-sector employees. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013).

132. *Discrimination by Type*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/index.cfm [https://perma.cc/98JC-4MVG].

133. *See Performance and Accountability Report: Fiscal Year 2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N 34 (Nov. 15, 2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/plan/2016par.pdf [https://perma.cc/M3PD-7GL9].

134. EEOC does require businesses to submit confidential employee data broken down by race, gender, and other categories as part of a minimal monitoring effort designed to identify systemic discrimination in employment. 29 C.F.R. § 1602.7 (2021) (requiring companies to file

the result of employee complaints. It is also a relatively small agency, employing just 522 legal personnel in 2016.[135]

At EEOC, agency guidance documents fall into the umbrella category that agency officials refer to as "subregulatory guidance documents." These include the agency's compliance manual, enforcement guidance, policy guidance, policy statements, and fact sheets.[136] Within this pool of subregulatory guidance, there is also an important dividing line between those guidance documents that are initiated and voted upon by the Commission and lower-level documents, referred to as "resource documents," which include fact sheets and other public-facing materials that are written by agency staffers.[137] Although the latter set of documents are approved by the Chair of the Commission, it is the former set that carry the most sway within the agency and "communicate the Commission's position on important legal issues."[138]

A variety of circumstances could prompt the Commission to begin drafting guidance. In some cases, such as when Congress passed the Genetic Information Nondiscrimination Act of 2008[139] or the ADA Amendments Act of 2008,[140] the

an EEO-1 report annually); Off. Fed. Cont. Compliance Programs, *EEO-1 Report Frequently Asked Questions*, U.S. DEP'T LAB., https://www.dol.gov/agencies/ofccp/faqs/eeo1-report [https://perma.cc/P7NU-PJYV] (noting that the survey "provides a demographic breakdown of the employer's work force by race and gender"). Although EEOC uses this data to launch systemic discrimination investigations, these "account for less than 1% of its total investigations." Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 411 (2019); *see Performance and Accountability Report: Fiscal Year 2016*, *supra* note 133, at 12, 37 (describing EEOC as having resolved 273 systemic discrimination investigations while filing 91,503 charges that stemmed from complaints of discrimination originating outside the agency).

135. Van Loo, *supra* note 134, at 438.

136. *What You Should Know: EEOC Regulations, Subregulatory Guidance and Other Resource Documents*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 5, 2016), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource [https://perma.cc/ZG9J-NZBW].

137. *Id.*; *see also* Telephone Interview with Participant #2, *supra* note 131 (noting the importance of this distinction).

138. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 136; *see, e.g.*, *EEOC Enforcement Guidance on National Origin Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Nov. 18, 2016), https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm [https://perma.cc/2W4U-C7Y2]; *see also* Telephone Interview with Participant #2, *supra* note 131 (noting that the Commission does not usually vote on these lower-level documents).

139. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 29 & 42 U.S.C.).

140. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29 & 42 U.S.C.).

Commission has a mandate from Congress to issue new regulations and accompany those with guidance. But in other cases the Commission will initiate the process of its own volition, either to pursue a policy area of interest to the Chair, to answer questions percolating up from the field offices, or to respond to a significant court ruling or other current events.[141] For instance, EEOC's arrest-and-conviction guidance was prompted in part by the Third Circuit's decision in *El v. Southeastern Pennsylvania Transportation Authority*,[142] in which the court referenced old and outdated EEOC guidance before ultimately holding that it was lawful for an employer to fire an employee because of their forty-year-old conviction record.[143] This motivated the agency to update its guidance to respond to the situation in that case.[144]

Within EEOC, the Office of Legal Counsel (OLC) serves as the principal legal advisor to the Chair and the Commission. It is also the office responsible for drafting regulations, enforcement guidance, and compliance manual sections for Commission approval. Whereas the General Counsel at EEOC is presidentially appointed and Senate confirmed and conducts the Commission's litigation program, the OLC employees act as the "Chair's lawyers."[145] An attorney in the OLC for many years noted that the OLC and the Commission have a close working relationship and a particularly close relationship with the Chair.[146]

Guidance at EEOC acts as a coordination device that centralizes the Commission's legal views to ensure consistency within all parts of the agency. During the guidance-creation process, the OLC considers the policy preferences of the Commission, the positions that the General Counsel has taken in general litigation and particularly in amicus briefs, and the expectations and experience of the field programs and investigators.[147] The result is a set of comprehensive guidance that not only communicates the agency's best view of the law's requirements, but that is specifically designed to be followed by every arm of the agency.[148]

---

141. Telephone Interview with Participant #2, *supra* note 131.

142. 479 F.3d 232 (3d Cir. 2007).

143. *Id.* at 243-48.

144. Telephone Interview with Participant #2, *supra* note 131.

145. *Id.* (noting this distinction).

146. *Id.*; *see also* Telephone Interview with Participant #5, Comm'r, U.S. Equal Emp. Opportunity Comm'n (Mar. 19, 2020) (noting that the legal counsel and Chair work particularly closely together).

147. Telephone Interview with Participant #2, *supra* note 131 (describing the process of vetting draft guidance).

148. As I mention above, this was one of the motivations for EEOC to update its arrest-and-conviction-history guidance following the Third Circuit decision in *El v. Southeastern Pennsylvania*

Two factors play into EEOC's decision to use guidance over other policy mechanisms. One factor is the agency's limited substantive rulemaking authority.[149] For example, EEOC lacks rulemaking authority to administer Title VII, leading both an OLC attorney and a former Commissioner to observe that guidance is the only means for the Commission to make policy in that realm.[150] Consequently, it made no sense to them that a court would bar the agency from establishing "a consistent policy within [the] agency on how to enforce the law without creating regulations for others."[151] In fact, for one former Commissioner, it was the Commission's very *lack* of rulemaking authority that bolstered the agency's position that the guidance could *not* be construed as legislative.[152]

The second factor is the agency's desire to avoid time-consuming Office of Management and Budget (OMB) review. For example, an OLC attorney reported that EEOC often chooses to issue guidance rather than engage in rulemaking (where it is able to exercise its rulemaking authority) that would have had to undergo OMB review, such as in cases involving the Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act of 1967.[153]

When considering the role of EEOC's guidance within the agency and among its staff, former Commissioner Participant #5's comments summarize it best: "[G]uidance is designed to be followed."[154] And while there may not be guidance on every possible topic for litigation, on those issues where guidance

Transportation Authority, 479 F.3d 232 (3d Cir. 2007), which referenced old and outdated EEOC guidance before ultimately establishing a holding with which EEOC was dissatisfied. *See* OFF. OF LEGAL COUNS., *supra* note 27.

149. EEOC has primary enforcement authority over several antidiscrimination laws, including Title VII, the ADEA, and Title I of the ADA, among others. Congress delegated different degrees of rulemaking authority to EEOC under these various statutes. For instance, under Title VII, EEOC only has the power to "issue, amend, or rescind suitable *procedural* regulations" necessary to carry out the statute. 42 U.S.C. § 2000e-12(a) (2018) (emphasis added); *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) ("Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title."). By contrast, the ADEA grants EEOC broad authority to "issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter." 29 U.S.C. § 628 (2018). Under the ADA, Congress explicitly required EEOC to issue regulations to carry out Title I's employment provisions within one year of the statute's enactment. 42 U.S.C. § 12116 (2018).

150. Telephone Interview with Participant #5, *supra* note 146; Telephone Interview with Participant #2, *supra* note 131.

151. Telephone Interview with Participant #5, *supra* note 146.

152. *Id.*

153. Telephone Interview with Participant #2, *supra* note 131.

154. Telephone Interview with Participant #5, *supra* note 146.

exists, the General Counsel, district offices, and agency staff are expected to operate consistently with it.[155] This was not just the view of the Commission, but also the opinion of an OLC attorney,[156] and the view expressed in the agency's briefs in response to challenges to guidance. For instance, in *Texas v. EEOC*,[157] a recent and high-profile challenge to EEOC Title VII guidance, the agency's brief argues that "federal agency employees are generally expected to follow their agency employers' view of the law in performing their duties."[158] The brief concedes that an "EEOC employee['s] application of . . . [g]uidance in administrative investigations" cannot bind states, the U.S. Department of Justice (DOJ), or the courts.[159] Instead, both DOJ and the courts have independent avenues for interpreting Title VII, the former through independent decisions to bring enforcement actions against the states and the latter through judicial review of those actions. Nevertheless, the Commission's positions on the relevant legal question as expressed through guidance can still instruct lower-level agency personnel on how to determine whether a given practice is lawful under Title VII for the purposes of EEOC investigations.[160]

At nearly every level of the agency, staffers reported a close adherence to the Commission's guidance. For instance, both a supervising attorney and an investigations manager from an EEOC field office observed that investigators would certainly find cause for discrimination if the Commission's guidance would lead to that result. In other words, they would not refuse to find cause in cases that the Commission indicated it considers to constitute discrimination.[161] The supervising attorney also observed that guidance would also carry significant weight with the legal supervisors that review investigators' cases to determine the likelihood that a particular charge was meritorious.[162] In fact, a former Commissioner observed that even the General Counsel, who has sole authority over the conduct of the agency's litigation once filed, is still typically bound to follow the Commission's view of the law as expressed in the guidance.[163]

---

155. *Id.*

156. Telephone Interview with Participant #2, *supra* note 131 (noting that in their experience, if agency staff "were properly instructed, they follow[] all [guidance the Commission issued]").

157. 933 F.3d 433 (5th Cir. 2019).

158. Brief for Appellants Cross-Appellees at 30, *Texas*, 933 F.3d 433 (No. 18-10638).

159. *Id.*

160. *Id.*

161. Telephone Interview with Participant #7, Supervising Trial Att'y, U.S. Equal Emp. Opportunity Comm'n (Apr. 16, 2020).

162. *Id.*; Telephone Interview with Participant #6, Investigation Manager, U.S. Equal Emp. Opportunity Comm'n (Apr. 2, 2020).

163. Telephone Interview with Participant #5, *supra* note 146.

More than just a mechanism for supervising lower-level staff, the agency's commitment to following its own guidance at every level of its decision-making can also be traced to the Commission's privileged perspective in their substantive view of the law. Because EEOC valued consistent interpretation of the antidiscrimination laws, the Commission's legal views are even more important for agency staff to adhere to. In fact, some interview subjects reported that where guidance that outlined the Commission's substantive legal views commanded the most respect by frontline officials, other guidance documents aimed at more neutral procedural issues—such as the timing of various steps in the investigation process, how investigators communicate with parties, and other technical issues—garnered less adherence. For example, an EEOC district investigations manager observed that the investigators who take in complaints would often decline to consult the procedural provisions of the agency compliance manual for investigators in deciding how to manage their investigations.[164] Rather, they remarked that investigations are run idiosyncratically and determinations on how best to move forward with complaints are driven not by strict procedural guidelines, but by more holistic concerns such as whether the investigator in charge believed that a complainant was sufficiently "harmed" to justify a thorough investigation.[165]

This characterization was confirmed by a supervising trial attorney at an EEOC field office, who noted that investigators generally had significant leeway to run investigations as they saw fit.[166] In this attorney's experience, as compared to other agencies, EEOC did not have as many levels of bureaucracy dictating how investigatory procedures had to be carried out.[167] Nevertheless, decisions about how to proceed with an investigation have significant practical consequences for regulated parties, as the investigators at EEOC have broad subpoena power that they can levy against employers accused of discrimination.[168] Both

164. Telephone Interview with Participant #6, *supra* note 162. Some of the procedural items contained in the investigator's compliance manual include model forms and letters, guidance on timing of various parts of an investigation, and technical matters. *Id.*

165. *Id.*

166. Telephone Interview with Participant #7, *supra* note 161.

167. *Id.*

168. 42 U.S.C. § 2000e-8(a) (2018) (providing that EEOC "shall . . . have access to, for the purposes of examination, . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation"); *id.* § 2000e-9 (conferring subpoena power on the Commission); *see also* McLane Co. v. Equal Emp. Opportunity Comm'n, 137 S. Ct. 1159, 1164-65 (2017) (describing the breadth of EEOC's subpoena power).

officials at an EEOC field office conceded that there was little guidance or supervision in implementing this power, with significant discretion left to the individual investigator.[169]

Both interviewees noted, however, that enforcement guidance—which captures the agency's substantive views on the antidiscrimination laws—carries significant weight with both the investigators and the legal supervisors that review investigators' cases to determine the likelihood that a particular charge was meritorious.[170] Frontline officials aggressively followed this guidance, and to the extent that they departed from the guidance as written, they did so to pursue more expansive interpretations of antidiscrimination law in ways that comported with the spirit of the guidance.[171] These practices suggested that the Commission was effective in using guidance to privilege its viewpoint—most often, the aggressive enforcement of its antidiscrimination mandate—on frontline officials. These officials would then carry these interpretations into the courts and its investigations, helping to advance the legitimacy of these interpretations on external actors beyond the agency.

The Commission's privileged view of the law is thus consistent with the differing internal binding effects of the agency's procedural and substantive guidance documents on agency staff. EEOC attempts to achieve compliance through litigation of its legal views in court, and the Commission's substantive determinations about the law are central to the work of its staff. Still, the expectation that agency staff follow the Commission's view of the law does not require that they do so blindly. After all, legal staff in each district office are also expected to pore over investigators' work to ensure that charges will be meritorious under the underlying substantive statutes and regulations.[172] And, of course, the agency's view of the law is ultimately checked by the courts, which review claims de novo.[173] Accordingly, EEOC must still convince the courts that its view of the

169. Telephone Interview with Participant #7, *supra* note 161; Telephone Interview with Participant #6, *supra* note 162.

170. Telephone Interview with Participant #7, *supra* note 161; Telephone Interview with Participant #6, *supra* note 162.

171. A supervising trial attorney at an EEOC field office, for example, observed that if the law of the circuit—in this case, the Second Circuit—was more employee friendly, they would follow that law, even if the guidance did not require as expansive an interpretation. Conversely, in circuits that did not have as expansive a reading of the law, investigators would still follow the guidance in issuing charges even if the guidance went beyond the case law of that circuit. Telephone Interview with Participant #7, *supra* note 161.

172. Telephone Interview with Participant #2, *supra* note 131.

173. The courts have consistently held that EEOC guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment

law is correct, making it difficult to conceptually separate its need to both instruct its staff on what it thinks the law is and successfully make its case before the courts. Interview subjects repeatedly emphasized this point when justifying the agency's adherence to its guidance.

The story of guidance at EEOC is thus one of achieving strict internal interpretive consistency among agency staff, led by a Commission whose primary and often only tool for communicating its views is through guidance. This desire for consistency stems directly from the agency's litigation-oriented mission: trying to convince the courts and the public of its views of the requirements of employment antidiscrimination law.[174] Guidance could be said to be "binding" on frontline agency officials insofar as these officials dutifully adhere to the legal positions the guidance documents contain in pursuit of this mission. These officials are in fact a primary audience for the guidance,[175] though the Commission also has a clear interest in telegraphing those views to the regulated public as well.[176] The result is a guidance regime that will undoubtedly have some effect on external regulated parties as they anticipate how the agency will conduct its enforcement,[177] but whose actual legal impact will be mediated through adversarial litigation and judicial review.

B. Procedural Consistency and the Occupational Safety and Health Administration

OSHA is an executive agency situated within the U.S. Department of Labor (DOL) and is responsible for developing and enforcing mandatory job safety and health standards, conducting workplace inspections to ensure safety, and consulting with states in the administration of their own occupational safety and

to which courts and litigants may properly resort for guidance." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)).

174. *Cf.* Emerson, *supra* note 22, at 2192 (arguing that when courts can "clearly separate the force of law from the respect that is owed to officials' nonbinding legal judgments, they might engage more robustly with the reasoning of administrative agencies").

175. Telephone Interview with Participant #2, *supra* note 131 (noting that the original compliance manual was read only by investigators rather than the general public, as has become increasingly the case).

176. Telephone Interview with Participant #5, *supra* note 146 (arguing that the purpose of guidance is to be "transparent on how the agency views and enforces the law, rather than just filing cases without notice to employers in advance that that's [the agency's] view").

177. *Cf.* Parrillo, *An Empirical Study of Agencies and Industries*, *supra* note 11, at 167 ("Individuals and firms want to know how the agency will use its discretion and how it will read the regulations' ambiguous provisions.").

health programs.[178] OSHA oversees and regulates all employers and their employees in the fifty states, the District of Columbia, Puerto Rico, and all other territories under the jurisdiction of the United States.[179] As a result, the scope of OSHA's mission is gargantuan. Congress authorized OSHA to enter workplaces to conduct inspections, examine documents, and question employees to ensure compliance.[180] In recent years the agency conducted approximately 32,000 workplace inspections per year on average,[181] which, in 2015, resulted in the discovery of over 65,000 violations.[182] Still, because of the sheer number of businesses over which OSHA has jurisdiction and its comparatively small field staff—comprising only 1,850 inspectors[183]—the agency is generally viewed as a weak regulator.[184]

Nevertheless, OSHA's central focus is on workplace inspections, and, unlike EEOC, the agency itself does not house its own legal staff. Instead, it relies on DOL attorneys—referred to in the department as "solicitors"—assigned to work on OSHA's policies.[185] These litigators are often not involved unless negotiations falter with employers during the inspection and fine-setting process. In fact, "OSHA inspectors in the vast majority of cases set fines and negotiate final settlements with businesses without ever involving litigators."[186]

---

178. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (2018).

179. *Id.* § 652(7).

180. *Id.* § 657(a)-(c).

181. *2018 Occupational Safety and Health Administration Enforcement Summary*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/enforcement/2018-enforcement-summary [https://perma.cc/3XPA-8KNW].

182. *2015 Occupational Safety and Health Administration Enforcement Summary*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/enforcement/2015-enforcement-summary [https://perma.cc/XX8L-4FRT].

183. *Commonly Used Statistics*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/data/commonstats [https://perma.cc/97MF-XVEC].

184. *See* Parrillo, *An Empirical Study of Agencies and Industries*, *supra* note 11, at 219-25; *see also id.* at 196 (observing that OSHA "has so few inspectors in proportion to its jurisdiction that each employer regulated by OSHA can be inspected only once every seventy years on average"). Despite the large number of inspections, the actual number of Compliance Safety and Health Officers (CSHOs) has been slowly declining in recent years. As of 2017, there were 896 CSHOs within the agency. *See Death on the Job: The Toll of Neglect*, AFL-CIO 109 (Apr. 2018), https://aflcio.org/sites/default/files/2018-04/DOTJ2018nb.pdf [https://perma.cc/STR9-KDPW].

185. Telephone Interview with Participant #3, Assoc. Solic. for Occupational Safety & Health, U.S. Dep't of Lab. (Mar. 6, 2020); Telephone Interview with Participant #1, Exec. Off., Occupational Safety & Health Admin. (Feb. 27, 2020).

186. Van Loo, *supra* note 134, at 418.

To help guide its field inspectors on how to carry out their inspections, OSHA has an extensive internally subclassified array of guidance documents, each of which has a different audience and purpose. These documents are organized in a starkly hierarchical manner, where each stage of the agency hierarchy has distinct levels of rigidity.[187] The most important guidance documents for purposes of binding staff are the OSHA Field Operations Manual,[188] enforcement directives,[189] standard interpretations,[190] and enforcement memoranda.[191] Of these, the Field Operations Manual applies most broadly to every inspector in the field. According to a former executive official at OSHA, the Field Operations Manual must be strictly adhered to and ensures OSHA's many inspections are carried out consistently.[192] The Field Operations Manual is written at a great level of detail and includes precise instructions that channel the discretionary decisions of inspectors across the country.[193] Because of the extraordinary scope

187. Telephone Interview with Participant #1, *supra* note 185 (describing the organization of OSHA's national, regional, and local offices).

188. The Field Operations Manual is a comprehensive guide that OSHA inspectors rely on heavily in conducting inspections to "ensure[] that occupational safety and health standards are enforced with uniformity." OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 57, at Abstract-1.

189. Enforcement directives are "written statements of policy and procedure on a single subject, which generally include implementation guidelines and responsibilities for the Agency's affected offices." *Directives*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/enforcement/directives/directivenumber [https://perma.cc/592X-2KY4].

190. Standard interpretations are "letters or memos written in response to public inquiries or field office inquiries regarding how some aspect of or terminology in an OSHA standard or regulation is to be interpreted and enforced by the Agency." *Standard Interpretations*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/laws-regs/standardinterpretations/publicationdate/currentyear [https://perma.cc/85GE-YQ5C].

191. Enforcement memoranda "provide agency policies and/or supplementary enforcement guidance, and some memos may include an interpretation of an OSHA standard." *Enforcement Memos*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/enforcement memos [https://perma.cc/D737-VJ5W].

192. Telephone Interview with Participant #1, *supra* note 185 (observing that OSHA's challenge is to make sure "inspectors know what they're doing and [are] doing it correctly and consistently"). This is also in line with other studies that have included OSHA. *See, e.g.*, GREGORY A. HUBER, THE CRAFT OF BUREAUCRATIC NEUTRALITY: INTERESTS AND INFLUENCE IN GOVERNMENTAL REGULATION OF OCCUPATIONAL SAFETY 111 (2007) (observing that deviations from the Field Operations Manual's inspection priorities are only allowed if "justifiable"); Parrillo, *An Empirical Study of Agencies and Industries*, *supra* note 11, at 268.

193. For example, at OSHA, the Field Operations Manual includes a section on "de minimis conditions," which are those situations where "an employer has implemented a measure different from one specified in a standard, that has no direct or immediate relationship to safety or health." OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 57, at 4-28 to 4-29.

of OSHA's mission, a former OSHA executive official also noted that consistency across inspections and a strict hierarchy within the agency are important values that the agency tries to maximize.[194] Consequently, OSHA's guidance is particularly preoccupied with procedural uniformity in the execution of inspections. This contrasts with the situation at EEOC, where guidance was less focused on the minutiae of how investigations were run and more concerned with the consistency of its legal arguments and interpretations, in line with its litigation-focused mission.

OSHA's decision-making hierarchy also creates the opportunity for geographically tailored guidance. Political scientist Gregory A. Huber observes in his study of OSHA that when it comes to office staffing at the agency, "[w]ithin each region . . . the devolution of decisions . . . to regional administrators presents an opportunity for crafting enforcement in response to local pressures."[195] The same is true of generating guidance at the agency. OSHA's Directives System allows for region-specific procedural guidance and enforcement priorities to be set by the area directors and regional administrators under the purview of the national office.[196]

At the national level, OSHA's enforcement memoranda and standard interpretations are the mechanisms through which the national office ensures nationwide uniformity in the agency's substantive view of the law. Using these memoranda and interpretations, the agency can ensure "consistency and clarity," thereby enabling any given area director to determine what the "right" and "wrong" views of the law are in accordance with a national standard.[197]

Because OSHA outsources its legal advice to DOL, the fine legal distinctions of the binding-norm test hold little sway over OSHA staffers. In the retelling of a former DOL solicitor, OSHA approaches DOL with a policy goal, and the solicitors respond by advising on how that policy could best be implemented—such as through an interpretation, policy statement, or some other means.[198] As a result, distinctions between policies and interpretations, in terms of their binding effect, are not relevant to agency staffers, particularly at the local office

194. Telephone Interview with Participant #1, *supra* note 185.

195. HUBER, *supra* note 192, at 101.

196. Telephone Interview with Participant #1, *supra* note 185; *Directives—Regional LEP*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/enforcement/directives/lep [https://perma.cc/X4ZY-9HPY].

197. Telephone Interview with Participant #1, *supra* note 185.

198. Telephone Interview with Participant #3, *supra* note 185.

level.[199] Instead, these documents serve a function that reflects their larger role in the agency's overall mission for consistency.

The result of the Field Operations Manual's detailed procedures and guidelines for inspections and the agency's mission of achieving consistency is that "OSHA constrains subordinate bureaucrats and demonstrates a stubborn consistency in seeking out those who violate the law."[200] Frontline rigidity seems to be built into the design of OSHA, where the strict hierarchy directs how the binding effect of guidance varies at each level within the agency. For instance, at the first level—that of the inspector—the Field Operations Manual, standard interpretations, regional directives, and enforcement memoranda guide inspectors' procedures, discretion, and priorities.[201] At the next level, there is more discretion, with the opportunity for employers who receive citations to conference with OSHA Area Directors, who can discuss "citations, penalties, abatement dates, or any other information pertinent to the inspection."[202]

Guidance at OSHA is crucial to administrators' ability to engage in bureaucratic supervision of frontline officials and operates much in the way that Elizabeth Magill describes agency efforts to implement internal procedural self-regulation.[203] OSHA's guidance is a tool for ensuring consistency across tens of thousands of inspections across the country and thus becomes a "[s]elf-regulatory measure[] . . . by which top-level agency 'principals' assert [their] control over agents exercising delegated authority."[204] And the focus on hierarchy is important, because these self-regulatory measures are often tied to the relationship between the principals—the administrators, commissioners, or other agency heads—and their desire to monitor and supervise the agency's enforcement mission from afar. It makes sense, then, that OSHA describes its guidance as a way to "instruct lower-level decisionmakers how to make their decisions"[205]—and

199. Telephone Interview with Participant #4, Indus. Regul. Consultant (Mar. 10, 2020) (noting that, for instance, the policy statement / interpretive rule distinction did not matter when dealing with OSHA and is more a purely academic conversation); *cf.* Administrative Conference of the United States: Adoption of Recommendations, 84 Fed. Reg. 38,927 (Aug. 8, 2019) (applying the previously developed best practices for policy statements from the Administrative Conference of the United States to interpretive rules).

200. HUBER, *supra* note 192, at 167.

201. Telephone Interview with Participant #1, *supra* note 185.

202. OCCUPATIONAL SAFETY & HEALTH ADMIN., OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) INSPECTIONS, https://www.osha.gov/sites/default/files/publications/factsheet-inspections.pdf [https://perma.cc/L99H-9PFX].

203. *See* Magill, *supra* note 61, at 860.

204. *Id.* at 886.

205. *Id.*

why the idea that the agency cannot conclusively tell its staff how to interpret the law or conduct its inspections was baffling to the agency officials I interviewed.[206]

The hierarchical and binding nature of OSHA's guidance within the agency came closest to ACUS's recommendation that "a policy statement could bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize action that varies from the policy statement."[207] As a former OSHA executive official explained, although the frontline inspectors are all expected to rigidly adhere to the agency's Field Operations Manual, enforcement memoranda, and other guidance, negotiation about the findings of an inspection could only occur at the level of Area Director and the informal conferences after finding a violation.[208] It is not immediately clear, however, that the additional flexibility at this level results in the agency meaningfully deviating from its guidance in practice—at least not regularly. As some OSHA officials reported, once an investigation has progressed to informal negotiations, the case centers not around disputes about the binding effect of guidance but instead around negotiating down fines[209] and working within the constraints of the record that OSHA inspectors generated.[210]

In addition to its commitment to tightly controlling procedural delegations, OSHA, like EEOC, also treats the agency's substantive interpretations in its guidance as binding within the agency. In the agency's briefing in *Agricultural Retailers Ass'n v. U.S. Department of Labor*,[211] the D.C. Circuit held that an OSHA enforcement memorandum interpreting what constituted a "retail facility" was not an appropriate interpretive rule but, instead, a substantive standard. However, the agency maintained that it was within its rights to establish an interpretation for its staff to follow, leaving challenges to its interpretation for individual enforcement proceedings.[212] In the end, the legislative basis for enforcement would remain as the enacted substantive standard, not the memorandum, which would only guide the agency's staff on its best interpretation of the standard's

206. Telephone Interview with Participant #1, *supra* note 185; Telephone Interview with Participant #3, *supra* note 185.

207. Administrative Conference of the United States: Adoption of Recommendations, 82 Fed. Reg. 61,734 (Dec. 29, 2017).

208. Telephone Interview with Participant #1, *supra* note 185.

209. Telephone Interview with Participant #4, *supra* note 199.

210. Telephone Interview with Participant #1, *supra* note 185.

211. 837 F.3d 60 (D.C. Cir. 2016).

212. Final Brief for the U.S. Department of Labor and the Occupational Safety and Health Administration at 18-19, *Agric. Retailers Ass'n*, 837 F.3d 60 (Nos. 15-1326 & 15-1340).

requirements.[213] Instead, the agency's brief argued, OSHA's ability to determine its litigating position was an "exercise of delegated lawmaking powers."[214] Although OSHA's stance on interpretations was not as mission-driven and purposive as EEOC's, it nevertheless betrayed a tendency toward viewing ex post judicial review of agency interpretations as justification enough for encouraging staff rigidity in implementing those interpretations in the field.

Unlike at EEOC, however, the internal binding effects of OSHA's legal views set forth in its guidance are complicated by the placement of OSHA's adjudicative function within a separate agency, the Occupational Safety and Health Review Commission (OSHRC). This separation undermines the level of force OSHA's interpretations of the Occupational Safety and Health Act have in adjudications conducted by OSHRC — both as a matter of law and in practice.

As a matter of law, in *Martin v. Occupational Safety & Health Review Commission*,[215] the Supreme Court held that "the power to render authoritative interpretations of [the Occupational Safety and Health] Act regulations is a 'necessary adjunct' of the Secretary's powers to promulgate and to enforce national health and safety standards."[216] In practice, however, OSHA personnel and DOL solicitors find that OSHRC does not always act consistent with *Martin*'s interpretation of the relationship between the two agencies. A former DOL solicitor noted that OSHRC "has historically seen itself as a way to protect employers from the Secretary" rather than as an adjudicatory body bound to follow OSHA's interpretations of national health and safety standards.[217] As a result, OSHA finds itself in the position of not only having to defend guidance in the courts, but also in OSHRC adjudications. For instance, in *Hugler v. Swift Pork Co.*,[218] OSHA defended a 1998 memorandum[219] that the agency styled as an interpretive rule against an accusation from an employer that the rule impermissibly altered the obligations under the relevant existing safety standard. In doing so, the agency called upon the same doctrines to support the validity of the interpretive rule that it would have had to invoke under judicial review.[220] In a sense, then,

213. *Id.*

214. *Id.* at 19 (citing Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144 (1991)).

215. *Martin*, 499 U.S. 144.

216. *Id.* at 152 (citing Cuyahoga Valley Ry. Co. v. United Transp. Union, 474 U.S. 3, 6-7 (1985)).

217. Telephone Interview with Participant #3, *supra* note 185.

218. The Secretary's Memorandum in Opposition to Respondent's Motion for Summary Judgment at 7-18, Hugler v. Swift Pork Co., No. 16-0510 (OSHRC Mar. 1, 2017).

219. Memorandum from John B. Miles, Jr., *supra* note 36.

220. *See, e.g.*, The Secretary's Memorandum in Opposition to Respondent's Motion for Summary Judgment, *supra* note 218, at 7 ("The critical feature of an interpretive rule is that it 'advise[s]

OSHRC's presence and its stance toward OSHA adds a double layer of review for the agency's guidance.

However, *Swift Pork Co.* may also be more of an exception than the rule. According to an industry regulatory consultant and former attorney at the American Chemistry Council, once OSHA issues a citation, employers are often not concerned about challenging the guidance per se but rather trying to minimize the fine.[221] In those cases where guidance is dispositive of the outcome—arguably as in *Swift Pork Co.*—then the guidance can be a bigger issue. The more frequent scenario, according to one OSHA official, is that the investigator's fact-findings are the starting point of the negotiations once a fine has been issued. Because the district director is limited by these facts, they often can only negotiate fines downward, taking the incentive away from employers to fight the guidance directly.[222]

In sum, as compared to that of EEOC, OSHA guidance was more preoccupied with establishing procedural consistency. OSHA's Field Operations Manual focused on ensuring that its workplace inspections were carried out uniformly across the country, with openings for regional variation and enforcement emphases through the agency's regional directives. OSHA was also committed to ensuring that its personnel consistently followed the agency's substantive views of the law as found in guidance. In contrast with EEOC, though, the internal binding effect of agency guidance seemed more explicitly hierarchical at OSHA, with more flexibility as one travels up the chain of command within the agency. This effect was enhanced by the presence of an external review commission that sees itself as not entirely bound by that guidance, creating a second layer of review for guidance documents within the agency.

C. Enforcement Discretion, Adjudicative Consistency, and U.S. Citizenship and Immigration Services

The U.S. immigration bureaucracy is predominantly housed under the umbrella of DHS.[223] Within DHS, the immigration system is organized in a bifurcated manner, with USCIS primarily tasked with administering immigration benefits and agencies such as U.S. Customs and Border Protection (CBP) and

---

the public of the agency's construction of the statutes and rules which it administers.'" (quoting Perez v. Mortg. Banker's Ass'n, 575 U.S. 92, 97 (2015))).

221. Telephone Interview with Participant #4, *supra* note 199.

222. Telephone Interview with Participant #1, *supra* note 185.

223. *See* 8 U.S.C. § 1103(a) (2018) (delegating the administration and enforcement of laws "relating to the immigration and naturalization of aliens" to the Secretary of the U.S. Department of Homeland Security (DHS)).

U.S. Immigration and Customs Enforcement (ICE) handling enforcement.[224] Despite the separation of these agencies' missions, their work often overlaps. For example, although primary enforcement responsibilities reside with CBP and ICE, USCIS also administers components of the executive branch's immigration-enforcement discretion, including processing applications for deferred action through the DACA and DAPA programs.[225] To manage these benefits and enforcement-discretion programs, USCIS conducts adjudications.

Like OSHA, USCIS's adjudication system is massive, with the agency adjudicating more than 26,000 applications for benefits daily.[226] Unlike EEOC and OSHA, however, which are primarily concerned with investigating violations of law after the fact (either through litigation or an inspection regime), USCIS oversees immigration-benefits applications, including visa petitions, applications for naturalization, adjustment of status, and refugee or asylee applications.[227]

The agency's position as a gatekeeper of benefits has significant implications for its ability to impose external binding effects on regulated parties. When a regulatory regime is headed by an agency empowered to carry out only ex post enforcement after the violation of a rule, regulated parties maintain the leeway to act freely subject to some later supervision if it turns out their conduct was unlawful. Agencies like USCIS, by contrast, are concerned with ex ante preapproval of regulated party conduct. Without their consent, regulated parties operate in a default state of unlawfulness. In the immigration context this means, for example, that noncitizens must obtain the prior permission of USCIS if they want to obtain lawful status, without which they face the prospect of immediate enforcement.

---

224. This bifurcated approach has long been a feature of the immigration bureaucracy. The precursor to the current system assigned immigration enforcement to the now-defunct Immigration and Naturalization Service (INS) and DOJ while leaving benefits adjudication scattered across a plethora of other agencies, such as the Department of Labor, the Department of State, and the Department of Health and Human Services. MILTON D. MORRIS, IMMIGRATION—THE BELEAGUERED BUREAUCRACY 87 (1992). This fragmented system has drawn criticism for its inefficiency and ineffectiveness in the past. *See id.* at 91-92.

225. *See Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 19, 2021), https://www.uscis.gov/DACA [https://perma.cc/YJ9L-LFDD].

226. *A Day in the Life of USCIS*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 17, 2021), https://www.uscis.gov/about-us/a-day-in-the-life-of-uscis [https://perma.cc/WY5Z-TBPM].

227. *See* Homeland Security Act of 2002, Pub. L. 107-296, § 451(b), 116 Stat. 2135, 2196 (codified as amended in scattered sections of 6 U.S.C.); *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 27, 2020), https://www.uscis.gov/about-us/mission-and-core-values/what-we-do [https://perma.cc/MC39-ZFE9].

Scholars have recognized that agencies that stand in the way of receiving a government benefit—particularly a benefit as high stakes as a person's ability to naturalize or immigrate to the United States—have significant power to compel compliance, particularly as compared to agencies that merely investigate violations and conduct enforcement after the fact.[228] These agencies are less practically constrained by ex post judicial review, have the power to delay the granting of benefits to applicants, and therefore have significant power over regulated parties.[229] This dynamic is particularly important for the power of agency guidance to bind regulated parties. As Parrillo finds in his interview research, "[r]egulated parties have a strong incentive to follow guidance when they face a preapproval requirement," particularly when the benefit sought is important to the regulated party, as is the case with immigration benefits.[230]

Within the agency, preapproval regimes also raise the stakes for bureaucratic supervision of frontline officials. The relative weakness of ex post judicial review means that preapproval agencies have more room to exercise discretion over regulated parties, including discretion by frontline officials.[231] It also means that the most effective check on the exercise of this discretion is from within the agency, in particular supervision over line personnel by higher-level agency officials.[232]

USCIS also faces two related pressures that lurk in the background of its adjudications: the political sensitivity of its mission[233] and the significant discretion that all immigration agencies (even those engaged in ex post enforcement) necessarily wield, both by statutory design and because of the impossibility of achieving perfect immigration enforcement with current resources.[234] USCIS is therefore tasked not only with administering a significant amount of executive discretion with few resources, but also with exercising its discretion in ways that are highly controversial and politically salient. This challenging mandate no

---

228. *See, e.g.*, Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1295 (1999).

229. *Id.* at 1302 (arguing that "*ex ante* regulation has a tendency to denude judicial supervision of agencies as a whole, by stripping firms of practical access to judicial review.").

230. Parrillo, *An Empirical Study of Agencies and Industries*, *supra* note 11, at 184.

231. Bhagwat, *supra* note 228, at 1300-02.

232. *Id.* at 1303.

233. *See* Chen, *supra* note 32, at 380 (noting that DHS is "constrained by the high-profile nature of . . . immigration and the political sensitivities surrounding it").

234. As of 2014, when the Obama Administration adopted the DACA program, DHS claimed that it had the budgetary resources to remove fewer than 400,000 undocumented aliens each year of the approximately 11.3 million then in the country. Prioritizing & Deferring Removal of Certain Aliens Unlawfully Present in the U.S., 38 Op. O.L.C. 39, 50 (2014) (reciting these statistics received from DHS).

doubt contributes to the notoriously low morale among agency staff at USCIS and, more broadly, throughout DHS.[235]

Guidance is a central tool for exercising this discretion and interpreting the many vague or indeterminate immigration statutes and regulations.[236] At USCIS, guidance is almost all housed in the USCIS Policy Manual. In the past, USCIS faced criticism for what one scholar described as its "unorganized hodgepodge" of guidance documents, many of which were not easily accessible to applicants.[237] Since then, USCIS has moved toward centralization of its guidance with the replacement of its previous Adjudicator's Field Manual and other decentralized documents with the new USCIS Policy Manual.[238]

USCIS staffers adhere to the views found in its guidance. The Policy Manual itself specifically communicates 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,"[239] and scholars have observed that USCIS adjudicators regularly depend on the agency's memoranda and policy documents in conducting adjudications.[240] In fact, according to one agency insider, much of the pressure for the agency to issue internally binding guidance comes from the agency managers and frontline staffers themselves.[241] Lucas Guttentag, who served as

---

235. *See* Chen, *supra* note 32, at 380 & n.135. On top of the low morale at DHS generally, USCIS often ranks very low in job satisfaction among agency subcomponents. *See 2020 Best Places to Work in the Federal Government Rankings*, P'SHIP FOR PUB. SERV., https://bestplacestowork.org/rankings/?view=overall&size=sub&category=leadership [https://perma.cc/C8MY-76WV] (ranking USCIS 339 out of 411 agency subcomponents with respect to employee satisfaction).

236. For example, as I note earlier, the INA is silent on significant issues that affect many applicants for immigration status, such as whether time spent in deferred-action status counts toward an individual's unlawful presence for the purpose of the three- and ten-year bars. *See supra* notes 37-42 and accompanying text; Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations Directorate, U.S. Citizenship & Immigr. Servs., Lori Scialabba, Assoc. Dir., Refugee, Asylum & Int'l Operations Directorate, U.S. Citizenship & Immigr. Servs. & Pearl Chang, Acting Chief, Off. of Pol'y & Strategy, U.S. Citizenship & Immigr. Servs. (May 6, 2009), https://www.uscis.gov/sites/default/files/document/memos/revision_redesign_AFM.PDF [https://perma.cc/TP7G-L8DT] (communicating consolidated guidance on unlawful presence).

237. *See* Family, *supra* note 117, at 5, 11.

238. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 41.

239. *Id.*

240. Family, *supra* note 117, at 3.

241. Telephone Interview with Participant #8, Couns., U.S. Dep't of Homeland Sec. (Sept. 17, 2020). The important caveat to these observations is that they come from a relatively high-level bureaucrat. To be sure, the best judges of what frontline immigration adjudicators actually believe about their discretionary authorities over individual claims are those adjudicators

counsel to the Secretary of Homeland Security during the Obama Administration, observed a general tendency against conferring discretionary authority on agency adjudicators.[242] For their part, managers feared 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.[243] Low-level adjudicators similarly did not desire increased discretion, worrying that any discretionary departures from established agency guidance would lead to personal culpability for the consequences of their departure.[244]

The combination of USCIS's administration of a preapproval regime and the significant, politically sensitive discretion that it is tasked with exercising makes both the internal and external binding effects of the agency's guidance extraordinarily strong. Applicants seeking immigration status have no choice but to comply with agency guidance or else risk having their applications denied. This can be problematic when, as was often the case in the Trump Administration, guidance documents increase burdens on immigration applicants by narrowing the agency's interpretations of law.[245] Similarly, the binding effect on agency personnel is also high as a result of the significant discretion available to the officials,

themselves. However, the heightened political sensitivity of immigration issues during the Trump Administration and the already-low morale among immigration officials made this a particularly difficult population to reach.

242. Lucas Guttentag, *Reflections on Bureaucratic Barriers to Immigration Reform*, REGUL. REV. (Dec. 24, 2019), https://www.theregreview.org/2019/12/24/guttentag-reflections-bureaucratic-barriers-immigration [https://perma.cc/SM96-RFEZ].

243. Telephone Interview with Participant #8, *supra* note 241.

244. *Id.* As Lucas Guttentag notes in his reflection on his time at DHS, frontline officials at this agency exhibited what political scientists have referred to as the "blame game"—a general fear that their discretionary decisions will lead to public, media, and professional blame, and a desire to avoid such blame. *See* Guttentag, *supra* note 242. *See generally* CHRISTOPHER HOOD, THE BLAME GAME: SPIN, BUREAUCRACY, AND SELF-PRESERVATION IN GOVERNMENT 3-6 (2011) (discussing the logic and politics of blame avoidance in public service and government).

245. *See* Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 25 LEWIS & CLARK L. REV. 71, 89-92 (2021) (noting how the Trump Administration issued USCIS guidance to narrow interpretations of the immigration laws and thereby reduce lawful immigration); *see also* Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes Under the Trump Presidency*, MIGRATION POL'Y INST. (July 2020), https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf [https://perma.cc/3EAV-VRSS] (cataloging changes to immigration policies under the Trump Administration, many of which were made to discourage immigration and increase denial rates).

the discomfort frontline officers have with exercising that controversial discretion without guidance, and the desire of the agency's political supervisors to closely control agency discretion to advance their policy aims.

Guidance at USCIS also provides political accountability to the supervision of the immigration bureaucracy. Indeed, as Chen observes, guidance and informal agency policies are central to the President's exercise of their authority in immigration policy.[246] But guidance from within USCIS is not the only mechanism for such political supervision. The Attorney General also oversees immigration adjudication and has the authority to selectively review and decide cases on appeal at the Board of Immigration Appeals.[247] These decisions often contain dicta that USCIS describes as "not binding, but often provid[ing] useful guidance or persuasive authority for courts and adjudicators in subsequent cases."[248] In practice, however, these dicta are binding on lower-level immigration adjudicators throughout DHS, despite not being legislative rules or having formal legal weight.[249] USCIS guidance, then, is one tool within a broader policymaking framework that lets high-level officials exercise strict control over frontline adjudicators using facially nonbinding documents.

As with each of the previous two agencies, guidance at USCIS is an essential tool for the internal administration of the agency's regulatory mission. Like OSHA, USCIS oversees an expansive adjudication system, and it relies on a central guidance manual to achieve consistency across adjudications. Like EEOC officials, USCIS officials are highly unlikely to stray from the agency's substantive interpretations of the law, a point that the guidance makes clear by explicitly noting that immigration adjudicators are expected to follow it. Unlike either previous agency, though, USCIS is also clothed with immense power over regulated parties as a benefits-granting agency and retains significant discretion in doling out those benefits. This significantly increases the likelihood of internal binding effects spilling over into incidental external binding effects. The agency's discretion—partly granted by statute, partly as a consequence of vague statutory requirements—is also high stakes and politically sensitive, incentivizing adjudicators to avoid personal responsibility for exercising that discretion. But, as in both

246. Chen, *supra* note 32, at 373 & n.103.

247. *See* 8 C.F.R. § 1003.1(h) (2021).

248. Refugee, Asylum & Int'l Operations Directorate, *Officer Training / RAIO Combined Training Program: Reading and Using Case Law*, U.S. CITIZENSHIP & IMMIGR. SERVS. 31 (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/document/foia/Reading_and_Using_Case_Law_RAIO_Lesson_Plan.pdf [https://perma.cc/ZD7H-HKCR].

249. *See* Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy Through Attorney General Referral and Review*, MIGRATION POL'Y INST. 9-12 (Jan. 2021), https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf [https://perma.cc/SR84-RTDP].

previous agencies, the result is largely the same: a general internal tendency and expectation for guidance to be followed, particularly by frontline officials.

* * *

Although each agency in this Part faces unique constraints and therefore deploys guidance in slightly different ways, a few themes became clear in my conversations with agency officials.

First, the need for guidance that binds frontline officials is apparent at all three agencies. Agency administrators want binding guidance to facilitate their work in supervising lower-level officials, and those lower-level officials want guidance to help them apply consistent rules across many different situations. Agency-specific dynamics, such as the political sensitivity of USCIS adjudications, can further strengthen bureaucrats' preference for written rules over informal policies and broad discretion.

Second, although there are usually mechanisms within the agency hierarchy to request departures from guidance, internal desires for consistent, predictable, and transparent treatment of cases create a strong presumption in favor of following guidance. The goals of the regulatory regime each agency administers also matter. For example, EEOC employees are less interested in following the agency's procedural guidance because the agency's primary mission involved advancing its preferred view of antidiscrimination laws through litigation. OSHA officials, by contrast, are more preoccupied about dutifully following the procedural guidance that creates consistency among the many workplace inspections the agency carries out.

Finally, idiosyncrasies at each agency affect *how binding* internally binding guidance is on external, regulated parties. For example, internal constraints at OSHA, including the presence of OSHRC and the outsourcing of agency legal support to DOL, could mean that even guidance that nominally binds frontline enforcement officials in the first instance may still face resistance elsewhere in the agency, diminishing its internal binding effects. Similarly, external constraints, such as a lack of rulemaking authority and a requirement to litigate all claims in court, as the EEOC faced, mean that the agency's view of the law must always undergo judicial review before it can legally bind private parties.

III. JUDICIAL REVIEW OF INTERNALLY BINDING GUIDANCE

As I explain in Part I, courts applying the binding-norm test today continue to review agency guidance skeptically, emphasizing the risk of binding effects on private parties. This skepticism ignores the independent normative justifications for internally binding guidance that make it an important tool for agency administration. It also ignores the actual expectations and practices of agency admin-

istrators. As my interviews in Part II suggest, agency administrators are concerned with their ability to supervise lower-level agency officials, the transparency of the policies that these officials are charged with carrying out, and the procedural burdens that further judicial review of internal guidance documents would put on agencies. These concerns lead agency administrators to routinely issue guidance that binds frontline officials to the agency's preferred view of the law, despite the threat of judicial review.

Legal scholars and commentators have offered various reform proposals. Some of these proposals would do away with probing judicial scrutiny of binding effects of guidance altogether in a bid to economize on judicial decision costs. Others are more modest, asking courts to modify the current doctrine to acknowledge the need for guidance that binds some agency personnel. Assuming that it is unlikely that courts will move away from the current doctrine's emphasis on the binding effects of guidance,[250] the suggestions of this latter group come closer to accommodating the day-to-day needs of agency administrators. Even so, these proposals fail to take full account of the many contexts in which agencies deploy internally binding guidance.

In this Part, I outline a novel alternative for judicial review that encourages courts to consider the character and context of agency guidance documents in order to separate their internal and external binding effects. This approach would instruct courts to weigh new factors that are relevant to the binding effects of guidance. These include the underlying authority of the agency to act absent the guidance, the power of the agency generally to create indirect binding effects on regulated parties, the agency's internal procedures for contesting guidance, and the audience for the guidance. Although this new approach would require closer scrutiny of the idiosyncratic practices and procedures that vary across agencies, it reflects the same type of analysis that courts are currently required to undertake when determining whether an agency interpretation should be afforded deference under *Mead* and *Kisor*.[251] Such an approach, therefore, falls squarely within the typical toolset of the courts in reviewing administrative action and offers a meaningful path forward for balancing the necessities of administration with the procedural protections of the APA.

---

250. *See* Levin, *supra* note 5, at 309 ("The 'practical binding effect' ship has long since sailed, and in all likelihood it is now too far out of port to be recalled.").

251. United States v. Mead Corp., 533 U.S. 218, 233 (2001) (establishing a test for determining whether an agency interpretation found in an agency guidance document is entitled to *Chevron* deference based in part on an examination of "the agency practice itself" with those documents and whether they indicate that the document was promulgated with a "lawmaking pretense"); Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019) (establishing a test for determining whether an agency interpretation qualifies for *Auer* deference, based on a contextual review of the agency's vehicle for that interpretation and whether it would be properly "understood to make authoritative policy in the relevant context").

In the remainder of this Part, I begin by briefly reexamining some of the challenges to judicial review of the internally binding effects of agency guidance and existing proposals to modify the doctrine that would address some of these issues. I then outline my proposal for a new contextual approach to judicial review of agency guidance.

A. Challenges and Possibilities for Judicial Review of Internally Binding Guidance

Critics of the binding-norm test, particularly as applied to internally binding guidance, have proposed several modifications to the prevailing doctrinal regime. These proposals range from increasing the procedural burdens on agencies promulgating guidance to, conversely, repudiating courts' role in policing the guidance exemption through the identification of "practical binding effects" altogether. Each of these proposals would represent a significant departure from the current regime, and each comes with drawbacks.

Proponents of the former approach argue that agencies can implement new procedural requirements for the issuance of guidance that can both increase transparency and defend against criticisms that agencies use these documents as a means of evading notice and comment. These proposals include encouraging agencies to voluntarily adopt good guidance practices[252] that incorporate public feedback into certain significant guidance documents,[253] implementing a government-wide mandate urging public comment on all guidance,[254] and encour-

---

252. Some agencies have voluntarily adopted additional procedures beyond those required by the APA for issuing guidance. These practices—commonly referred to as "good guidance practices"—often formalize the procedures for developing and issuing new guidance, sometimes include provisions for soliciting public input, and generally attempt to increase transparency around the use of guidance documents. The FDA notably adopted a set of good guidance practices, which provide, among other things, that the agency would voluntarily conduct notice-and-comment procedures before promulgating significant guidance documents. *See* 21 C.F.R. § 10.115(g)(1) (2021). The OMB under the George W. Bush Administration adopted its own version of good guidance practices that would apply across executive agencies, using the FDA regulation as a model. *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432 (Jan. 25, 2007); Paul R. Noe & John D. Graham, *Due Process and Management for Guidance Documents: Good Government Long Overdue*, 25 YALE J. ON REGUL. 103, 107 (2008).

253. *See* Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 172 (2000); *see also* Conrad, *supra* note 44 (arguing that "agencies should be required to provide notice and an opportunity to comment on drafts of sufficiently momentous guidance documents").

254. *See* Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 398 (2009); *see also* Nina A. Mendelson, *Regulatory*

aging agency-by-agency variation and procedures tailored to each agency's specific institutional needs.[255] Nevertheless, my interviews show that the binding-norm test in its present form imposes *too great* a burden on agency officials seeking to promulgate guidance to direct internal staff action. These proposals would each erect further procedural burdens that would impair bureaucratic supervision, impair agencies' responsiveness to changing conditions, and encourage agencies to engage in secrecy rather than transparency about their internal deliberative procedures.[256]

On the other end of the reform spectrum are those who suggest that the courts are ill-equipped to scrutinize the binding effects of guidance altogether. This group argues that the challenges created by judicial exploration of agencies' internal processes and management—including the conceptual difficulties already implicated in determining which guidance documents create "binding norms"—counsel against any kind of judicial review that attempts to scrutinize a guidance document's effects. Perhaps the most famous of this school of proposals is what David L. Franklin has dubbed the "short cut."[257] Under a "short cut" approach to guidance, courts would simply take an agency's characterization of its own rule at face value, treating any rule promulgated pursuant to the guidance exemption as presumptively nonbinding and unenforceable against private parties unless it has gone through notice and comment.[258]

Beneficiaries and Informal Agency Policymaking, 92 CORNELL L. REV. 397, 447-50 (2007) (going further and arguing that opportunities for public comment are insufficient in preventing agencies from circumventing APA safeguards in ways that harm regulatory beneficiaries in particular).

255. *See* Family, *supra* note 117, at 15-16.

256. *See* Strauss, *supra* note 55, at 806; *cf.* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 346-50, 400-01 (2019) (warning against assuming that additional procedures in administrative law necessarily increase legitimacy or public accountability for administrative action).

257. David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276 (2010).

258. There is a "long and distinguished line of writings advocating" for what David L. Franklin calls the "short cut." *Id.* at 289; *see, e.g.*, William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1324-25 (2001) (proposing a "simple test for whether a rule is a legislative rule or a nonlegislative rule: simply whether it has gone through notice-and-comment rulemaking"); Gersen, *supra* note 96, at 1719 ("Rather than asking whether a rule is legislative to answer whether notice and comment procedures should have been used, courts should simply ask whether notice and comment procedures were used. If they were, the rule should be deemed legislative and binding if otherwise lawful. If they were not, the rule is nonlegislative. If the rule is nonlegislative, a party may challenge the validity of the rule in any subsequent enforcement proceeding; if the rule is legislative, the agency may rely on the rule in a subsequent enforcement proceeding without defending it."); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 929 (2004); Strauss, *supra* note 2, at 1467-68.

This approach would effectively turn the typical question in judicial review of guidance on its head. Rather than asking whether a guidance document is "binding," and therefore should have gone through notice and comment, a court would assume that a statement of agency policy issued pursuant to the guidance exemption is "nonbinding" and thus unenforceable against regulated parties. This approach would obviate the need for judicial review of the procedures leading up to the issuance of guidance altogether and would "facilitate agencies' ability to issue nonlegislative rules that provide effective management of agency staff and that give members of the public useful advice as to the agency's interpretations and policies."[259]

This solution would also likely lead to inadequate protection of regulatory beneficiaries from deregulatory guidance, which would by definition reduce enforcement actions where the guidance could be substantively reviewed.[260] Conversely, it would also inadequately protect regulated parties who are unwilling to take the risk of being found in noncompliance and thus comply with the guidance regardless of their doubts about its validity.[261]

Some scholars have proposed a more moderate approach that embraces the binding-norm test's fundamental premise of reviewing agency guidance for inappropriate binding effects while also acknowledging the practical needs of agency administration. Under such an approach, "an agency should be allowed, without resorting to notice-and-comment [rulemaking], to issue a guidance document that is binding on its staff if persons affected by the document will have a fair opportunity to contest the document at a later stage in the implementation process."[262] Proponents of this view agree with agency administrators on the fundamental "advantages of encouraging government regularity in accordance with published guidelines," including the need for guidance to "structure

259. Levin, *supra* note 5, at 309.

260. *See* Strauss, *supra* note 2, at 1484-85. On this point, proponents of the "short cut" might argue that the ability of the public to file a rulemaking petition with the agency to request reconsideration of the guidance would still offer an avenue for judicial review of permissive or deregulatory agency policy statements. *See* Sean Croston, *The Petition Is Mightier than the Sword: Rediscovering an Old Weapon in the Battles over "Regulation Through Guidance,"* 63 ADMIN. L. REV. 381 (2011); Aram A. Gavoor & Daniel Miktus, *Public Participation in Nonlegislative Rulemaking*, 61 VILL. L. REV. 759 (2016); Mendelson, *supra* note 254.

261. *See* Levin, *supra* note 5, at 309 & n.222.

262. *Id.* at 305.

discretion, [and] to provide warning and context for efficient interaction between the agency and the affected public."[263] This is also the official recommendation of ACUS, which has twice adopted the view that internally binding norms among agency staff should be permissible in certain circumstances, even where externally binding norms are impermissible.[264]

Although this approach has the benefit of more closely aligning with agency practice, it nevertheless suffers from several flaws. First, proponents of this approach have not further elaborated how reviewing courts should put it into practice. This leaves open questions about the types of procedures that would satisfy this test. For example, how might a court treat situations where agency supervisors continue to follow guidance for the sake of consistency and predictability? This was precisely the case at OSHA and USCIS. Additionally, an approach that emphasizes only regulated parties' opportunity to contest guidance within the agency ignores other factors that are relevant to distinguishing internal and external binding norms. For example, even an agency that lacks an internal procedure to contest guidance may not risk creating indirect external binding effects if, like at EEOC, the guidance cannot create any independent legal consequences or obligations.

The lack of such a roadmap is particularly problematic given the existing difficulties courts have encountered in applying the current binding-norm test. Under the current doctrine, courts purport to look to whether a guidance document "appears on its face to be binding or is applied by the agency in a way that indicates it is binding."[265] In reality, however, it is rare for courts to go beyond the

263. Strauss, *supra* note 2, at 1484-85, 1486; *see also* Thomas, *supra* note 20, at 155 (noting that "a rule that essentially penalizes an agency for restricting the discretion of its own personnel would appear to be counterproductive" to the goal of avoiding "unstructured, variable and undisciplined" agency prosecutorial discretion that evades judicial review); Brief of Administrative Law Scholars as Amici Curiae in Support of Petitioners at 8-17, United States v. Texas, 579 U.S. 547 (2016) (No. 15-674) (arguing that "promulgating binding guidance for lower-level agency officials is precisely what general policy statements are properly designed to do").

264. *See* Administrative Conference of the United States: Adoption of Recommendations, 82 Fed. Reg. 61,728, 61,734 (Dec. 29, 2017); *see also* Administrative Conference of the United States: Adoption of Recommendations, 57 Fed. Reg. 30,101, 30,103 (July 8, 1992) (arguing that an agency should be able to "mak[e] a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence").

265. Gen. Elec. Co. v. Env't Prot. Agency, 290 F.3d 377, 383 (D.C. Cir. 2002) (first citing Appalachian Power Co. v. Env't Prot. Agency, 208 F.3d 1015, 1023 (D.C. Cir. 2000); and then citing McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1321 (D.C. Cir. 1988)).

language on the face of the guidance itself and to the underlying agency practice.[266] When they have closely examined the underlying agency practice in the context of rooting out guidance that purports to bind agency personnel, they have done so using crude simplifications that fail to disentangle the internally and externally binding effects involved. For example, in *Texas v. EEOC*, the court invalidated EEOC guidance for binding agency staff even though the guidance could have no discernable legal effect on the states challenging it.[267] And in the DAPA litigation, the court extrapolated from simple statistics such as low applicant denial rates to surmise that the guidance must have been binding on agency personnel.[268] Therefore, any proposed modification that encourages courts to scrutinize internal agency practices should be careful to outline those factors that bear more reliably on the likelihood that internal binding effects could indirectly create external binding effects.

As the case studies in Part II demonstrate, disentangling internal and external binding effects requires a contextual analysis that looks to the practices of the individual agency, its relationship with regulated parties, and the agency's underlying discretionary powers. In the next Section, I will propose a new approach to judicial review of internally binding guidance that draws on the case studies' lessons and offers a path forward that balances the needs of agency administration with the need to protect regulated parties from inappropriately binding guidance.

---

266. This reticence for courts to look underneath the hood to scrutinize actual agency practice stems from a larger norm in administrative law that traditionally counsels against discovery and leads courts away from second-guessing the written reasoning of the agency. *Cf.* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (establishing a general rule against inquiring into "the mental processes of administrative decisionmakers"). In the context of the binding-norm doctrine, courts' reticence also stems from the difficulties involved in distinguishing guidance that is binding or dispositive in practice from guidance that is merely influential to the agency's decision-making. *See* Levin, *supra* note 5, at 296-300.

267. *See supra* text accompanying notes 157-158.

268. In the challenge to DAPA in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), the court found a substantial likelihood that "DAPA would not genuinely leave the agency and its employees free to exercise discretion" based on the district court's factfinding that, in practice, the DAPA memo would likely bind agency discretion. *Id.* at 176. This conclusion was based on a simple comparison to the DACA program where "only about 5% of the 723,000 applications accepted for evaluation had been denied," *id.* at 172, and the government was unable to quantify denials for individuals who formally met the memorandum's criteria, *id*. (quoting Texas v. United States, 86 F. Supp. 3d 591, 609 (S.D. Tex. 2015)). The dissent in this case made special note of the limitations of this analysis, observing that "even assuming DACA's 5% denial rate has some probative value, and assuming that rate can be properly characterized as low, a low rate would be unsurprising given the self-selecting nature of the program." *Id.* at 210 (King, J., dissenting). It went on to argue that such a simple regurgitation of application statistics simply cannot bear the "burden of showing DAPA is non-discretionary." *Id.* at 211.

B. Toward Contextual Judicial Review of Guidance

A new, contextual approach to the binding-norm test requires courts to disentangle internal and external binding effects of guidance and recognize that guidance can have different binding strength at different levels of an agency's internal hierarchy. It also requires that courts approach this analysis anew for each agency, in recognition of each agency's differing structure, authorities, and practices. Such an approach would bring the binding-norm test in line with the expectations of agency officials and reaffirm the role of guidance as a legitimate tool for internal administration.

Intuitively, it makes sense to look to the agency's actual behavior and experience implementing guidance to determine whether the agency is setting forth a "tentative" expectation of its views, rather than impermissibly binding itself with a quasi-legislative rule. Without reference to the realities of administration, these labels would have no meaning. However, as *Texas v. United States* demonstrates, one difficulty that comes with going beyond the agency's stated policy is that there is significant conceptual difficulty in separating *consistency* on the part of agency personnel from a *binding effect* on regulated parties. Instead, courts should look beneath the surface to consider how the guidance fits into the agency's decision-making hierarchy and whether the internal binding effects evince more than just an effort by the agency to supervise its frontline officials and achieve consistent application of its view of the law.

Fortunately, judicial review that considers the subtleties of agency practice is not novel in administrative law. In fact, it is a method of review that has taken firm hold in determining when agency interpretations of statutes or regulations should be afforded *Chevron* or *Auer* deference, respectively.[269] To make such a determination, the Court in *Mead* advanced a highly textured form of judicial review that evaluated the underlying agency practices that led to a given interpretation—including the number of such interpretations and the procedures by which the agency adopted them—to determine whether the agency had acted in a way that indicated that it meant to apply the "force of law" to its interpretation.[270] In *Kisor*, the Court went even further in the realm of applying *Auer* def-

269. *See* United States v. Mead Corp., 533 U.S. 218, 229-34 (2001) (describing the standard for applying *Chevron* deference to agency interpretations of statutes); Kisor v. Wilkie, 139 S. Ct. 2400, 2423-24 (2019) (describing the standard for applying *Auer* deference to agency interpretations of regulations).

270. *See Mead*, 533 U.S. at 233 (concluding that the Customs Service's practice of "churn[ing] out" tariff classifications "at a rate of 10,000 a year" undercut the claim that these rulings should

erence, outlining steps the Court would take to "inquir[e] into whether the *character and context* of [an] agency interpretation entitles it to controlling weight."[271] These factors include a highly contextual and flexible analysis that would ask courts to determine whether a given agency interpretation "emanate[s] from those actors, using those vehicles, understood to make *authoritative policy in the relevant context*."[272]

The same level of scrutiny now prevalent in the deference context can apply to review of agency guidance under the binding-norm test. Under a new contextual approach, courts would assess binding norms agency by agency, taking into consideration the agency's procedures to determine whether it has created too strong a dependency among its staff on the views expressed in its guidance and whether frontline staffers can depart from those views under certain circumstances. In fact, given that the binding-norm test's current formulation includes a requirement to look to an agency's application of a guidance document, one might think that such an investigation of agency practice is already necessary, though often ignored.

Specifically, courts should examine four key aspects of an agency guidance document to determine whether it creates too stringent an internally binding norm. First, courts should be cognizant of the underlying source of power the agency is drawing from in promulgating its guidance. In other words, in the absence of the guidance document, what would be the source of the agency's authority to accomplish the goals of the guidance? The answer to this question should inform the court's judgment about whether the agency would otherwise have the power to accomplish the same goals of the guidance—albeit in a more unstructured and less transparent way—or whether the guidance is itself purporting to create new rights or obligations on regulated parties. As Part I observes, many agency guidance documents are promulgated by agency administrators to control how frontline agency staff exercise the agency's enforcement discretion.[273] Under the *Heckler v. Chaney* doctrine, agencies have significant unreviewable discretion in choosing when to pursue or abstain from enforcement.[274] As a result, any eventual *substantive* judicial review of individual agency enforcement-discretion decisions would be very deferential to the agency. It would make little sense, therefore, to erect significant *procedural* barriers to the

be entitled to *Chevron* deference). Alternatively, one might argue that this move simply transformed a legal fiction that admittedly was not trying to capture agency realities into an overly complicated legal fiction that would try to capture those realities.

271. *Kisor*, 139 S. Ct. at 2416 (emphasis added).

272. *Id.*

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

274. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

process by which an agency publicly documents how it will exercise its enforcement discretion. Rather, encouraging agencies to openly document and consistently apply enforcement discretion across frontline officials would avoid the situation that Thomas warned of after *CNI*, where a "more unstructured, variable and undisciplined" prosecutorial approach would diminish public participation and evade judicial review.[275]

For example, USCIS and other immigration agencies are often in the position of exercising enforcement discretion given the practical impossibility of achieving perfect enforcement against unlawfully present individuals. The DACA guidance document responds to this situation by telling USCIS officials how to exercise this enforcement discretion.[276] This guidance has the benefit of creating predictable internal principles for enforcement discretion that would otherwise later be unreviewable by the courts. It would be counterintuitive, then, for courts to subsequently punish agency officials for following these guidelines consistently, as the Fifth Circuit did in the DACA litigation.

The same goes for agencies that use guidance to establish an authoritative interpretation within the agency of a vague statutory requirement or otherwise determine how an agency will carry out a function that is, by statute, committed to agency discretion.[277] Where EEOC has independent litigating authority,[278] for example, it should be able to promulgate guidance indicating the interpretations of law it anticipates advancing in future litigation.

In each of these examples, the ultimate power the agency is constraining by promulgating guidance is highly discretionary and typically free from probing judicial review, as is the case with nonenforcement or litigation decisions. In those situations, guidance does not create new obligations or binding effects on regulated parties that did not already exist. Rather, it only clarifies how the

275. Thomas, *supra* note 20, at 155.

276. Admittedly, these programs present a complicated example for a few reasons. First, DACA required USCIS to create an affirmative-application system for consideration of deferred action. The Supreme Court has since ruled that such an application system creates an independent basis for review, separate from the issue of whether the guidance was unlawfully binding. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1897-98 (2020); *supra* Section I.B.2. These programs also implicate the distribution of some benefits that come with nonenforcement. These include work authorization, which USCIS may grant to unlawfully present noncitizens as a matter of discretion, *see* 8 C.F.R. § 274a.12(c)(14) (2021); 8 U.S.C. § 1324a(h)(3) (2018), and deferred action, which is a form of administrative discretion from enforcement that has arisen informally over the course of several decades, *see* Prioritizing & Deferring Removal of Certain Aliens Unlawfully Present in the U.S., 38 Op. O.L.C. 39, 53-54 (2014).

277. *See* 5 U.S.C. § 701(a)(2) (2018).

278. *See* 42 U.S.C. § 2000e-4 (2018).

agency will exercise its existing powers and consequently courts should be skeptical that such guidance runs afoul of the binding-norm test.

Second, courts should consider the power of the agency generally to bind regulated parties and, thus, the probability that an internal binding norm could inappropriately bleed into an external binding norm. In doing so, courts should consider an agency's formal powers to bind (i.e., whether the agency has rulemaking authority that could feasibly bind regulated parties) and the agency's stance in relation to regulated parties (i.e., whether the agency stands in the way of a benefit or merely enforces the law post hoc). For example, a court may consider that an agency like EEOC, which lacks formal coercive rulemaking authority in its enforcement of Title VII and only has the power to choose to advance its preferred policy outcomes through litigation, would be unlikely to incidentally create externally binding norms through internal guidance. After all, EEOC can only persuade courts to adopt its preferred interpretations of the civil-rights laws, and its lack of rulemaking authority means that it otherwise lacks coercive power.

Conversely, courts may look more skeptically on guidance from an agency such as USCIS which has both rulemaking authority and is in the position of granting or denying benefits, thus increasing its general coercive power over regulated parties. Even nonbinding guidance from USCIS regulating benefits may create an impermissible binding norm by indirectly coercing compliance from applicants for benefits. In such a case, the court should look to other factors, including whether the agency is using guidance to regulate its enforcement or other agency discretion and, as I note below, the procedures available to regulated parties to challenge the guidance.

Third, courts should consider the internal procedures of an agency and the extent to which they grant regulated parties avenues to challenge guidance as it applies to them. As Levin and other scholars have argued, courts should "encourage, or at least look with favor on, agency exercises of rulemaking authority to regularize the procedures by which they will allow affected persons to contest their guidance documents at the enforcement stage."[279] Courts examining these procedures could find that a "guidance document falls within the exemption if the agency has committed itself to providing an adequate opportunity for contestation" and if "the stated procedures could be expected to give the challenger a fair opportunity to contest the agency's position as stated in the document."[280] OSHA, for example, maintained significant frontline rigidity but its starkly hierarchical decision-making structure allowed for more flexibility as one reached later stages of the investigation and enforcement process. EEOC, by contrast,

279. Levin, *supra* note 5, at 353.

280. *Id.* at 354.

did not have a clear process to challenge agency interpretations outside of litigation. Additionally, the presence of a robust internal-contestation process could diminish the weight courts put on the two previous factors. So, if an agency standing in the way of a benefit promulgates guidance that would likely have a coercive effect on external parties, a contestation system could help counteract a potential externally binding effect.

Finally, courts should consider the audience the guidance is directed toward, though this factor should be given the least weight. As other scholars have observed, the nominal recipients of guidance do not fully correlate with the eventual binding effects that guidance will have, both internally and externally.[281] Nevertheless, the binding-norm test and administrative law generally have a long tradition of treating the agency's characterizations of its own rules as relevant to judicial review.[282] Looking to the face of an agency document also reflects some of the empirical realities of internal agency guidance. Both the USCIS Policy Manual and the OSHA Field Operations Manual were addressed to frontline agency officials and transparently stated their intention to create uniformity among adjudications and investigations, respectively, by requiring those frontline officials to follow the guidance.

Together, these four factors aim to provide a roadmap for courts to more carefully examine agency guidance for external binding effects while leaving room for agency administrators to continue using guidance to bind agency personnel. In deploying this type of contextual review, no one factor should be necessarily dispositive. As I argue above, an agency that may be prone to creating incidental external binding effects under one of the factors—for example, because it is a benefits-granting agency—should be able to offset those effects. That agency could create a robust internal-contestation system, explicitly provide supervisors the authority to depart from guidance, and draft guidance carefully to explain whom it is intended to bind. Considered in their totality, these factors provide courts with a roadmap to more carefully review guidance in context, without the generalized skepticism that has characterized the binding-norm doctrine.

---

281. *See* Parrillo, *An Institutional Perspective*, *supra* note 11, at 26-27.

282. *See* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 39 (D.C. Cir. 1974) (noting that "[o]ften the agency's own characterization of a particular order provides some indication of the nature of the announcement"); Warshauer v. Solis, 577 F.3d 1330, 1337 (11th Cir. 2009) ("[A]lthough not dispositive, the agency's characterization of the rule is relevant . . . ."); *cf.* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019) (acknowledging that an agency has "stated" and "unstated" reasons for acting, and recognizing "the general rule against inquiring into 'the mental processes of administrative decisionmakers'").

CONCLUSION

The case studies in this Note suggest that the everyday use of agency guidance documents remains underexplored and subject to overly simplistic scholarly and judicial narratives. Agencies do not simply use guidance to avoid the procedures of rulemaking and burden regulated parties. Rather, guidance helps agency officials direct their staff, achieve consistency, and cabin the permissible range of agency discretion. These practices are in serious tension with the established doctrine and assumptions underlying the binding-norm test and reflect judicial misunderstandings of how agency administrators use guidance to manage their staff. Agency practices also make clear that merely formalizing the empirical assumptions of the binding-norm test — that agency guidance is *supposed* to be tentative and *not* supposed to tell agency staff the right answer in a given factual scenario — is untenable. Instead, agencies must be able to bind internal actors to guidance if they are to achieve their goals of consistent, transparent, and predictable execution of their missions. Within the agency hierarchy, structural and attitudinal considerations also affect the role of agency guidance. This preliminary study begins to add texture to this story and highlights the need for further research on the internal agency experience with guidance documents. Acknowledging these factors can help courts move toward a version of the binding-norm test that is capable of reviewing guidance in context and that is more congruent with modern internal administrative law.