THE NON-ADVERSARIAL FICTION OF IMMIGRATION ADJUDICATION

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Amid the Trump Administration's crackdown on immigration, policies aimed at constructing an "invisible wall" in the legal immigration system have been overshadowed by atrocities at the border. As such, immigration agencies have quietly and effectively created barriers to lawful immigration. Significantly, increased enforcement policies and an emphasis on "securing the homeland" within the United States Citizenship and Immigration Services (USCIS), the agency charged with administering the legal immigration system, has turned what once was a pathway to immigration status and citizenship into a pipeline to deportation proceedings.

This Article is the first to analyze a model of adjudicating immigration benefits that requires individuals to appear before a USCIS decisionmaker. In so doing, it makes an important contribution in bridging immigration and administrative law scholarship through analyzing the procedural design of an often-overlooked mass adjudication system. Recently, administrative law scholarship has adopted a new approach to categorizing informal agency adjudications that do not come within the ambit of the Administrative Procedure Act's formal hearing requirements. Within this new framework, the vast and amorphous nature of the most informal hearing category, which includes USCIS proceedings, is difficult to assess as a group. Therefore, case studies are necessary to glean insight into what can otherwise be an elusive procedural black hole with monumental consequences for private parties in agency adjudications.

This Article provides such a case study by utilizing agency adjudication theories concerning procedural protections as a framework to analyze existing safeguards for applicants in USCIS's informal adjudication

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system. It exposes deficiencies within the current model that have been amplified by recent anti-immigration, pro-enforcement policies. In so doing, it highlights the implications of flexibility and deference given to agencies to determine sufficient procedural safeguards for private parties appearing before their adjudicators. As this Article demonstrates, strengthening procedural safeguards would bolster the system's integrity, legitimacy, and perception of fairness, while bringing procedures in line with current recommendations and best practices for informal agency adjudications.

INTRODUCTION

During his campaign, President Trump vowed that changing the immigration system would be a top priority.[1] He has kept his promise.[2] The Trump Administration has continuously implemented policies aimed at deterring and reducing both lawful and unauthorized immigration to the United States.[3] While the public's focus has been on border and interior enforcement efforts, the administration has been quietly and effectively chipping away at legal immigration through what has been dubbed the "invisible wall."[4]

To curb legal immigration, recent anti-immigration and enforcement-focused policies have erected a large portion of the invisible wall within the adjudication system of the United States Citizenship and Immigration Services (USCIS) within the Department of Homeland Security (DHS).[5] USCIS is charged with providing the "service" of administering the lawful immigration system, whereas its sister agencies within DHS

1. *See Transcript: Donald Trump's Full Immigration Speech, Annotated*, L.A. TIMES (Aug. 31, 2016, 9:35 PM), https://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html.

2. *See, e.g.*, Jennifer M. Chacón, *Immigration and the Bully Pulpit,* 130 HARV. L. REV. F. 243, 254 (2017).

3. *See, e.g.*, Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 25 LEWIS & CLARK L. REV. (forthcoming 2021); Chacón, *supra* note 2, at 254, 256–57; SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 6–7, 33, 61, 87 (2019); Shoba Sivaprasad Wadhia, *Immigration Litigation in the Time of Trump*, 53 U.C. DAVIS L. REV. ONLINE 121, 125–29, 131, 134–36 (2019); Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125 (2019).

4. Family, *supra* note 3; Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549, 549 (2019); AM. IMMIGR. LAWS. ASS'N, AILA DOC. NO. 18031933, DECONSTRUCTING THE INVISIBLE WALL: HOW POLICY CHANGES BY THE TRUMP ADMINISTRATION ARE SLOWING AND RESTRICTING LEGAL IMMIGRATION 3–4, 8, 15 (2018). Because of the nature of internal administrative law, the bricks of the invisible wall restricting lawful immigration have been accomplished relatively easily and largely flown under the radar of public attention and judicial review. *See* Ming Hsu Chen, *How Much Procedure Is Needed for Agencies to Change "Novel" Regulatory Policies*, 71 HASTINGS L.J. 1127, 1135, 1137–39 (2020); Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1238–41 (2020); Jill E. Family, *Immigration Law and a Second Look at the Practically Binding Effect*, YALE J. REG. (May 6, 2019), https://www.yalejreg.com/nc/immigration-law-and-a-second-look-at-the-practically-binding-effect-by-jill-e-family/ [https://perma.cc/8EYQ-6UKD]; 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, 4, 6, 10 (2013).

5. Rep. Nadler (D-NY), Chairman of the House Judiciary Committee, stated that "these policy changes seem to fix things that were not broken to begin with, and only serve to create unnecessary obstacles to legal immigration." AM. IMMIGR. LAWS. ASS'N, AILA DOC. NO. 19071912, AILA'S SUMMARY OF CONGRESSIONAL HEARING ON USCIS PROCESSING DELAYS (July 16, 2019).

are primarily responsible for immigration enforcement.[6] These adjudications include applications[7] for legal immigration status for noncitizens, such as employees of U.S. companies and close family members of U.S. citizens and lawful permanent residents, and applications for individuals seeking to become U.S. citizens.[8] Additionally, USCIS adjudicates humanitarian cases, including applications for immigration status and procedural protections for those in expedited removal proceedings.[9] In 2019, USCIS received over eight million applications; it currently has a backlog of over two million cases.[10]

In creating the current immigration agency structure under DHS, Congress's intent and statutory mandate were clearly to insulate USCIS's adjudication service-oriented mission from immigration enforcement functions performed by Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP).[11] While USCIS still officially states this separation exists, the line has been increasingly blurred since the agencies' inceptions and has practically vanished under the Trump Administration.[12] USCIS has dramatically increased its enforcement

6. *Mission and Core Values*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/mission-and-core-values [https://perma.cc/2JR5-3GR2] (last visited Aug. 16, 2020); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. § 101).

7. This Article uses "applications" generally to describe applications, petitions, and requests for immigration benefits and citizenship filed with USCIS.

8. 6 U.S.C. § 271(b); WILLIAM A. KANDEL, CONG. RSCH. SERV., R44038, U.S. CITIZENSHIP SERVICES (USCIS) FUNCTIONS AND FUNDING 2–3 (2015); *A Day in the Life of USCIS*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/a-day-in-the-life-of-uscis [https://perma.cc/G5X3-7B24] (last updated Mar. 13, 2020).

9. 6 U.S.C. § 271(b); KANDEL, *supra* note 8, at 2–3; *Humanitarian,* U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian [https://perma.cc/4M5N-9BFW] (last visited Sept. 4, 2020); *Credible Fear Screenings*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/credible-fear-screenings [https://perma.cc/DG8B-7RXV] (last updated Sept. 26, 2008). Much important research has been done about USCIS's humanitarian functions, which are not the focus of this Article. *See generally* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 210 (2017); ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY 2–5 (2014); Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Deja vu of Decisional Disparities in Agency Adjudication Response*, 60 STAN. L. REV. 475 (2007); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 416 (2010); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1251, 1266–67 (1990).

10. DEP'T OF HOMELAND SEC., FY 2018–2020 ANNUAL PERFORMANCE REPORT 38, 68, 79 (2019).

11. *See* 6 U.S.C. § 291(b).

12. Family, *supra* note 3, at 22–23; *see* Memorandum from Michael Aytes to USCIS Directors, Disposition of Cases Involving Removable Aliens 1, 7–8 (July 11, 2006) [hereinafter Aytes Memorandum].

functions within its adjudication mission, thereby fortifying a pipeline from application to apprehension, detention, and deportation.[13] These include numerous initiatives, accomplished generally through subregulatory guidance, such as the "extreme vetting" of applicants, more stringent standards for eligibility, and increasing enforcement actions.[14] Notably, USCIS adjudicators have been tasked with the enforcement function of initiating deportation cases ("removal proceedings") at an alarming rate.[15] Since 2017, USCIS has taken this prosecutorial action more than both ICE and CBP, issuing twice as many charging documents as ICE, who is generally tasked with prosecutorial function in these proceedings.[16]

Despite congressionally separated enforcement functions, USCIS has effectively become a third enforcement arm of DHS.[17] However, the procedural protections afforded to applicants in USCIS adjudications have not kept stride with more stringent policies and enmeshment with enforcement functions, notwithstanding the enormous consequences of the results. USCIS asserts that these informal hearings are "non-adversarial," thereby providing justification for limited procedural protections for applicants.[18] The agency's shift away from its statutory service-oriented mission towards enforcement amplifies the inadequacies in what were already insufficient safeguards for applicants.

USCIS's mass-adjudication system has not received the substantial attention that immigration and administrative law's scholarship affords the more notorious mass-adjudication system—the immigration courts of the Executive Office of Immigration Review.[19] Therefore, many aspects

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13. *See infra* Part II.

14. *Cuccinelli Announces USCIS' FY 2019 Accomplishments and Efforts to Implement President Trump's Goals*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 16, 2019), https://www.uscis.gov/news/news-releases/cuccinelli-announces-uscis-fy-2019-accomplishments-and-efforts-to-implement-president-trumps-goals [https://perma.cc/2LCG-R9DT] [hereinafter *Cuccinelli Announcement*]; *USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/archive/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants [https://perma.cc/5TJU-JGSX] (last updated Aug. 28, 2017) [hereinafter *USCIS to Expand In-Person Interview Requirements*].

15. MIKE GUO & RYAN BAUGH, DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2018, at 7–8 (2019).

16. *Id.*

17. *See infra* Part II; *compare* 6 U.S.C. § 298(b)*, with* GUO & BAUGH, *supra* note 15.

18. U.S. CITIZENSHIP & IMMIGR. SERVS., ADJUDICATOR'S FIELD MANUAL—REDACTED PUBLIC VERSION 2012 § 15.2 (2012) [hereinafter USCIS ADJUDICATOR'S FIELD MANUAL].

19. Notably, a few scholars have provided important contributions specific to USCIS and benefits adjudication. *See, e.g.*, Chen, *supra* note 4, at 1137–38; Ming H. Chen, Response, *Making Litigating Citizenship More Fair*, 133 VAND. L. REV. EN BANC 133, 134 (2020); Chen & New, *supra* note 4, at 549–51; Shoba Sivaprasad Wadhia, *Sharing Secrets:*

of the nature of USCIS adjudications have thus far remained elusive.[20] Given the sheer volume of cases, the unique interplay with enforcement systems, and the potentially grave consequences of these decisions, USCIS's system serves as an important example of informal agency adjudication.

The Administrative Conference of the United States (ACUS) and scholars alike have struggled to categorize and analyze informal agency adjudications that do not come within the ambit of the Administrative Procedure Act's (APA) formal hearing requirements. The most recent categorization, as put forward by Professor Michael Asimow, bifurcates these informal adjudications based on certain indicia of formality.[21] The least formal of these informal classifications, under which USCIS adjudications fall, is comprised of a broad, amorphous group of agency adjudications varying in terms of size, scope, and procedural protections. As such, generalizations and studies on the adequacy of procedural protections to private parties subject to these adjudications have been limited.[22] Therefore, case studies of these informal systems instituted by agencies, such as USCIS, are necessary to glean insight into what can otherwise be a procedural design black hole with monumental consequences for private parties in agency adjudications.

This Article seeks to provide insight into the implications of procedural design choices of agencies in the most informal category of adjudication by examining USCIS's non-adversarial model through an agency adjudication theories framework. Specifically, missing from the scholarship is an analysis of USCIS's model of adjudication, which requires applicants to appear in person before an adjudicator. As part of the

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Examining Deferred Action and Transparency in Immigration Law, 10 U.N.H. L. REV. 1 (2012); Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 45, 64–66 (2011); Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 585–86 (2012); Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 200 (2014); Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 206–213 (2002); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1300–01 (1986). See also *supra* note 9 for scholarship focused on asylum adjudications.

20. Kent H. Barnett, *Some Kind of Hearing Officer*, 94 WASH. L. REV. 515, 537 (2019) ("[T]he hidden nature of procedural schema renders it more difficult for outside groups—whether affected interest groups, academics, or good-government watchdogs—to identify problems and propose improvements.").

21. Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,314–15 (Dec. 23, 2016); MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 3–4 (2019).

22. Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1371–72; Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749, 1751–52 (2020).

agency's "enhanced vetting" of applicants, USCIS has increased the number and types of applications that require these in-person adjudications.[23] The minimal procedural safeguards for applicants in field office interviews are not new,[24] but the stakes are increasingly high,[25] making theorization about the nature of these adjudications overdue and necessary.

This Article recasts these adjudications in light of the literature on theories of informal agency adjudication by unpacking the non-adversarial label and corresponding minimal procedural protections for applicants in USCIS field office interviews. Scrutinizing the realities of field office interviews through this framework, this Article rebukes the official designation of this model as non-adversarial and exposes the inadequacies of current procedural safeguards for applicants that have been amplified by recent anti-immigration, pro-enforcement policies. In so doing, it highlights the implications of the flexibility and deference given to agencies to determine sufficient procedural safeguards for private parties appearing before their adjudicators.

This Article proceeds as follows. Part I provides a brief overview of informal agency adjudication and theories of procedural protections for private parties. Part II provides an overview of USCIS's adjudication system and its mission shift towards enforcement. Part III then excavates the procedural protections for applicants in USCIS's field office interview model. Using conceptualizations of agency procedural design as a framework, Part III analyzes existing safeguards and juxtaposes official guidance on the function of the model with the realities and relevant theories. Finally, Part VI offers recommendations for squaring the official position concerning the nature of field office interviews with reality and bringing the model in line with current recommendations and best practices for informal agency adjudications, including removing the "non-adversarial" label and strengthening procedural safeguards.

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23. Louise Radnofsky, *Ken Cuccinelli Takes Reins of Immigration Agency with Focus on Migrant Vetting*, WALL ST. J. (July 6, 2019, 7:00 AM), https://www.wsj.com/articles/ken-cuccinelli-takes-reins-of-immigration-agency-with-focus-on-migrant-vetting-11562410802 [https://perma.cc/EH6S-D44M]; *Cuccinelli Announcement*, *supra* note 14; *USCIS to Expand In-Person Interview Requirements*, *supra* note 14.

24. *See* Benson, *supra* note 19, at 206–13; *see also* Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 549 (2011) (discussing procedural protections in USCIS's adjudication system).

25. Chen, *supra* note 4, at 1137–38; Nina Rabin, *Searching for Humanitarian Discretion in Immigration Enforcement: Reflections on a Year as an Immigration Attorney in the Trump Era*, 53 U. MICH. J.L. REFORM 139, 142 (2019).

I. ADMINISTRATIVE ADJUDICATIONS AND PROCEDURAL SAFEGUARDS

Administrative agencies in the United States adjudicate a vast number of disputes concerning diverse subjects and consequences of differing severity.[26] In many of these adjudication systems, private parties are required to appear before an agency decision-maker to resolve disputes with the government.[27] Agencies are given a great degree of deference in creating both the process and standards for outcomes, leaving them relatively free to institute insufficient safeguards for private parties appearing before them under the guise of balancing fairness and accuracy with efficiency.[28]

This Part first defines the current classifications of agency adjudication models. It then explores the legal sources and theories of procedural protections for individuals subject to these agency adjudications. Finally, it homes in on key types of safeguards for private parties in informal adjudications.

A. Classifying Agency Adjudication Models

Agencies' procedural design choices for adjudication systems are extremely broad and diverse. Due Process, the Administrative Procedure Act (APA), and administrative common law grant agencies conducting informal adjudications substantial deference and flexibility in crafting their unique adjudication processes.[29] The Administrative Conference of the United States (ACUS) and scholars have attempted to categorize the vast and diverse models of adjudication used by agencies and make generalized recommendations to agencies given the diverse types and nature of adjudication systems.[30] At the heart of the classification inquiry is the type, nature, and source of procedural safeguards that Congress or the agencies provide for private parties.

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26. *See generally* ASIMOW, *supra* note 21.

27. Other agencies decide disputes between private parties, as well as between a private party and the government. Disputes involve government benefits and enforcement, but also include other matters such as licensing, subsidies, grants, inspections, and national security. Barnett, *supra* note 20, at 522; ASIMOW, *supra* note 21, at 89.

28. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, *supra* note 22, at 1753; Emily S. Bremer, *Designing the Decider*, 16 GEO. J.L. & PUB. POL'Y 67, 68 (2018).

29. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, *supra* note 22, at 1753; Bremer, *Designing the Decider*, *supra* note 28, at 68.

30. *See, e.g.*, Bremer, *Designing the Decider*, *supra* note 28; Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1 (2019); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 154 (2019); ASIMOW, *supra* note 21.

Traditionally, adjudications have been separated into two groups, formal and informal. Formal hearings are those whose statute requires "on the record" proceedings and therefore fall under a stringent set of requirements dictated by the APA.[31] They are trial-type models presided over by an Administrative Law Judge (ALJ) that provide similar safeguards to parties participating in an adversarial system.[32] Informal hearings, including United States Customs and Immigration Services (USCIS) adjudications, encompass a large and exceedingly diverse subset.[33] As such, there is very little uniformity in the amount and type of safeguards provided and resulting formality of proceedings.[34] Models range from including very few procedural safeguards for parties to mirroring, or even surpassing, what is required by the APA for formal hearings.[35]

In an attempt to rein in the unwieldy informal hearing group for analysis, Michael Asimow's new method of categorization splits the informal category into two separate subcategories.[36] In this formulation, formal hearings under the APA are classified as Type A hearings.[37] Informal hearings are now classified as Type B or Type C models.[38] Type B hearings are the more formal of the two groups, requiring adjudications that are evidentiary hearings, contain exclusive record requirements, and mandate a hearing by statute or regulation.[39]

Type C models, including USCIS adjudications, represent the "other" option that does not meet the Type A or B definitions.[40] The variation in procedural design choices is particularly pronounced in this category.[41] Throughout the years, ACUS scholarly surveys and reports have provided insight into the procedural design of the more formal of the informal systems, those generally falling into the now called Type B

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31. Barnett & Wheeler, *supra* note 30, at 15.

32. *Id.*; 5 U.S.C. § 554(a) (1978); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 744 (1976).

33. ASIMOW, *supra* note 21, at 6; Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 22, at 1372.

34. ASIMOW, *supra* note 21, at 6, 26; Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 22, at 1353–54.

35. ASIMOW, *supra* note 21, at 5–6. Some hearings are on the border of the three categories, which may be the case with USCIS adjudications which, as will be discussed in Part III, likely fall under Type C but inching toward Type B. *Id.* at 15–16, 19.

36. *Id.* at 6.

37. *Id.* at 3.

38. *Id.* at 5. Others refer to these two categories as "Non-ALJ" hearings. *See* Barnett, *supra* note 20, at 521; John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 263 (1992).

39. ASIMOW, *supra* note 21, at 15.

40. *Id.* at 15, 89; Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, *supra* note 22; Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 22, at 1372, 1415.

41. ASIMOW, *supra* note 21, at 6.

hearings.[42] However, Type C adjudications are hard to analyze as a group given the wide range of adjudication designs used by agencies.[43] Therefore, informal hearings that would fall under the Type C category are generally not included in surveys and recommendations.[44]

In what Professor Emily Bremer has coined the "exceptionalism norm," the amorphous nature and resulting inability to generalize informal adjudications, particularly in Type C models, leaves a vast amount of decisions with wide-ranging consequences, including those before USCIS with potentially life or death implications, largely free from scrutiny.[45] Moreover, the internal administrative law mechanisms often relied upon by agencies decrease the transparency of these insufficient procedural protections.[46] This makes case-study analysis of procedural protections provided in Type C hearings, particularly those whose decisions hold enormous import on the individuals subject to the agency's procedures, a necessary contribution to discussions of procedural design choices in informal adjudications.

B. Minimum Procedural Protections for Private Parties Under Due Process and the APA

Calculating what procedural protections should be afforded to private parties in a Type B or C informal adjudication model requires a complex and often opaque analysis.[47] The APA and Due Process requirements serve as a floor for procedural protections.[48] While the APA is most known for dictating safeguards for formal (Type A) hearings, it also provides modest protections for Type B and C adjudications where an

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42. *See* Walker & Wasserman, *supra* note 30, at 154; *see also Federal Administrative Adjudication*, STAN. UNIV., http://acus.law.stanford.edu/ [https://perma.cc/9CMM-N8TH] (last visited Oct. 17, 2020); *FAQ*, STAN. UNIV., http://acus.law.stanford.edu/content/user-guide [https://perma.cc/4ZMK-P7BS] (last visited Oct. 17, 2020); *BBGOFARG0004*, STAN. UNIV., http://acus.law.stanford.edu/scheme/bbgofarg0004 [https://perma.cc/Q7MN-75KL] (last visited Oct. 17, 2020); Barnett & Wheeler, *supra* note 30, at 6; Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1342 (1992); Frye, *supra* note 38, at 263; Verkuil, *supra* note 32, at 793–96.

43. ASIMOW, *supra* note 21, at 6.

44. *See id.* at 98–99.

45. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, *supra* note 22, at 1754.

46. *Id.*

47. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 22, at 1415.

48. Barnett, *supra* note 20, at 527; Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 22, at 1382; *see also* David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 5 (2020) (explaining "there would be reason to doubt the remedial efficacy of enhanced procedural rights").

individual is "compelled to appear in person before an agency or representative thereof."[49] For models that fall under this provision, private parties must be given certain procedural protections that reflect Due Process concerns of notice and the meaningful opportunity to be heard.[50] The APA's notice requirements dictate that denials must be issued promptly and with articulated reasons for the denial.[51] In addition, parties have a right to obtain a copy or transcript of evidence submitted by witnesses compelled to testify, with exceptions for confidential investigations.[52] Protections involving the ability to present the case meaningfully include the right to have counsel appear at proceedings and a limited right to bring witnesses and request subpoenas, if that power is authorized by the adjudicating agency.[53]

Though the APA's formal hearing requirements are not binding on Type B or C proceedings,[54] they are nonetheless helpful to understand as a high watermark. Importantly, formal hearings give the right to a neutral adjudicator.[55] They also include the right to receive notice of the hearing—which includes notice of the asserted laws and facts and the right to present the case, either orally or in writing—and the right to cross-examine wit-nesses, have an attorney or other representative present, have the decision be based exclusively on the record including limitations on ex parte communications, and receive a decision that includes reasoning for the outcome.[56]

Informal adjudications must also comply with Due Process requirements.[57] However, the narrow applicability of Due Process to benefits adjudications and the level of safeguards required provide limited protections for private parties. The threshold to trigger Due Process protections is whether the dispute involves a constitutionally protected "life, liberty, or property" interest.[58] Historically, government benefits that are often the subject of agency adjudications were seen as "privileges" rather than "rights" and, therefore, were not under the ambit of these constitutional

49. 5 U.S.C. § 555(b).
50. §§ 554(b), 555(b), (e), 556(d)–(e).
51. § 555(b), (e).
52. § 555(c).
53. § 555(b), (d).
54. § 555(b).
55. §§ 554(d), 557(d).
56. §§ 554(b), 555(b), 556 (d)–(e), 557(c)(3)(A), (d)(1).
57. *Mathews v. Eldridge*, 424 U.S. 319, 332–34 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 268–70 (1970).
58. U.S. CONST. amend. V; *Mathews*, 424 U.S. 319; *Goldberg*, 397 U.S. 254; William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 457 (1977) (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–71 (1972)); Barnett, *supra* note 20, at 527.

protections.[59] However, a shift in jurisprudence towards seeing certain benefits as property or liberty interests, notably demonstrated in *Goldberg v. Kelly*,[60] opened the door for Due Process claims in many agency decisions.[61]

Despite this jurisprudential shift, establishing a constitutionally protected private interest in benefits decisions is not a simple task. Judge Henry Friendly suggested that the key determinant is whether the "government is seeking to take action against the citizen" or "is simply denying a citizen's request."[62] Using this framework, he then suggested a ranking of commonly-held types of interests in agency disputes.[63] In the benefits context, he placed decisions that impact liberty interests and those that modify or revoke previously granted benefits on the high end of the spectrum.[64] For denials of initial discretionary benefits, Friendly classified these as a low private interest.[65] Courts have agreed with his classifications, finding that, where the statutory language is discretionary in terms of granting the benefit, the private interest is not constitutionally protected.[66]

Even if the interest implicates Due Process protections, deducing what precise process is due is similarly not a clear proposition.[67] At its core, Due Process requires that an individual has adequate notice and a meaningful opportunity to be heard.[68] Determining what process passes constitutional muster requires scrutinizing the procedural design of the

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59. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1440 (1968).

60. 397 U.S. 254, 264 (1970).

61. Van Alstyne, *supra* note 58, at 455–57; Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733, 741–42 (1964); *Goldberg*, 397 U.S. at 262 n.8, 267–71.

62. Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1295 (1975).

63. *Id.* at 1278–79, 1295.

64. *Id.* at 1295–98.

65. *Id.* at 1295–96, 1304.

66. *Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013) (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005)); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994); *McCreath v. Holder*, 573 F.3d 38, 41 (1st Cir. 2009); *Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008); *Hamdan v. Gonzales*, 425 F.3d 1051, 1061 (7th Cir. 2005); *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003).

67. *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 24 (1981) ("'[F]undamental fairness,' [is] a requirement whose meaning can be as opaque as its importance is lofty.").

68. Barnett, *supra* note 20, at 527–28. In the agency context, though the opportunity to be heard may require or permit oral testimony, it may also be conducted based on written documents only; oral hearings are generally necessary where credibility issues are at play. *Oshodi v. Holder*, 729 F.3d 883, 895–96 (9th Cir. 2013); *Mathews v. Eldridge*, 424 U.S. 319, 343–44 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); Friendly, *supra* note 62, at 1281.

adjudication model in question under the *Mathews v. Eldridge*[69] three-factor balancing test.[70] The *Mathews* test weighs: (1) the private actor's interest at stake; (2) the risk of erroneous deprivation and ability of the safeguards to rectify the deprivation; and (3) the burden that increased procedures would place on the government.[71] While deducing what process is due in benefits adjudications has been a moving target since *Mathews*, *Goldberg* remains the highest standard.[72] *Goldberg*, which concerns the termination of welfare benefits, mirrors most of the requirements under the APA formal hearing requirements.[73]

C. Provision of Additional Safeguards by Congress and the Executive Branch

Despite the limitations of safeguards demanded by the APA and by Due Process, Congress and the executive branch have the discretion to exceed these constitutional and APA requirements to strengthen the integrity of their systems.[74] While Congress can dictate agency adjudication processes and safeguards, it is generally left to agencies to determine their own appropriate adjudication system.[75]

A constant undercurrent in agencies' procedural design choices is the need to balance three often conflicting goals, identified by Roger Cramton as accuracy, efficiency, and acceptability.[76] Heightened procedural safeguards and formality leads to increased perceptions of fairness and thus, acceptability, but may tilt against the goal of government

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69. 424 U.S. 319 (1976).

70. The factors are applied on a case-by-case basis. *Id.* at 334–35.

71. *Id.*

72. Verkuil, *supra* note 32, at 740–41, 780; *see, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 575–84 (1975); *Wolff v. McDonnell*, 418 U.S. 539, 555–58 (1974); *Goldberg*, 397 U.S. at 266–71; *Arnett v. Kennedy* 416 U.S. 134, 154–58 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 480–90 (1972); *Morton v. Ruiz*, 415 U.S. 199, 230–36 (1974); *Frost v. Weinberger*, 515 F.2d 57, 65–68 (2d Cir. 1975).

73. *Goldberg*, 397 U.S. at 266–71 (holding termination of welfare benefits required: timely and adequate notice detailing the reasoning for the termination, effective opportunity to defend through confronting and cross-examining adverse witnesses and presenting arguments and evidence orally, ability to retain counsel, disclosure of adverse facts and evidence, decision limited to facts within the record, and an impartial decision-maker); *cf.* 5 U.S.C. §§ 554–57.

74. Walker & Turnbull, *supra* note 4, at 1234; Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in* Vermont Yankee*'s White Space*, 32 J. LAND USE & ENV'T L. 523, 523–24 (2017).

75. Bremer, *Designing the Decider*, *supra* note 28, at 68.

76. Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 111–12 (1964).

efficiency.[77] The United States generally favors formal adversarial-type models of adjudication, viewed as better able to protect the rights of the parties involved and more able to fight against the strong arm of the state.[78] However, most agencies emphasize efficiency and therefore prefer the informality of inquisitorial systems, particularly those agencies like USCIS that decide a large number of cases.[79] Yet, there are concerns about the balance that inquisitorial models tend to strike. As Professor Jerry Mashaw points out, "[n]o one who has been a student of mass administrative processes can doubt the tempestuousness of the marriage between inquisitorial-style processes, which promote speed and professionalism in claims administration, and the ever-present demand for confrontation and cross-examination in cases where motivation, good faith, and veracity are important issues."[80]

Congress and the courts have afforded considerable deference to agencies in their decisions on adjudication procedures, justified by the notion that the individual agencies possess the expertise and knowledge of the practicalities of their regulatory mission to best understand what safeguards are necessary and how to balance accuracy, efficiency, and acceptability appropriately.[81] The Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[82] found that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if agencies have chosen not to grant them."[83] Agencies' procedural design choices are given additional latitude as a result of the internal administrative law mechanisms used, with varying degrees of informality transparency. These agency actions are generally not reviewable by courts, and when they are, agencies are given a great degree of deference.[84]

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77. Frye, *supra* note 38, at 265. Criticisms of heightened formality may include accuracy concerns, given the reduced role of adjudicators to draw out factual questions. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2119–20 (1998); David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1686–87 (2009).

78. Sklansky, *supra* note 77, at 1686–87.

79. *See* Verkuil, *supra* note 32, at 743; Friendly, *supra* note 62, at 1269.

80. Jerry L. Mashaw, *Unemployment Compensation: Continuity, Change, and the Prospects for Reform*, 29 U. MICH. J.L. REFORM 1, 16 (1995–1996).

81. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 22, at 1414–15; Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1919–20 (2016).

82. 435 U.S. 519 (1978).

83. *Id.* at 524.

84. Walker & Turnbull, *supra* note 4, at 1227, 1229; Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 170 (2019); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1239 (2017).

As such, agencies' use of discretion to provide additional safeguards, particularly in enforcement actions, has been lackluster.[85] As stated in President Trump's Executive Order 13,892, Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, "[S]ome agency practices with respect to enforcement actions and adjudications undermine the APA's goals of promoting accountability and ensuring fairness."[86] The Office of Management and Budget (OMB) stated in its Request for Information titled Improving and Reforming Regulatory Enforcement and Adjudication: "The growth of administrative enforcement and adjudication over the last several decades has not always been accompanied by commensurate growth of protections to ensure just and reasonable process."[87] OMB's call for public comments reflected concerns of limited safeguards for regulated parties against agency enforcement, including agencies' responsibilities to produce favorable and exculpatory evidence to the regulated party, the lack of independence of adjudicators from enforcement functions of the agencies, and the lack of transparency regarding punitive measures.[88]

D. Meaningful Hearing and Notice Safeguards

Agencies may choose to employ a variety of safeguards in attempts to balance the goals of adjudication.[89] These protections generally include mechanisms aimed at Due Process notions of ensuring individuals appearing before agencies are afforded a meaningful opportunity to be heard and receive adequate notice.[90] This Section explores some key safeguards that agencies can implement towards these aims, including mechanisms for ensuring adjudicator impartiality, the right to representation, and notice of the proceedings.

1. IMPARTIAL DECISION-MAKERS

Many of the strongest procedural safeguards in informal hearings aim to improve the impartiality of decision-makers.[91] In *Marshall v.*

85. Improving and Reforming Regulatory Enforcement and Adjudication, 85 Fed. Reg. 5483, 5483–84 (Jan. 30, 2020).

86. Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (Oct. 9, 2019) (stating that actions of nationality and homeland security were exempted).

87. *Id.* at 5483.

88. *Id.* at 5483–84.

89. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 22, at 1414–15; Bremer & Jacobs, *supra* note 74, at 531–32 (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 523–24 (1978)).

90. Barnett, *supra* note 20, at 527–28.

91. High on Judge Friendly's list of what he considers "elements of a fair hearing" as an "unbiased or impartial tribunal." Friendly, *supra* note 62, at 1279–92.

Jerrico, Inc.,[92] the Court asserted that neutrality "preserves both the appearance and reality of fairness, ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."[93] In Type B and C hearings, the presiding officers generally act as inquisitorial adjudicators whose duties include investigating, building the record, making credibility findings, conducting legal and factual determinations, and ultimately deciding the case.[94] These decision-makers' duties, locus of employment, and mechanisms to ensure impartiality vary.[95] The lessened formality in inquisitorial proceedings decreases perceptions of impartiality and consequently the perception of fairness and legitimacy.[96]

Despite these concerns, unless necessitated by Due Process, informal hearings generally do not require a neutral adjudicator.[97] If a Due Process right is implicated, impartiality is an important component in analyzing whether an individual is afforded a meaningful opportunity to be heard and often is the key to sufficient protections within the system as a whole.[98] Assessing impartiality under Due Process contemplates the adjudicator's actual bias or unconstitutional risk of bias.[99] Risk of adjudicator bias has been raised in cases involving pecuniary or personal conflicts of interests, appointment decisions, and "institutional loyalty, psychological pressure, or compulsion."[100]

Adjudicators within policymaking agencies present bias concerns relating to the pressures imposed to fulfill policy aims.[101] As Professor Kent Barnett explains:

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92. 446 U.S. 238 (1980).

93. *Id.* at 242.

94. *See generally* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005).

95. Barnett & Wheeler, *supra* note 42, at 21–22; Verkuil, *supra* note 42, at 1342.

96. Frye, *supra* note 38, at 268; Lynch, *supra* note 77, at 2119.

97. ASIMOW, *supra* note 21, at 38.

98. Verkuil, *supra* note 32, at 751 ("It may be advisable, then, to consider impartiality (above the Goldberg impartiality minimum) as a shifting fourth ingredient that, when present, can act as a surrogate for other ingredients. In this way, even if the courts will not directly require substantial impartiality from agency deciders, the presence of this factor in the particular case may change the mix of other ingredients required by procedural due process.").

99. Barnett, *supra* note 20, at 528.

100. *Id.* at 519–520, 528 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 493, 507 n.10 (2010); *Schweiker v. McClure*, 456 U.S. 188, 196 n.10 (1982); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60–62 (1972); *Tumey v. Ohio*, 273 U.S. 510, 520, 535 (1927)).

101. *Id.* at 1704–05; Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1649–50 (2016) (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868

> [A]gencies, as agents of Congress and the President, may have an interest in achieving certain policy goals to please those who comprise the agency, their different overseers (the President, the current Congress, and congressional committees), or interest groups. Agencies may view their missions as tilting towards certain outcomes to please any or all of these groups, despite contrary statutory design or fairness concerns.[102]

As Administrative Law Judge John Frye noted, there is an "inherent tension" in the idea that policy-making agencies provide the hearings and the "substantive results" where policies contrast the need for fair adjudicatory process.[103]

In many models, such as in USCIS adjudications, no one represents the government's position per se; adjudicators are not officially seen as filling this role.[104] Nonetheless, the presiding official is generally employed by the policy-making agency.[105] Therefore, questions arise about agency culture's impact on adjudicator perceptions of applications.[106] Official agency guidance may encourage treating applications favorably, unfavorably, or ambivalently.[107] A more favorable official attitude decreases the need for safeguards against bias.[108] Some administrative adjudication models impose an articulated affirmative responsibility to assist unrepresented individuals, the most unique being the Department of

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(2009); *Free Enter. Fund*, 561 U.S. 477). Professor Barnett read cases to demonstrate a "compelling, unacknowledged argument that agency control over [non-ALJ adjudicators] creates an unconstitutional appearance of partiality under the Due Process Clause and thereby renders invalid tainted agency proceedings." Verkuil, *supra* note 42, at 1358 ("ALJ independence can be a crucial ingredient to fair decision-making in circumstances where institutional pressure may affect outcomes on the individual case.").

102. Barnett, *supra* note 20, at 535.

103. Frye, *supra* note 38, at 265; *see also* Daniel B. Rodriguez, *Bias in Regulatory Administration* 3 (Nw. Pub. L. Rsch. Paper No. 19-14, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3430809#references-widget [https://perma.cc/R7WG-C2ZT].

104. Adversarial adjudication, within the context of the Equal Access to Justice Act, requires the presence of a non-adjudicator individual who is representing and advocating the position of the government. Courts have rejected arguments that the adjudicator's knowledge of what the government would argue and wants satisfies the "or otherwise" language of the statute requirement that "the position of the United States is represented by counsel or otherwise . . . ." 5 U.S.C. § 504(b)(1)(C); *see Handron v. Sebelius*, 669 F. Supp. 2d 490, 495 (D.N.J. 2009) *aff'd on other grounds sub nom.*, *Handron v. Sec'y Dep't of Health & Human Servs.*, 677 F.3d 144, 146 (3d Cir. 2012).

105. See Frye, *supra* note 38, at 350–52 for a numerical breakdown of presiding officers employed by policy-making agencies.

106. Verkuil, *supra* note 32, at 784 n.189.

107. Robert E. Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725, 737–38 (1972).

108. Verkuil, *supra* note 32, at 784 n.189.

Veterans Affairs (DVA). The DVA affirmatively requires a "pro-claimant" attitude given the unique, albeit "paternalistic," duty society owes to those who have served the country.[109] Similarly, adjudicators in the welfare system may view the system as "designed primarily to aid the claimant."[110] Other agencies do not impose this duty.[111]

Importantly, it is also true that agency culture may diverge from official guidance. Though veterans have a unique pro-claimant system, some claimants view the adjudication process as being pitted against them, asserting that the agency's true motto is "delay, deny, and hope you die."[112] Perceptions in welfare benefits cases are that "applicants are treated as presumptive liars, cheaters, and thieves."[113]

Fears of adjudicator hostility towards applicants are amplified when agencies combine adjudication and enforcement functions. An agency as a whole may contain both adjudication functions and enforcement functions, including investigation and prosecution.[114] Additionally, each phase of proceedings may have combined or separated functions.[115] Further, individual adjudicators may have combined adjudicatory and enforcement duties.[116] Presiding officials performing functions that are not

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109. 38 U.S.C. § 5107(b); CONNIE VOGELMANN, ADMIN. CONF. OF THE U.S., SELF-REPRESENTED PARTIES IN ADMINISTRATIVE HEARINGS 6 (2016), https://www.acus.gov/sites/default/files/documents/Self-Represented-Parties-Administrative-Hearings-Draft-Report.pdf [https://perma.cc/297C-HGNP]; PAUL R. VERKUIL, DANIEL J. GIFFORD, CHARLES H. KOCH, JR., RICHARD J. PIERCE, JR. & JEFFREY S. LUBBERS, ADMIN. CONF. OF THE U.S., THE FEDERAL ADMINISTRATIVE JUDICIARY 815 (1992), https://www.acus.gov/sites/default/files/documents/1992-2%20ACUS%20%28Green%20Book%29.pdf [https://perma.cc/E7PU-65NW]; ASIMOW, *supra* note 21, at 178.

110. Scott, *supra* note 107, at 735.

111. VOGELMANN, *supra* note 109, at 6.

112. Family, *supra* note 24, at 549 (citing *60 Minutes: Why the VA Frustrates Veterans*, CBS (Jan. 1, 2010), https://www.cbsnews.com/news/why-the-va-frustrates-veterans/ [https://perma.cc/4SX7-AFSJ]); SUSAN THOMPSON, UNIV. S. CAL. CTR. INNOVATION & RESEARCH ON VETERANS & MIL. FAMILIES, NAVIGATING THE DEPARTMENT OF VETERANS AFFAIRS WITH INVISIBLE WOUNDS: HOW TO OVERCOME THE STIGMA OF "DELAY, DENY, & HOPE YOU DIE" 1 (2012), https://cir.usc.edu/wp-content/uploads/2013/10/2012-04-CIR-Policy-Brief_Navigating-the-Department-of-Veterans-Affairs_S.Thompson.pdf [https://perma.cc/LX9X-HSRX]; Walker & Wasserman, *supra* note 42, at 13.

113. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 646 (2009).

114. ASIMOW, *supra* note 21, at 6; Legomsky, *supra* note 19, at 1299.

115. ASIMOW, *supra* note 21, at 6; VERKUIL, GIFFORD, KOCH, PIERCE & LUBBERS, *supra* note 109, at 974.

116. ASIMOW, *supra* note 21, at 6; Barnett, *supra* note 20, at 548 (Of individual adjudicators, 43.2 percent of non-ALJ types had "no required separation of functions." Three types worked for agencies that only adjudicate and thus had no need to separate functions, but for 15 non-ALJ types, "8 were prohibited from engaging in investigative or prosecutorial functions," but could perform other kinds of agency functions. The rest reported "'other' limits.").

purely adjudicatory, such as enforcement or policy-making, raise neutrality concerns.[117] Nevertheless, agencies often have adjudicators with combined functions because it is viewed as more efficient and cost-effective.[118]

For Type A formal hearings, the APA contains prohibitions on the combination of adjudication with investigative or prosecutorial functions.[119] ALJs cannot perform duties that are inconsistent with their adjudication responsibilities and cannot report to or be supervised by those performing prosecutorial or investigatory duties.[120] Additionally, those involved in the investigation or prosecution cannot advise the adjudicator or participate in the proceedings. [121] Conversely, the APA does not require the separation of functions for Type B and C models.[122] Due Process jurisprudence has historically analyzed a combination of functions differently depending on whether the combination is adjudication-investigation or adjudication-prosecution, though both have, for the most part, been found to be permissible.[123] The Court has found that the combined adjudicatory-investigatory function does not violate Due Process, particularly when used for efficiency reasons.[124] In so doing, the Court has shown a great deal of confidence in and deference to agency-selected adjudicators, affording "a presumption of honesty and integrity in those serving as adjudicators."[125]

But Due Process concerns have, in the past, caused friction where prosecutorial functions are conducted by adjudicators.[126] The combination of functions in deportation proceedings has partially guided jurisprudence on the impartiality of combined-function agency adjudicators. The Supreme Court in *Wong Yang Sung v. McGrath*[127] held that the combination of adjudication and prosecutorial functions, under the prior deportation adjudication system, unconstitutionally deprived due process rights

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117. Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1694, 1701, 1717 (2020).

118. VERKUIL, GIFFORD, KOCH, PIERCE & LUBBERS, *supra* note 109, at 975.

119. 5 U.S.C. §§ 554(d), 3105.

120. §§ 554(d), 3105.

121. § 554(d).

122. § 554(a), (d).

123. Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. Rev. 2679, 2680 (2019); Barnett, *supra* note 20, at 528, 533–34; VERKUIL, GIFFORD, KOCH, PIERCE & LUBBERS, *supra* note 109, at 794.

124. Verkuil, *supra* note 42, at 1349–50 (citing *Richardson v. Perales*, 402 U.S. 389, 410 (1971); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Withrow v. Larkin*, 421 U.S. 35, 54–55 (1975); *Marcello v. Bonds*, 349 U.S. 302 (1955)).

125. Walker & Wasserman, *supra* note 42, at 183 n.236 (citing *Withrow*, 421 U.S. at 47 (1975)).

126. *See* VERKUIL, GIFFORD, KOCH, PIERCE & LUBBERS, *supra* note 109, at 975.

127. 339 U.S. 33, *modified*, 339 U.S. 908 (1950), *superseded by statute*, 18 U.S.C. § 1585 (West 1950).

to a neutral adjudicator.[128] Congress disagreed with the ruling and, in the creation of the Immigration and Nationality Act (INA), removed deportation proceedings from the APA, thereby permitting the combination of functions.[129] Thereafter, courts have continuously upheld a combination of prosecutorial and adjudicatory functions where statutorily permitted.[130]

Where Due Process is not implicated, and therefore not required, Congress may elect to institute impartiality measures, such as those that are obligatory for ALJs, to enhance perceptions of fairness and acceptability.[131] Agencies can also implement impartiality protections through internal administrative law means, in what scholars have called an internal separation of powers.[132] These include prohibitions on combined functions,[133] ex parte communications,[134] physical separation,[135] and independence from agency oversight, such as job qualifications and hiring decisions, performance appraisals and bonus eligibility, and for cause removal.[136] ACUS has recommended additional safeguards towards impartiality, such as adjudicator recusal based on appearance of bias, to

128. VERKUIL, GIFFORD, KOCH, PIERCE & LUBBERS, *supra* note 109, at 49–50.

129. *Marcello*, 349 U.S. at 306, 310; *Ardestani v. Immigr. & Naturalization Serv.*, 502 U.S. 129, 133–34 (1991).

130. *Marcello*, 349 U.S. at 311.

131. 5 U.S.C. §§ 554(d)(2), 556(b), (d), 557(d)(1), 3105; Barnett, *supra* note 20, at 520, 537–38. In adjudications that fall outside the APA formal hearing requirements, Professors Barnett and Wheeler frame the APA factors as "indicia of independence." Barnett & Wheeler, *supra* note 30, at 13. Barnett describes the ALJ restrictions as a means of providing optimal impartiality in hearings not covered by the APA formal hearing requirements. Barnett, *supra* note 101, at 1666. Barnett has called for the executive branch to use internal administrative law mechanisms to adopt what he has coined "impartiality regulations." Barnett, *supra* note 117, at 1701.

132. Barnett, *supra* note 117, at 1720–24 (citing Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006)).

133. Barnett, *supra* note 20, at 533–34 ("[T]he separation of functions was a significant addition to the APA to address concerns over pro-agency adjudicators who would manipulate factual findings to reach the agency's policy objectives."); Barnett, *supra* note 117, at 1741–42 (citing *Model Adjudication Rules*, ADMIN. CONF. U.S. 121 (Sept. 2018), https://www.acus.gov/sites/default/files/documents/Model%20Adjudication%20Rules%209.13.18%20ACUS_0.pdf [https://perma.cc/UMM5-BAAC]).

134. Barnett, *supra* note 20, at 549–51 (finding that over half of survey respondents had complete prohibitions on ex parte communications, almost one third had some prohibitions, and only 13.5 percent permitted ex parte communications with no restriction); *see also* Walter Gellhorn, *Official Notice in Administrative Adjudication,* 20 TEX. L. REV. 131, 149 (1941) (proposing that if an administrative agency acts upon knowledge not generally known, "it must indicate its knowledge and give opportunity for its refutation or qualification," going towards mechanisms that could enhance the perception of fairness among ALJs).

135. Frye, *supra* note 38, at 344–45; Barnett, *supra* note 20, at 552 (showing that of non-ALJ survey respondents, about half were physically separated).

136. Barnett, *supra* note 20, at 520, 537–38; Barnett & Wheeler, *supra* note 30, at 13.

increase legitimacy of the adjudicatory system where actual constitutionally prohibited bias fails to do so.[137]

2. RIGHT TO REPRESENTATION

An additional safeguard in providing a meaningful hearing is the right to be represented in proceedings.[138] As stated in *Powell v. Alabama*,[139] "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[140] For informal adjudications, the APA provides a right to obtain representation for those compelled to appear in person before the agency.[141] It does not, however, include the right to have counsel appointed.

Lawyers under adversarial systems present the case by building the record, whereas in inquisitorial systems, the record is built by the adjudicators.[142] Attorneys in inquisitorial models play less of a role than their adversarial counterparts.[143] Nonetheless, the right to counsel includes not just the presence of an attorney during this appearance but also to be "represented" and "advised."[144] While increasing the role of attorneys clearly elevates safeguards for private parties, it also raises numerous issues. For example, there are concerns that the presence of attorneys in inquisitorial proceedings heightens the formality and will increase the likelihood that an inquisitorial adjudicator will take on a more adversarial role by advancing the cause of the government.[145]

That increased formality also gives rise to efficiency and accuracy concerns. To counter inefficiency concerns, Justice Stevens noted, "there is no reason to assume that lawyers would add confusion rather than clarity to the proceedings. As a profession, lawyers are skilled communicators dedicated to the service of their clients."[146] This dedication to clients, however, also leads to accuracy concerns. Critics of an active attorney role point to the ethical duties of attorneys to advance the client's cases,

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137. Recusal Rules for Administrative Adjudicators, 84 Fed. Reg. 2139, 2140 (Feb. 6, 2019).

138. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

139. 287 U.S. 45 (1932).

140. *Id.* at 68–69.

141. 5 U.S.C. § 555(b).

142. Lynch, *supra* note 77, at 2119.

143. *Id.*

144. § 555(b).

145. Friendly, *supra* note 62, at 1288 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974)); VERKUIL, GIFFORD, KOCH, PIERCE & LUBBERS, *supra* note 109, at 816–17.

146. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 363 (1985) (Stevens, J., dissenting); *see also* Verkuil, *supra* note 32, at 750.

rather than making sure the whole truth is brought forward.[147] While this may be true, attorneys also owe duties to the tribunals they appear before.[148] Furthermore, though attorneys may not seek to bring to light all positive and negative aspects of the case, attorneys nonetheless often contribute significantly to the investigative process given the hours spent developing the case.[149]

3. NOTICE OF THE NATURE OF THE PROCEEDINGS

Notice provisions are an additional foundational safeguard to private parties, enabling individuals with a meaningful opportunity to be heard.[150] Notice can be conceptualized in a variety of ways.[151] Many notice requirements involve access to the facts and evidence considered in the case to enable individuals to meaningfully rebuke.[152] As there is no discovery in agency adjudication,[153] access to the record is an important key to an individual being able to present their case meaningfully. For informal hearings where an individual is compelled to appear, the APA requires private parties be given a description of the underlying basis to the denial and access to testimony presented in the case.[154]

Notice requirements also contemplate informing interested parties about the nature of the process, including information about the availability of the benefit as well as the procedures involved.[155] As expressed in Executive Order 13,892: "The rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions."[156]

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147. *Walters*, 473 U.S. at 325 (quoting Friendly, *supra* note 62, at 1287–90).

148. MODEL RULES OF PRO. CONDUCT r 3.3 (AM. BAR. ASS'N 1983).

149. SCHOENHOLTZ, SCHRAG & RAMJI-NOGALES, *supra* note 8, at 185–87.

150. *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999).

151. For example, the APA formal hearing notice requirements reach wider issues by giving private parties: the legal authority and jurisdiction utilized; the laws and facts asserted, including the availability of the record and prohibitions on ex parte communications; and the time, place, and nature of the hearing. Further, individuals are given access to certain facts within the record. 5 U.S.C. §§ 554, 555(b), (e), 557; *see generally* Edward A. Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89 (discussing ACUS discovery recommendations to agencies).

152. §§ 554(b), 555(e).

153. *See* §§ 554(b), 555(b), 555(c), 555(e).

154. § 555(b), (c), (e).

155. Family, *supra* note 24, at 572; Verkuil, *supra* note 32, at 789; Scott, *supra* note 107, at 735, n.50. ASIMOW, *supra* note 21, at 103 (citing *Service v. Dulles*, 354 U.S. 363, 388 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)) ("It should go without saying that people should have convenient access to the details of the adjudicatory procedures that affect them.").

156. Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (Oct. 9, 2019).

Public accessibility of procedural information is a common issue in informal systems and affects perceptions of fairness and acceptability.[157] Agencies' procedures are often intricate and complex, and many details of proceedings are laid out in subregulatory guidance with varying degrees of accessibility to the public.[158] Many private parties in administrative adjudications must navigate these procedurally and substantively complex adjudicatory processes without the assistance of counsel.[159]

Though subregulatory guidance is not technically binding, the public's understanding of the nature of the guidance, as well as the practicalities of private parties' incentives to follow the guidance and disincentives to litigate, make them have the effect of binding regulations.[160] The Executive Order highlighted the "unfair surprise" caused by agency reliance on subregulatory documents in enforcement actions and adjudications.[161] To address this, ACUS issued recommendations concerning agencies' use of subregulatory guidance to dictate procedural rules and concerns that impact applicants' ability to "easily access the documents and understand their legal significance" in a "clear, logical, and comprehensive fashion."[162]

Lack of publicly available explanations of the proceedings and remedies may violate Due Process. The Court has found there is no need to provide further procedural information where the statutes and case law were publicly available.[163] However, "when those procedures are arcane and are not set forth in documents accessible to the public," notice to individuals concerning the process may be required.[164] In assessing the adequacy of public notice, whether or not to account for the level of sophistication of the applicants and a corresponding individual responsibility to access information on procedures has been debated.[165] In one

157. William J. Lockhart, *The Origin and Use of "Guidelines for the Study of Informal Action in Federal Agencies,"* 24 ADMIN. L. REV. 167, 175 (1972) ("Many agencies which have developed statements or summaries of the considerations governing their informal functions have failed to systematize such statements or to put them in a form useful and accessible to the public.").

158. Warner W. Gardner, *The Procedures by Which Informal Action Is Taken*, 24 ADMIN. L. REV. 155, 159 (1972).

159. *Self-Represented Parties in Administrative Proceedings*, ADMIN. CONF. OF THE U.S. (Dec. 14, 2016), https://www.acus.gov/sites/default/files/documents/Recommendation%202016-6.pdf [https://perma.cc/EDA6-NULQ].

160. Walker & Turnbull, *supra* note 4, at 1240.

161. *Id. See also* Promoting the Rule of Law Through Improved Agency Guidance Documents, Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 9, 2019).

162. Public Availability of Adjudication Rules, 84 Fed. Reg. 2142 (Feb. 6, 2019).

163. *City of West Covina v. Perkins*, 525 U.S. 234, 241 (1999).

164. *Id.* at 242 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 n.14 (1978)).

165. *Atkins v. Parker*, 472 U.S. 115, 154–55 (1985) (Brennan, J., dissenting).

camp, several Justices assert that procedures must account for "the capacities and circumstances of those who are to be heard," including "various levels of education, experience and resources."[166] The other camp regards such a view as an unacceptable "paternalistic predicate" and believes "our democratic government would cease to function if . . . our citizenry were unable to find such information on their own initiative."[167]

The lack of transparency in the provision of agency procedures concerning policies that would subject private parties to enforcement actions is particularly troubling. Executive Order 13,892 ordered agencies to "act transparently and fairly" regarding enforcement actions and adjudications and issued safeguards "above and beyond those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose."[168] The Executive Order directed that private parties could not be subject to enforcement or adjudication "absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct," and in so doing, "apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise."[169]

As shown, agencies are given a great deal of discretion to decide which of a wide range of procedural protections to implement in their informal adjudication systems, with limited requirements to do so. Further, most agencies' procedural decisions are not subject to review, leaving agencies to create models with minimal safeguards for private parties. As such, private parties are often left with inadequate safeguards and insufficient recourse.

II. USCIS IMMIGRATION ADJUDICATIONS

USCIS was created as an agency whose core mission was immigration adjudication services. This Section explores that, though congressional intent was to separate immigration service and enforcement functions through creating distinct agencies, USCIS has increasingly become a key agency in enforcement. Within that context, it then provides an overview of USCIS's mass-adjudication system.

166. *Id.* (Brennan, J., dissenting) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)); *Memphis Light*, 436 U.S. at 14 n.15.

167. *Memphis Light,* 436 U.S. at 26 (Stevens, J., dissenting).

168. Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (Oct. 9, 2019).

169. *Id.* at 55,239–41 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 n.15 (2012)).

A. USCIS's Enforcement Evolution

To provide context for analyzing USCIS's adjudicatory system, it is first important to acknowledge the long-understood friction between immigration enforcement and adjudication "services," and its implications for the current immigration agencies' design. In response to September 11, 2001, Congress passed the Homeland Security Act, answering decades-old calls to restructure the agencies that handled the various immigration functions.[170] Historically, both the services and enforcement functions were under the same agency, the Immigration and Naturalization Service (INS).[171] With the Homeland Security Act, Congress disbanded INS and intentionally placed its conflicting functions in separate bureaus under a newly-created cabinet-level agency, the Department of Homeland Security (DHS).[172] It provided authority to the executive branch to reorganize DHS, but explicitly prohibited restructuring "used to recombine the two bureaus into a single agency or otherwise to combine, join, or consolidate functions or organizational units of the two bureaus with each other."[173] In so doing Congress intended for USCIS's service functions to be insulated from enforcement functions.[174]

USCIS officially states it was "founded to enhance the security and efficiency of national immigration services by *focusing exclusively* on the administration of benefit applications. The Homeland Security Act created Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to oversee immigration enforcement and border security."[175] The tasks most core to USCIS's mission, as delegated by Congress in the Act, are the adjudication of immigration benefits, citizenship applications, and adjudications related to humanitarian

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170. Chacón, *supra* note 2, at 247–49; Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. § 101).

171. 6 U.S.C. § 291 (2002).

172. S. COMM. ON FOREIGN RELS., 107TH CONG., STRATEGIES FOR HOMELAND DEFENSE 39–40 (Comm. Print 2001).

173. § 291(b); Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1111 nn.83–84 (2011) ("[T]hen-Attorney General John Ashcroft remarked, 'It is time to separate fully our services to legal immigrants, who helped build America, from our enforcement against illegal aliens, who violate the law.'").

174. § 291(b).

175. *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/archive/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants [https://perma.cc/6JUT-UMZB] (last visited Oct. 17, 2020) (emphasis added); *see* Homeland Security Act of 2002; David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, 80 INTERPRETER RELEASES 601, 602 (2003) (noting that the enforcement-services distinction might not be applicable to every case as some cannot be classified as one or the other).

obligations.[176] USCIS receives over eight million applications per year and has a backlog of over two million applications.[177] The agency decides a vast array of immigration applications from individuals wishing to obtain lawful status, citizenship, or humanitarian protection in the United States, as well as citizens, lawful permanent residents, or companies applying to facilitate the immigration of close family members or employees.[178]

Despite its statutory mandate, USCIS has increasingly been assuming and prioritizing enforcement tasks of its sister and parent agencies at the expense of its service-oriented mission of adjudication.[179] Though not new, the Trump Administration has permitted the enforcement values of the agency to see the light of day in dramatic fashion.[180] Crystalized in a conspicuous example, USCIS changed its mission statement away from fostering the United States as a "nation of immigrants" toward the mission of "protecting Americans, securing the homeland, and honoring our

176. 6 U.S.C. § 271(b). Congress also required reporting on these adjudications. 6 U.S.C. § 276; *Policy Changes and Processing Delays at USCIS: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Marketa Lindt, President, American Immigration Lawyers Association), https://docs.house.gov/meetings/JU/JU01/20190716/109787/HHRG-116-JU01-Wstate-LindtM-20190716.pdf [https://perma.cc/7C4A-A39M]; KANDEL, *supra* note 8, at 2–3.

177. DEPARTMENT OF HOMELAND SECURITY, *supra* note 10, at 79.

178. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., STRATEGIC PLAN FOR FISCAL YEARS 2018–2021, at v (Nov. 16, 2016), https://www.uscis.gov/sites/default/files/document/reports/USCIS_2017-2021_Strategic_Plan.pdf [https://perma.cc/VKP5-W6F9]. The Department of State's Bureau of Consular Affairs also performs an adjudicatory function in certain types of cases when the intending immigrant is outside of the U.S. *See Consular Processing*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing [https://perma.cc/S48V-3D4K] (last updated May 4, 2018).

179. *Policy Changes and Processing Delays at USCIS: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, *supra* note 176 ("Many of the [new] USCIS policies signal a distressing shift within the agency—its increasing prioritization of, and allocation of resources to, immigration enforcement rather than the service-oriented adjudications that are at the core of its mandate."); AM. IMMIGR. LAWS. ASS'N, AILA POLICY BRIEF: SEVEN WAYS USCIS IS DEFYING THE WILL OF CONGRESS (Feb. 25, 2019), https://www.aila.org/advo-media/aila-policy-briefs/seven-ways-uscis-is-defying-the-will-of-congress [https://perma.cc/9YNR-YVQ5].

180. The American Immigration Lawyers Association listed seven drastic shifts under the Trump Administration toward enforcement goals: (1) collaborating with ICE to arrest individuals at field office interviews; (2) changing the mission statement; (3) policy increasing initiation of deportation proceedings; (4) authorizing denials before seeking additional evidence; (5) guidance increasing risks of permanent bans for students; (6) creating processing delays that result in loss of legal status; and (7) requesting to transfer application fees gathered by USCIS into ICE. AM. IMMIGR. LAWS. ASS'N, *supra* note 179; U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. CITIZENSHIP AND IMMIGRATION SERVICES RESPONSE TO REPRESENTATIVE GARCIA'S FEBRUARY 12, 2019 LETTER 2 (Apr. 5, 2019), https://www.uscis.gov/sites/default/files/document/foia/Processing_Delays_-_Representative_Garcia.pdf [https://perma.cc/XY88-D85J].

values."[181] President Trump and agency leadership have repeatedly made anti-immigration statements.[182] Ken Cuccinelli, who leads the agency, has consistently issued public statements further exposing the agency's enforcement mindset.[183] He issued a press release on "Accomplishments and Efforts to Implement President Trump's Goals," grouping the agency's activities in categories including "Securing the Homeland" and "Protecting American Workers and Taxpayers."[184] Importantly, deploying USCIS officers to ICE to "provid[e] critical legal services and mission support" was listed as an accomplishment.[185] These efforts have fostered an institutional culture that is hostile to applicants for the agency's services.[186]

In addition to institutional rhetoric focused on enforcement, prioritization of enforcement tasks in adjudications has been accomplished through systematic internal administrative law changes.[187] For example, the prosecutorial role of USCIS was greatly expanded with guidance related to commencing immigration court proceedings to determine whether or not a noncitizen applicant should be deported, called removal proceedings.[188] As will be discussed in Part III, through subregulatory guidance, USCIS ballooned its role in issuing and filing the charging document in removal proceedings.[189] In its 2012 annual Immigration Enforcement Action report, DHS began listing USCIS alongside ICE and CBP as a primary agency responsible for immigration enforcement.[190]

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181. Richard Gonzalez, *America No Longer a 'Nation of Immigrants,' USCIS Says*, NPR (Feb. 22, 2018), https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says [https://perma.cc/MN7A-BBB5].

182. Family, *supra* note 3, at 9.

183. *See* Ken Cuccinelli (@HomelandKen), TWITTER (Oct. 18, 2019, 9:31 AM), https://twitter.com/HomelandKen/status/1185201684148039683; Ken Cuccinelli (@HomelandKen), TWITTER (June 26, 2019, 10:16 PM), https://twitter.com/HomelandKen/status/1144082004616654849; Ken Cuccinelli (@HomelandKen), TWITTER (July 18, 2019, 4:22 PM), https://twitter.com/HomelandKen/status/1151965605215526915.

184. *Cuccinelli Announcement*, *supra* note 14.

185. *Id.*

186. *See* JAMES WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 158 (1991).

187. Family, *supra* note 3, at 10–32.

188. Memorandum, Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (June 28, 2018), https://www.uscis.gov/sites/default/files/document/memos/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf [https://perma.cc/54D8-SFCM].

189. *Id.*

190. John F. Simanski & Lesley M. Sapp, *Annual Report: Immigration Enforcement Actions: 2012*, DEP'T OF HOMELAND SEC. OFF. IMMIGR. STAT. (Dec. 2013), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2012.pdf [https://perma.cc/XS3T-NRCH]; Katherine Witsman, *Annual Report: Immigration Enforcement Actions: 2017*, DEP'T OF HOMELAND SEC. OFF. IMMIGR. STAT. (Mar. 2019),

Since 2017, the agency has initiated removal proceedings at a higher rate than any other agency, issuing almost twice as many charging documents as ICE.[191]

In a more optical demonstration of enforcement functions, in-person interviews have been used as a setup to arrest applicants.[192] ICE can arrest and detain any noncitizen who is in the United States without authorization or whomever ICE believes is subject to deportation.[193] USCIS guidance prior to September 2020 stated that, generally, individuals shall not be arrested during a USCIS interview.[194] Despite guidance to the contrary, litigation in Massachusetts shed light on a coordination between USCIS and ICE involving spousal petitions of noncitizens applying for a benefit they were permitted to seek despite prior removal orders.[195]

B. USCIS's Adjudication System

Navigating USCIS's immigration adjudication processes often proves to be a bewildering and hostile experience, fraught with increasing obfuscated risks of triggering enforcement actions.[196] The procedural intricacies applicants face, in addition to immigration law's notorious substantive complexities and draconian penalties, create what Professor Lenni Benson has termed "process borders."[197] Benson explains, "[t]he lack of clear standards, complex substantive and procedural rules, and

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dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf [https://perma.cc/9P4V-ENKG] (listing USCIS data on NTA issuance from 2010).

191. GUO & BAUGH, *supra* note 15; Witsman, *supra* note 190.

192. *See* Regina Garcia Cano, *Suit Says Feds Using Immigration Marriage Interviews as Trap*, ASSOCIATED PRESS (Oct. 8, 2019), https://apnews.com/875583fbddef4135ac72ab3a5d365653; Erin Corbett, *ICE and USCIS Coordinating Arrests of Immigrants During Marriage Interviews*, FORTUNE (Oct. 3, 2018), https://fortune.com/2018/10/03/immigrants-marriage-interviews-arrests/ [https://perma.cc/8SJ5-D5Y9]; Brenda Medina, *Her Husband Went to an Immigration Interview About Their Marriage. He Was Detained by ICE*, MIA. HERALD (Oct. 1, 2018), https://www.miamiherald.com/news/local/immigration/article219298775.html; Paige Austin, *ICE Arrested a Man During His Immigration Interview*, N.Y. C.L. UNION NEWS (June 26, 2019) https://www.nyclu.org/en/news/ice-arrested-man-during-his-immigration-interview [https://perma.cc/QGZ5-E6B6].

193. *See* Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 165 (2016).

194. USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.1(c). Exceptions include those who have outstanding warrants for criminal violations, assault someone or destroy property during the interview, are a threat to safety or wellbeing of another party, or have a prior removal order unless seeking benefits that are available to individuals with such orders. *Id*.

195. *See, e.g.*, *Jimenez v. Nielsen*, 334 F. Supp. 3d 370 (D. Mass. 2018).

196. Family, *supra* note 24, at 561 ("While no area of law is completely transparent, immigration law is detrimentally elusive."). Family gives three main reasons: substantive complexity of the law, discretion, and nonregulatory guidance. *Id.*

197. Benson, *supra* note 19, at 205.

redundancy in adjudication create process obstacles, so significant to U.S. immigration law, that in many cases the adjudication hurdles are more burdensome and restrictive than the substantive law itself."[198]

First, determining which of the many types of statuses an individual might be eligible for is, in and of itself, often daunting. USCIS's website, which was revamped in July 2020, is accessible in many languages and provides information on the types of applications and filing procedures.[199] User interface improvements to the website include a tool called "Explore My Options," which uses decision tree methods of self-diagnosis.[200] However, the questions contain legal language, provide minimal direction, and require a baseline knowledge of certain processes.[201] For example, the option for the first question on immigration status lists "alien" as the option for individuals who are neither citizens nor lawful permanent residents.[202] While definitionally accurate under the INA,[203] the statutory definition also includes one of the other choices (lawful permanent resident) and is hardly in plain language.[204] Further, if the user selects that option, the decision tree assumes understanding that there is an intermediary step before applying for citizenship.

Once the correct type of application is ascertained, the website provides the applications, instructions, and checklists of required initial evidence. The standard of proof in most USCIS adjudications is a preponderance of the evidence, and the burden is on the applicant to show eligibility.[205] The minimum filing requirements generally include a form to be completed, but seemingly minor parts of the application process can trigger complex substantive questions with harsh enforcement

198. *Id.* at 210. Immigration law has been described as "labyrinthine," "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike." *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003); *see also Filja v. Gonzales*, 447 F.3d 241, 253 (3d Cir. 2006); *Baltazar-Alcazar v. Immigr. & Naturalization Serv.*, 386 F.3d 940, 947–48 (9th Cir. 2004). For a thorough analysis of "invisible wall" obstacles instituted under the Trump Administration, see Family, *supra* note 3, at 10–33; Chen & New, *supra* note 4, at 549.

199. *USCIS Launches Updated Website*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 21, 2020), https://www.uscis.gov/news/alerts/uscis-launches-updated-website [https://perma.cc/5SA7-PENJ].

200. *Explore My Options*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/forms/explore-my-options [https://perma.cc/442D-V3Z3] (last visited Aug. 30, 2020) [hereinafter *Explore My Options*].

201. *Id.*

202. *Id.*

203. 8 U.S.C. § 1101(3).

204. *Explore My Options*, *supra* note 200 (listing "Green Card Holder (Permanent Resident)" as an option); 8 U.S.C. § 1101(a)(20) (defining "lawfully admitted for permanent residence").

205. OFFICE OF INSPECTOR GENERAL, *infra* note 221, at 29.

consequences.[206] Often the questions requiring the most complex statutory analysis concerning eligibility and potential enforcement consequences are in a "yes or no" checkbox form. Moreover, these forms are often long and include confusing phrasing and legal jargon to elicit eligibility and other concerns.[207] For example, the application to become a lawful permanent resident (green card holder) is now 20 pages long, accompanied by 45 pages of instructions.[208] The form includes 103 "yes or no" checkbox questions, including:

> Are you the spouse, son, or daughter of a foreign national who illicitly trafficked or aided (or otherwise abetted, assisted, conspired, or colluded) in the illicit trafficking of a controlled substance, such as chemicals, illegal drugs, or narcotics and you obtained, within the last five years, any financial or other benefit from the illegal activity of your spouse or parent, although you knew or reasonably should have known that the financial

206. For example, Form I-485 asks twenty-one "yes or no" checkbox questions about criminal acts and violations. U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC., FORM I-485: APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS 11–12 questions 25–45 (Oct. 15, 2019, ed.), https://www.uscis.gov/sites/default/files/document/forms/i-485-pc.pdf [https://perma.cc/X6YB-BSTA] [hereinafter FORM I-485: APPLICATION]. Consequences of missteps in answering these questions can be severe, as USCIS is now required to refer applicants to removal proceedings based on many inadmissibility grounds these questions seek to establish. *See* Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, *supra* note 188, at 10–11; Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017).

207. *Policy Changes and Processing Delays at USCIS: Hearing Before the Subcomm. on Immigration and Citizenship of the H. Comm. on the Judiciary*, 116th Cong. at 12 (2019) (statement of Eric Cohen, Executive Director, Immigrant Legal Resource Center), https://docs.house.gov/meetings/JU/JU01/20190716/109787/HHRG-116-JU01-Wstate-CohenE-20190716.pdf [https://perma.cc/2HW9-WYGX] ("In 2018, USCIS published proposed changes to the N-400 (Application for Naturalization) form under the Paperwork Reduction Act. The ILRC submitted a comment to the Federal Register expressing our concerns, noting 'the increased time burden of an already laborious information collecting tool; adding unclear and legally overbroad questions, inviting arbitrary and inconsistent adjudications; and the resulting chilling effect, which is compounded by unclear and burdensome instructions that discourage people from applying. The instructions and demand for evidence that reaches beyond the statutory eligibility for naturalization is particularly troubling considering new policies to deny applications in cases where the agency determines initial evidence to be lacking.'" (quoting Letter from Erin Quinn, Senior Staff Attorney with Immigrant Legal Resource Center, to Samantha L. Deshommes, Chief, Regulatory Coordination Division (Jan. 22, 2019), available at https://www.regulations.gov/document?D=USCIS-2008-0025-0161 [https://perma.cc/86D3-7564])).

208. FORM I-485: APPLICATION, *supra* note 206.

> or other benefit resulted from the illicit activity of your spouse or parent?[209]

Once applications are filed, they are funneled through a chutes-and-ladders game of USCIS offices and directorates.[210] Affirmative applications undergo investigation and adjudication by three primary directorates: the Service Center Operations Directorate, the Field Operations Directorate (FOD), and the Refugee, Asylum & International Operations Directorate (RAIO).[211] An additional interconnected directorate is the Fraud Detection and National Security (FDNS) Directorate, which performs many enforcement-focused investigative and prosecutorial tasks.[212] FDNS has officers located in and managed by non-FDNS adjudicating offices within the other directorates.[213] Further, through subregulatory guidance, USCIS has created an increasingly interconnected process for involving FDNS in adjudications throughout the agency.[214]

Most applications are first sent to a service center, where adjudicators assess the application for completion, correct fees, and sufficiency of evidence.[215] For certain types of applications, recent guidance instructs officers to reject applications where even one field is left blank, in a move

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209. *Id.* at 12.

210. *Organizational Chart*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 9, 2018), https://www.uscis.gov/sites/default/files/document/charts/USCIS_OrgChart.pdf [https://perma.cc/3A5T-NWS9]. USCIS also houses a separate asylum office for affirmative asylum applications. Interviews at the USCIS asylum office share many traits of the field office interviews and much of this Article's critiques can be applied to these interviews; however, certain distinctions do exist. *Refugee, Asylum and International Operations Directorate*, U.S. CITIZENSHIP & IMMIGR. SERVS., (Mar. 10, 2020), https://www.uscis.gov/about-us/directorates-and-program-offices/refugee-asylum-and-international-operations-directorate https://perma.cc/KK8J-4WWZ].

211. *See Offices, Geographic Sectors, and Ports of Entry*, 10C FEDERAL PROCEDURAL FORMS § 40:2, at 15 (2016). In expedited removal proceedings, an asylum officer will conduct a screening to determine if the individual is eligible to be removed from those expedited proceedings, enabling them to present their case to an immigration judge. *See*, *e.g.*, Koh, *supra* note 9, at 196. This article will not discuss these proceedings; however, they are also classified as "nonadversarial." 8 C.F.R. § 208.9(b).

212. *Fraud Detection and National Security Directorate*, U.S. CITIZENSHIP & IMMIGR. SERVS., (Mar. 13, 2020), https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security-directorate [https://perma.cc/8DT9-RGCN].

213. *Id.*

214. *See, e.g.*, U.S. CITIZENSHIP & IMMIGR. SERVS., PRIVACY IMPACT ASSESSMENT FOR THE FRAUD DETECTION AND NATIONAL SECURITY DIRECTORATE, DHS/USCIS/PIA-013-01, at 5 (2014) (citing DEP'T OF HOMELAND SEC., PRIVACY POLICY FOR OPERATIONAL USE OF SOCIAL MEDIA, INSTRUCTION NO. 110-01-001 (2012), https://www.dhs.gov/sites/default/files/publications/Instruction_110-01-001_Privacy_Policy_for_Operational_Use_of_Social_Media_0.pdf [https://perma.cc/2UPC-EXWQ]).

215. *Chapter 6—Submitting Requests* in 1 POLICY MANUAL pt. B, U.S. CITIZENSHIP & IMMGR. SERVS. (2020).

described as "Kafkaesque."[216] More than just an inconvenience, in rejecting these applications for an inadvertent oversight or leaving a middle name question blank if the applicant has no middle name, this policy has caused obstacles to applicants applying for humanitarian benefits that have time limitations, sometimes causing their ineligibility.[217] Further, USCIS recently instructed its service centers to reject filings for insufficient evidence more frequently, such as forgetting to include a translation of a foreign language birth certificate.[218]

Most applications include results from biometric information captured at one of USCIS's local Application Support Centers, including the noncitizen's criminal and immigration records, as well as results from checks for national security issues.[219] Hits during this process will lead to the involvement of FDNS for investigation and recommendations on these aspects of the application and possible referral to other law enforcement agencies.[220]

After the initial review of the application, the level of continued involvement of the service center varies depending on the type of application and issues that are presented by the application. As a matter of discretion, the service center may seek additional evidence from the applicant by issuing a Request for Evidence (RFE). USCIS has consistently been criticized that "some RFEs needlessly delay adjudications and create public confusion" or "are unclear, incomplete, or otherwise of low

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216. Catherine Rampell, *The Trump Administration's No-Blanks Policy Is the Latest Kafkaesque Plan Designed to Curb Immigration*, WASH. POST (Aug. 6, 2020, 5:53 PM), https://www.washingtonpost.com/opinions/the-trump-administration-imposes-yet-another-arbitrary-absurd-modification-to-the-immigration-system/2020/08/06/42de75ca-d811-11ea-930e-d88518c57dcc_story.html [https://perma.cc/8X4U-W38Z].

217. For example, the application for U nonimmigrant status, which is available for victims of crimes, must be filed within six months of the law enforcement certification, 8 C.F.R. § 214.14(c)(2)(i) (2020), and asylum applications must be submitted within a year of entry to the United States, 8 C.F.R. § 208.4(a)(2)(i)(A) (2020).

218. Memorandum, Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b), at 2, 5–7 (July 13, 2018), https://www.uscis.gov/sites/default/files/document/memos/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf [https://perma.cc/2ZX5-555S].

219. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46,788, 46,915 (Aug. 3, 2020) (to be codified at 8 C.F.R. § 103.17).

220. FDNS analyzes hits and referrals from USCIS adjudicators, as well as others, and determines if investigation is required. Investigations result in a Statement of Findings from FDNS to the adjudicating officer, including: Fraud Found, Fraud Not Found, or Inconclusive. It may also lead to referral to ICE if FDNS decides a criminal fraud investigation is warranted. FDNS can also refer cases to other law enforcement agencies. U.S. CITIZENSHIP & IMMIGR. SERVS., 2018 ANN. REP. 11–14, fig. 1.4 (June 28, 2018), https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2018-annual-report-to-congress.pdf [https://perma.cc/6GBW-9EUM].

quality," and that generally RFEs "are not uniform, are duplicative, and ask for information that petitioners are not required to provide."[221]

RFEs can include simple requests, such as documentation inadvertently forgotten in the application, but often these involve complex procedural or legal issues. For example, in the case of a child who has been abused, abandoned, or neglected by a parent who is applying for Special Immigrant Juvenile classification, the child must first obtain a state court order before submitting an application to USCIS.[222] If USCIS is not satisfied with the state court's initial order, the applicant risks denial and placement in removal proceedings by legally disputing USCIS's analysis of the initial order, requiring a return to state court to obtain amended orders in the short time given.[223] If a response to an RFE is not satisfactory, the adjudicator may issue a Notice of Intent to Deny, giving the applicant one last time to put forward a case in favor of granting the application.[224]

In some cases, adjudicators at the service centers decide the case based on the paper submissions.[225] For asylum applications, all cases require an in-person interview before an adjudicator within the RAIO directorate, called an asylum officer.[226] In an increasing number of other types of cases, applications are sent to FOD field offices, where applicants are required to appear in person for an interview before an Immigration Services Officer.[227] For all in-person interviews, the setting is informal. Generally, interviews are conducted in the adjudicator's office and include the applicant, an interpreter that, if necessary, must be provided by the applicant, and an attorney for the applicant, if they are able

221. OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., THE EFFECTS OF USCIS ADJUDICATION PROCEDURES AND POLICIES ON FRAUD DETECTION BY IMMIGRATION SERVICES OFFICERS, OIG-12-24, at 19 (Jan. 2012), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG_12-24_Jan12.pdf [https://perma.cc/8UHK-QRPK]; 8 C.F.R. § 103.2(b)(8)(ii)–(iii).

222. 8 C.F.R. § 204.11(d)(2).

223. *See* 8 C.F.R. § 103.2(b)(8)(iv) (requiring the applicant to respond to a Notice of Intent to Deny or Request for Evidence by the deadline indicated, which must be within no more than thirty days for a Notice of Intent to Deny or twelve weeks for a Request for Evidence).

224. *Id.*

225. § 103.2(b)(8)(i)–(iii); UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *supra* note 215 (explaining that applications pending at service centers may be transferred to a field office when an in-person interview is necessary).

226. 8 C.F.R. § 208.9(a)–(b).

227. Which field office has jurisdiction is determined by where the individual resides. Other types of discretionary cases are sent directly to the field offices including some prosecutorial discretion applications are sent directly to field offices such as Deferred Action and Parole in Place. Wadhia, *supra* note 19.

to retain one.[228] As will be explored in Part III.C, USCIS's official stance on the nature of these interviews is that they are non-adversarial.[229]

After the interview, the adjudicator can make a decision on the case, request additional evidence, or issue an RFE or a Notice of Intent to Deny the application.[230] A denied applicant may seek administrative recourse with the agency through attempting to refile the application, requesting USCIS re-open or reconsider the decision, and appealing to the Administrative Appeals Office (AAO).[231] Additionally, administrative review by the Board of Immigration Appeals (BIA) is available for some types of applications.[232] Federal court review of denied applications has been increasingly used to combat the increased hurdles put in place at USCIS.[233] However, there are limitations and obstacles. A major impediment to judicial review is that most USCIS applications involve discretion.[234] Discretionary decisions are generally barred from judicial review.[235] And, when reviewable, deference to immigration agencies is particularly high.[236] USCIS issues standards for discretionary cases through subregulatory guidance, and, in 2020, the agency greatly expanded a stringent set of positive and negative discretionary factors to a majority of types of applications.[237]

For denials in asylum applications and an increasing number of other types of applications, as will be discussed in Part III, the adjudicator will file a Notice to Appear (NTA), which initiates removal proceedings

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228. *See* USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, §§ 15.2(a), 15.7(e)(3) (stating that USCIS is obligated to provide an interpreter for interviews at its own cost only when it has disqualified an interpreter for a naturalization examination).

229. *Id.* § 15.4(a).

230. *Id.* § 10.5(a)(2).

231. Family, *supra* note 3, at 28–32; 8 C.F.R. § 103.3(a)(1)(ii). For a detailed discussion of the AAO, see Family, *supra* note 19, at 68–75. The AAO reviews such cases de novo and are generally reviewed based on the record of proceeding and additional evidence and arguments made in writing. U.S. CITIZENSHIP & IMMIGR. SERVS., ADMINISTRATIVE APPEALS OFFICE PRACTICE MANUAL, §§ 3.4, 3.8 (2019). The AAO generally issues non-precedential decisions. Though uncommon, applicants may request oral hearing but the AAO may deny the request.

232. Professor Stephen Legomsky posits the BIA is a more appropriate body for administrative review than the AAO (previously AAU pre-HAS). Legomsky, *supra* note 19, at 1356.

233. Family, *supra* note 3, at 33.

234. *See* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y. L. SCH. L. REV. 161, 165 (2006).

235. 8 U.S.C. § 1252(a)(2)(B).

236. 5 U.S.C. § 706(2)(A), (E); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007); *Fiallo v. Bell*, 430 U.S. 787, 792, (1977); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012) (discussing discretion in American immigration courts).

237. *Chapter 8—Discretionary Analysis, in* 1 POLICY MANUAL pt. E, U.S. CITIZENSHIP & IMMIGR. SERVS. (2020).

before the Executive Office of Immigration Review.[238] Though these deportation proceedings are prompted by USCIS adjudications, the Immigration Court and the BIA in the Executive Office for Immigration generally cannot adjudicate the denied application, with asylum being the major exception.[239] Additionally, recently proposed regulations and precedential decisions of the BIA and docketing guidelines for immigration judges have discouraged or eliminated immigration judges and the BIA use of docketing tools, such as granting continuances and administrative closure, specifically including when an individual has a case pending with USCIS that could result in removal proceedings being terminated.[240] The individual is at the discretion of the immigration judge to postpone the deportation case long enough for USCIS to adjudicate the claim, which is becoming a more and more dubious proposition as USCIS adjudication times are extending.[241]

III. UNPACKING "NON-ADVERSARIAL" IMMIGRATION ADJUDICATIONS

The APA and administrative common law intentionally provide agencies great flexibility in designing their adjudication systems, including procedural protections for private parties. The justification for this deference is that agencies have developed expertise and a greater understanding of how to balance the goals of adjudication within their domain.[242] However, for this premise to hold, it must also assume that agencies are efficiently and effectively regulating within their missions.[243]

The enhanced role of enforcement in USCIS has created a troubling convergence of the service and enforcement arms of DHS, contrary to

238. *See infra* Part III.

239. 8 C.F.R. § 1003.1; *Immigration Practice Court Manual*, U.S. DEP'T JUST. EXEC. OFF. IMMIGR. REV., https://www.justice.gov/eoir/file/1192636/download [https://perma.cc/67LU-MRYP]; *see, e.g.*, 8 C.F.R §§ 1208.2(c)(1), 1208.4(b)(3) (asylum status).

240. *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491 (proposed Aug. 26, 2020) (to be codified at 8 C.F.R. §§ 1003, 1240; *Matter of L-N-Y-*, 27 I. & N. Dec. 755 (B.I.A. Jan. 22, 2020); *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. Aug. 16, 2018); *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. May 17, 2018).

241. *See Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERV., https://egov.uscis.gov/processing-times/historic-pt [https://perma.cc/D8BP-S5XQ] (last visited Sept. 21, 2020).

242. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, *supra* note 22, at 1414–15; Adrian Vermeule, Essay, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1919 (2016).

243. Rodriguez, *supra* note 103, at 3 ("Many of our concerns with the actions of administrators emerge from a persistent worry that agency officials will approach their tasks with an agenda in mind, an agenda that is inconsistent with the agency's delegated power and with the public interest.").

congressional intent to split enforcement functions from USCIS's delegated adjudication functions.[244] In so doing, it has fundamentally altered discussions about the adequacy of procedures for applicants in USCIS adjudications. This Part demonstrates, through a case study of the procedural design of USCIS field office interviews, how agencies' power to choose appropriate safeguards can lead to unfettered diminution of protections for private parties compelled to appear before these agencies.

A. Some Type of Hearing: Classifying the Field Office Interview

In evaluating the field office interview, it is first helpful to situate USCIS's in-person hearing model within the current informal agency adjudication framework. At first glance, USCIS interviews fall squarely within the broad and diverse Type C group, as they fail to strictly satisfy the Type B definition.[245] The first distinguishing feature of Type B proceedings is classification as "evidentiary hearings." Though USCIS interviews are hearings, they would not be classified as evidentiary hearings because the exclusive record principle does not apply.[246] The interviews encompass two stages of USCIS's system, the investigation and initial decision. Given the concurrent investigatory purpose, the record of proceedings is not confined to materials submitted and testimony elicited.[247] The scope of the interview includes questions on the application and those aimed at assessing credibility, though questions are increasingly falling outside the bounds of the application.[248] Additionally,

244. *See infra* Part III.

245. There is no statutory or regulatory requirement for "on the record" proceedings which removes them from Type A classification. ASIMOW, *supra* note 21, at 15–16.

246. Though USCIS does not refer to most interviews as "hearings," the one place "hearings" is used, the proceedings are conducted in the same manner as interviews. *Chapter 3—Naturalization Interview, in* 12 POLICY MANUAL pt. B, U.S. CITIZENSHIP & IMMIGR. SERVS. (2020). Initially denied naturalization applicants are permitted a "hearing." *Id.* The only difference is these hearings are presided over by a different ISO than the initial adjudicator or a higher-level ISO.

247. ASIMOW, *supra* note 21, at 20–21; 8 U.S.C. § 1154(a)(1)(J); *Stokes v. Immigr. & Naturalization Servs.*, 393 F. Supp. 24, 31 (S.D.N.Y. 1975); USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.4.

248. USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.6 ("ordinarily does not include questioning which extends much beyond the standard questions contained on the application or petition itself"); *but see Policy Changes and Processing Delays at USCIS: Hearing Before the Subcomm. on Immigration and Citizenship of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Eric Cohen, Executive Director, Immigrant Legal Resource Center), https://docs.house.gov/meetings/JU/JU01/20190716/109787/HHRG-116-JU01-Wstate-CohenE-20190716.pdf [https://perma.cc/9FJK-URQJ]. Furthermore, USCIS recently encouraged adjudicators to go back and reexamine previously approved applications that serve as the basis for the current application. Memorandum, Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of

adjudicators consider material not contained in the record, including information that is classified, confidential, or from a government agency that has restricted disclosure.[249]

USCIS interviews may also diverge from Type B classification's requirement that hearings are mandated by statute, regulation, or executive orders.[250] For some types of cases heard by USCIS adjudicators, including asylum and naturalization cases, interviews are mandated by statute or regulation.[251] Though the regulations require interviews for applications for lawful permanent resident status, the agency is permitted to waive the requirement, which historically was routinely done for many categories of cases.[252] Previously, the use of the field office interview model for immigration benefits was the exception, not the rule.[253] Recent agency guidance drastically increased instances where interviews are now required.[254] Notably, on August 28, 2017, citing the Executive Order "Protecting the Nation from Foreign Terrorist Entry into the United States," USCIS announced that it would begin requiring interviews where applications could lead to permanent residence.[255] The Policy Manual now instructs that all applicants for lawful permanent residence *must* be interviewed unless a waiver is granted on a case-by-case basis.[256]

Despite not strictly satisfying the Type B criteria, a closer examination of USCIS's interview model of adjudication exposes attributes that

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Nonimmigrant Status, (Oct. 23, 2017), https://www.uscis.gov/sites/default/files/document/memos/2017-10-23-Rescission-of-Deference-PM602-0151.pdf [https://perma.cc/842C-BVY5].

249. Included in what adjudicators can consider are juvenile delinquency and criminal records that are not permitted in courts. This includes sealed or otherwise confidential juvenile records as well as dismissed, expunged, or sealed adult criminal convictions. *Chapter 8—Discretionary Analysis, in* 1 POLICY MANUAL pt. E, U.S. CITIZENSHIP & IMMIGR. SERVS. (2020), https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8 [https://perma.cc/N68Y-B35B]; USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 10.2(b).

250. *See* ASIMOW, *supra* note 21, at 15; *see also supra* Part I.A.

251. 8 U.S.C. §§ 1446(b), 1158(d); 8 C.F.R. §§ 208.9(d), 335.2.

252. 8 C.F.R. § 245.6; *USCIS to Expand In-Person Interview Requirements*, *supra* note 14.

253. The AFM previously read: "[interviews] shall not be conducted unless required by statute, regulation or policy instruction or unless a material question of fact cannot be resolved without interview." USCIS ADJUDICATOR'S FIELD MANUAL—PUBLIC REDACTED VERSION 2011 § 15.1 (2011). However, in 2012, the AFM was revised and this sentence removed. USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.1(a); POLICY MEMORANDUM: REVISIONS TO ADJUDICATOR'S FIELD MANUAL (AFM) CHAPTERS 12 AND 15, AFM UPDATE AD11-42, PM-602-005 (2012), https://www.uscis.gov/sites/default/files/document/memos/Role_of_Private_Attorneys_PM_Approved_122111.pdf [https://perma.cc/HG24-2L4F].

254. *USCIS to Expand In-Person Interview Requirements*, *supra* note 14.

255. *Id.*

256. *Chapter 5—Interview Guidelines* in 7 POLICY MANUAL pt. A, U.S. CITIZENSHIP & IMMGR. SERVS. (2020).

make assessment using Type B theorization valuable. For one, requiring applicants to appear in person at the initial decision stage makes the field interview a unique Type C model. Further, the increased enmeshment with enforcement functions, and the level of stakes at play for applicants, make analysis under Type B procedural safeguards prudent.

B. Sources of Procedural Protections for Applicants

Applicants for immigration benefits and citizenship come from diverse socioeconomic, educational, and cultural groups.[257] They range from those who recently arrived in the United States who may not speak English or have much formal education, to large employers in the United States who are hyper-sophisticated regular players.[258] However, USCIS uses a one-size-fits-all system, generally providing all applicants with the same limited procedural protections.[259]

Safeguards for applicants are governed by the APA, INA, Due Process requirements, regulations, and subregulatory guidance. The use of field office interviews triggers informal APA requirements, as applicants are being "compelled to appear in person" before an agency.[260] Regulations, as well as limited statutory provisions of the INA, serve to reinforce these requirements and provide some additional safeguards.[261]

Protections under the APA include the right to bring representation, obtain transcripts of witnesses with exceptions for confidential information, receive a statement of reasons for denial, and have cases decided "within a reasonable time."[262] The regulations give applicants additional rights to review the record of proceedings, be advised of unknown adverse information—except where matters involve classified information concerning national security—and be allowed to rebuke said information.

Due Process protections may also be implicated in certain cases. Due Process applies to all "persons" in the United States, not just

257. *See generally* DEPT. OF HOMELAND SEC. OFF. IMMIGR., 2018 YEARBOOK OF IMMIGRATION STATISTICS (2018), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/yearbook_immigration_statistics_2018.pdf [https://perma.cc/A7DP-ESP4].

258. *Id.*

259. Benson, *supra* note 19, at 288.

260. 5 U.S.C. § 555(b); *see supra* Part I.B.

261. 8 C.F.R. §§ 103.2, 335.2. The government continues to assert in recent litigation that *Marcello* and *Ardestani* stand for the proposition that since the INA clarified that deportation proceedings fall outside the APA's reach, so too do all immigration proceedings. *Doe v. Wolf*, 432 F. Supp. 3d 1200, 1207–08 (S.D. Cal. 2020) ("The Court reaffirms its previous decision: neither case stands for the proposition [the government] proffer.").

262. 5 U.S.C. § 555.

citizens.[263] Where Due Process protections are required, the process given is generally limited because of the extreme deference given to immigration agencies in implementing the law.[264] The threshold to determining the applicability of Due Process is defining the applicant's interest as one of life, liberty, or property, therefore requiring constitutional protection.[265] The private interest at stake in immigration benefits cases is complex and varied.[266] Understanding the particular applicant's interest requires consideration of both the benefit sought and the current immigration status of the noncitizen called to appear.

Determination of a protectable interest concerning an immigration benefit is generally conceptualized as a property or liberty interest.[267] In particular, non-discretionary immigration benefits, such as certain applications for close family members, are protectable property and liberty interest.[268] However, courts have repeatedly held that discretionary benefits, which make up many of the adjudications conducted by USCIS, are not a constitutionally protected interest and do not fall under the Due Process safeguards.[269]

Though benefits as property interests are the prevailing framework, with heightened enforcement actions within the immigration benefits model, life and liberty interests may now come more into play.[270] Noncitizens who come forward and apply for immigration benefits, like other

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263. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *cf. Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1983 (2020).

264. *Fiallo v. Bell*, 430 U.S. 787, 798 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–44 (1950); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 174 (1983); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1679 (1992).

265. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam).

266. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 595–97 (1990).

267. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970).

268. *Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 313 (D.D.C. 2017); *Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013); *Salvador v. Sessions*, No. CV 18-01608, 2019 WL 1545182, at *5 (E.D. Pa. Apr. 9, 2019).

269. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

270. Ingrid V. Eagly, Gideon*'s Migration*, 122 YALE L.J. 2282, 2284–87, 2305–13 (2013); Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011); *see also Ng Fung Ho v. White*, 259 U.S. 276, 284–85 (1922); *Zadvydas v. Davis*, 533 U.S. 678, 690–96 (2001); *Demore v. Kim*, 538 U.S. 510, 523 (2003); *cf. Kerry v. Din*, 576 U.S. 86, 91–93 (2015).

benefits, do so voluntarily.[271] As such, historically, many immigration benefits have been assessed as a low private interest.[272] However, immigration benefits are unique in that, though the noncitizen is technically affirmatively seeking a benefit, it is also for many, for all intents and purposes, a means of defending or preventing against possible deportation and detention.[273] Further, the increasing interconnectedness of the benefits and enforcements systems creates a direct line to possible detention and deportation, thereby raising an argument for life and liberty interests.[274]

Assessing the private interest in immigration cases has an additional unique factor: the significance of the applicant's immigration status. Analyzing private interest with respect to immigration status is steeped in a long history of minimizing Due Process for individuals who are seen as outsiders seeking entry into the country.[275] The view of the limited interest of newcomers seeking the privilege of entry, maintaining the traditional rights-privilege distinctions, is contrasted with individuals with a greater connection to the country to whom it is believed a greater duty is owed.[276] As articulated in *Landon v. Plasencia*:[277]

> This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit

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271. In Professor Verkuil's assessment, an applicant "voluntarily steps forward to enhance his or her immigration status," which signifies a lower private interest. Paul R. Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1188 (1984).

272. Friendly, *supra* note 62, at 1295–98, 1304; Verkuil, *supra* note 271, at 1149–53 (applying Judge Friendly's ranking to the immigration context, listing deportation and denaturalization on the high end, followed by asylum applicants and detained noncitizens, then discretionary defenses to deportation). Verkuil explains that in cases of adjustment of status where individuals have a lawful status, "the individual interests are of lesser weight, since deportation does not result from a denial of adjustment." *Id.* at 1153.

273. Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475, 481–82 (2015); César Cuauhtémoc García Hernández*, Naturalizing Immigrant Imprisonment*, 103 CAL. L. REV. 1449, 1453–55 (2015); Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399, 2404–05 (2013); Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 117–21 (2008).

274. *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101 (1903); John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, *"Death Is Different" and a Refugees Right to Counsel*, 42 CORNELL INT'L L.J. 361, 372–75 (2009); Martin, *supra* note 9, at 1251, 1324.

275. Martin, *supra* note 264, at 191–201; T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 259 (1983); *see, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

276. Motomura, *supra* note 264, at 1651–53 (1992).

277. 459 U.S. 21 (1982).

> or exclude aliens is a sovereign prerogative. . . . [O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.[278]

This distinction is also seen in the safeguards provided to immigration applicants, where protections can correlate to the level of legal status.[279] Regardless of this categorization, there are no differences in the procedures provided in the field office interview model, though additional protections are given to some in terms of additional agency or judicial review.[280]

The binary view of applicants, being either newcomers seeking entry or established members of the nation, ignores the range of backgrounds and circumstances behind an individual's request for a benefit that may engender a constitutionally protected interest.[281] For instance, those considered to be seeking "admission" include recent arrivals, as well as applicants who have lived in the United States for many years and have strong ties to the country.[282] It similarly overlooks potential life and liberty interests, such as employment or family unity, or where a denial could lead to fears of death or bodily harm.[283]

C. Evaluating Existing Safeguards for Applicants in the Field Office Interview Model

In assessing the field office interview as a model of adjudication, key conceptualizations of safeguards from Type B hearing theorization stand out as a useful guide for analysis. Significantly, as this Part demonstrates, the current procedural design of field office interviews lacks important mechanisms for ensuring a meaningful opportunity to be heard. These include the right to an impartial decision-maker, representation, and notice of the nature of proceedings.

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278. *Id.* at 32.

279. 8 U.S.C. § 1252(a)–(b).

280. 8 U.S.C. §§ 1421(c), 1447(a); USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.1(c)(1).

281. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261.

282. Daniel Cicchini & Joseph Hassell, U.S. DEP'T JUST. EXEC. OFF. FOR IMMIGR. REV., *The Continuing Struggle to Define "Admission" and "Admitted" in the Immigration and Nationality Act*, 6 IMMIGR. L. ADVISOR 1, 3–4 (2012).

283. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *cf. Kerry v. Din*, 576 U.S. 86, 97 (2015).

1. UNBIASED DECISION-MAKER

The "non-adversarial" field office interview model raises significant adjudicator impartiality concerns. The field office model lacks in adjudicator independence as the adjudication system is within a policy-making agency and has a troubling increase in the combination of duties with enforcement functions.

i. Adjudicators in a Policy-Making Agency

Understanding adjudicator independence in the context of USCIS adjudications first requires acknowledging a discordance between official guidance and the realities of the current field office interview as an adjudication model in a policy-making agency. The field office adjudicators who conduct the interviews are called Immigration Service Officers (ISOs), and as in most Type B and C models, they are inquisitorial adjudicators, controlling the record development by asking the applicant questions to determine eligibility for benefits and requesting documentation.[284] USCIS instructs adjudicators in field office interviews to be neutral.[285] Guidance to ISOs concerning their function in presiding over the interview is "to obtain the correct information in order to make the correct adjudication of the case . . . . The purpose is to cover (and discover) all the pertinent information, both favorable and unfavorable to the applicant."[286] However, an agency's instruction of neutrality does not ensure that impartiality actually occurs.

USCIS asserts that field office interviews are "non-adversarial."[287] The term non-adversarial describes adjudications that fall to the farthest side of informality.[288] Non-adversarial proceedings may be appropriate in situations where the government does not oppose the party's interest.[289] As a general matter, classifying benefits adjudications as non-adversarial is questionable, as a denial invariably creates a dispute.[290] The

284. *Job Announcement Immigration Service Officer*, USA JOBS (May 13, 2019), https://www.usajobs.gov/GetJob/PrintPreview/533449500 [https://perma.cc/64NK-KE4H].

285. USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.3(b).

286. *Id.* § 15.4(a).

287. *Id.* § 15.6(a) (conceding that there are times the adjudicator will need to conduct interrogations that may become adversarial).

288. Verkuil, *supra* note 32, at 754–56.

289. *Id.* at 754–55.

290. Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293, 296 (1997) ("Is the grievance between an individual and his government any less a dispute because it involves denial of benefits? Where an individual has been denied benefits, and the government has affirmatively so acted, such that the

classification of field office interviews as non-adversarial is particularly problematic as USCIS is a politically-charged policy-making executive branch agency that is increasingly taking enforcement action against applicants.[291]

USCIS justifies the non-adversarial classification by claiming that its interest in adjudication is neither for nor against applicants' interests. Adjudicator guidance states:

> The principal intent of the Service is not to oppose the interviewee's goal of obtaining a benefit, but to determine whether he or she qualifies for such benefit. If the interviewee qualifies for the benefit, it is in the Service's interest to accommodate that goal. On the other hand, if he or she does not qualify for the benefit, it is in the Service's interest to deny the application or petition. Therefore, unlike an adversarial proceeding, the interests of the Service and the applicants are not mutually exclusive.[292]

However, this wording clearly leaves the granting of an eligible applicant outside the scope of the agency's interest—rather, it will "accommodate" the applicant's interest.[293] By way of contrast, the veterans' benefits adjudication guidance "is strongly and uniquely pro-claimant."[294]

Moreover, as the Trump Administration's anti-immigration, pro-enforcement policies have exposed, the agency's culture and generalized hostility toward applicants makes the idea that the agency and applicant have shared interests implausible.[295] As described by Professor Nina

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burden then rests upon the individual to appeal the denial, there can pragmatically be no doubt as to the existence of a dispute.").

291. Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 19, 28 (2017) (describing the political nature of USCIS decision-making and USCIS's approach as adversarial).

292. USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.4(a).

293. The statement also misconstrues adversarial proceedings involving those where interests are "mutually exclusive" rather than adverse, and therefore inaccurately frames the non-adversarial categorization. *Id.*

294. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

295. Family, *supra* note 3, at 10–13. Though the Trump Administration has shed light on the agency's hostile view towards applicants, the view has existed throughout and even predates the agency's history. In 2009, prominent immigration attorney, Charles Kuck, described USCIS as "a Jekyll and Hyde creation. With one face, USCIS happily grants benefits, issues approvals, and welcomes people as citizens. With the other face UCSIS . . . distrusts everyone, believes there is a lie on every application, and looks for ways to disqualify clearly qualified applicants." Charles Kuck, *USCIS–H-1B Investigations Run Amok!*, THINK IMMIGR. BLOG (Aug. 7, 2009), https://thinkimmigration.org/blog/2009/08/07/uscis-h-1b-investigations-run-amok/ [https://perma.cc/UK6N-X4PF]; Radnofsky, *supra* note 23. Further, as Verkuil pointed out when these adjudications were performed by legacy INS: "[W]here the disability system values participant

Rabin, the Executive Branch's "relentlessly adversarial stance has become a hallmark of Trump's immigration bureaucracy."[296] Professor Amanda Frost describes the administration's stance as a "gotcha mentality" seeking to deny and place in removal proceedings.[297] USCIS has long been dubbed by practitioners as having a "Culture of No."[298] The Executive Director of the Immigrant Legal Resource Center, in testimony before the House Judiciary Committee, described survey results of legal representatives' impressions of ISOs during interviews.[299] Practitioners' responses indicated "an increase in suspicion among adjudicators towards their clients, a 'fraud first' mentality, longer interviews, and changes in the types of questions asked," including a response stating "the default assumption is that applicants are engaged in fraud."[300] Practitioners also found adjudicators to be less willing to exercise positive discretion and to ask questions outside the scope of the application.[301]

Institutional rhetoric under the Trump Administration has unabashedly moved toward a publicly hostile view of applicants. Again, most demonstrative was USCIS's change to its mission statement in 2018, removing any doubt about USCIS's interests. The previous mission statement read: "USCIS secures America's promise as a nation of immigrants by providing accurate and useful information to our customers, *granting immigration and citizenship benefits*, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system."[302] The current version states: "[USCIS] administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values."[303] Notably, the prior version indicated an aligned interest in "granting" applications, whether or not the stated interest represented the true sentiments of those implementing the mission. The current version not

satisfaction as highly as efficiency and accuracy, the immigration process seems more concerned with deterrence of illegal entrants than with satisfying those permitted to enter. This difference in values acknowledges the tough-minded attitude we have continually taken toward those desiring to enter our country . . . ." Verkuil, *supra* note 271, at 1153 (describing the immigration benefits system under legacy INS).

296. Rabin, *supra* note 25, at 156.

297. Frost, *supra* note 291, at 28.

298. Kuck, *supra* note 295.

299. *Hearing on Policy Changes and Processing Delays at USCIS Before the Subcomm. on Immigr. and Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 9 (2019) (testimony of Eric Cohen, Executive Director of the Immigrant Legal Resource Center).

300. *Id.*

301. *Id.* at 9–10.

302. Gonzalez, *supra* note 181 (emphasis added).

303. *Id.*

only removed the prior interest, it added "protecting" United States citizens from applicants, indicating applicants are viewed with suspicion.

The shift in USCIS's interests was reiterated when Ken Cuccinelli assumed leadership of the agency. He declared: "[w]e are not a benefit[s] agency, we are a vetting agency."[304] In 2019, he announced USCIS's accomplishments, including:

> Consistent with President Trump's call for enhanced vetting, USCIS plays a key role in safeguarding our nation's immigration system and making sure that only those who are eligible for a benefit receive it. USCIS is vigorous in its efforts to detect and deter immigration fraud, using a variety of vetting and screening processes to confirm an applicant's identity and eligibility.[305]

Cuccinelli's boasted vigorous vetting and screening processes explicitly included the push to make these non-adversarial interviews mandatory.[306]

The non-adversarial misnomer masks impartiality concerns in how adjudicators actually view and treat applications.[307] Field office adjudicators are instructed that their purpose is "not to prove a particular point or to find a reason to deny the benefit sought."[308] However, ISOs and their supervisors are employed by USCIS.[309] Agency heads and supervisors set the tone for the office culture with respect to decision-making.[310] ISOs are subject to performance reviews, which include reviews of decisions by these supervisors and have increasingly emphasized measures related to catching fraud rather than efficient or quality adjudication.[311] Further, DHS employee performance policy requires that employees show "[a]lignment to the Department's mission, plans and objectives."[312] The perception of unfavorable treatment of applications raises serious questions about whether an applicant for immigration benefits is

304. Radnofsky, *supra* note 23.

305. *Cuccinelli Announcement*, *supra* note 14.

306. *Id.*; Radnofsky, *supra* note 23; *USCIS to Expand In-Person Interview Requirements*, *supra* note 14.

307. Verkuil, *supra* note 32, at 784, n.189.

308. USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.4(a).

309. *Job Announcement Immigration Service Officer*, *supra* note 284.

310. SCHOENHOLTZ, SCHRAG & RAMJI-NOGALES, *supra* note 8, at 209; *see* DEP'T OF HOMELAND SEC. OFF. OF INSPECTOR GEN., OIG-19-48, DHS NEEDS TO IMPROVE ITS OVERSIGHT OF MISCONDUCT AND DISCIPLINE, 40–42 (2019) (showing that over one third of survey respondents listed fear of retaliation by supervisors as reasons they would not report misconduct despite over one third of respondents observing misconduct at USCIS).

311. DEP'T OF HOMELAND SEC., DIRECTIVE NO. 255-09, EMPLOYEE PERFORMANCE MANAGEMENT (2016).

312. *Id.* at 3.

meaningfully able to present their case before an "arbiter [who] is not predisposed to find against him."[313]

ii. Combination of Functions

The implications of the anti-immigration policies of the Trump Administration on adjudicator impartiality are amplified by the combined functions of ISO decision-makers. In addition to adjudicatory duties, ISOs have standard inquisitorial investigatory duties focused on the approvability of the application, including scrutinizing the application for eligibility and discretionary factors, as well as the applicant for credibility.[314] The troubling combination of functions, however, are those of enforcement-focused investigatory and prosecutorial tasks.[315]

The main prosecutorial functions of ISOs is issuing the NTA and filing it with the immigration court, which starts deportation proceedings.[316] Through amendments to the INA, immigration judges' discretionary options have been limited, leaving much of the discretionary power in the hands of the agency and officer who initiates removal proceedings.[317] Though DHS has delegated the authority to issue and file NTAs to USCIS adjudicators since the early days of the agency, it was rarely done.[318] Initial subregulatory guidance instructed USCIS officers to use this prosecutorial tool when there was a public safety or national security concern, discovery of a fraud scheme, or it was required by regulation.[319]

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313. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

314. Abraham D. Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. LEGAL STUD. 349, 361–63 (1972); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246–65 (2010); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 751–66 (1997).

315. The Article refers to investigations that involve possible referral criminal or removal proceedings as "enforcement-focused" investigation. Fraud investigations involve both credibility and fraud so fall into both enforcement-focused and application-focused.

316. TOM RIDGE, DEP'T OF HOMELAND SEC. SEC'Y, DELEGATION NO. 0150.1, DELEGATION TO THE BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES 2–4 (2003); Homeland Security Act of 2002, Pub. L. No. 107-296, § 442(c), 116 Stat. 2135, 2194.

317. Rabin, *supra* note 25, at 151.

318. ARNOLD & PORTER LLP, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, 2010 A.B.A. COMMISSION ON IMMIGR. 1-12, 1-15, 1-17–18; 8 C.F.R. § 239.1.

319. Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., Service Center Issuance of Notice to Appear (Form I-862) (Sept. 12, 2003). In limited types of cases, the regulations require USCIS Field Operations Directorate to issue and file the Notice to Appear. *See* 8 C.F.R. §§ 207.9, 216.3.

USCIS has gradually increased its use of this prosecutorial task over the years. The agency's attitude shifted towards greater involvement of USCIS in decisions to initiate removal decisions in 2006 when ICE and USCIS signed a Memorandum of Agreement concerning NTA issuance.[320] USCIS's guidance for implementation began with the introduction that "[d]eciding whether a person is removable and whether an NTA should be issued is an integral part of the adjudication of an application or petition [for immigration benefits]."[321] The guidance detailed when USCIS should issue and file NTAs and when cases should be referred to ICE, as the enforcement agency, to decide whether to begin deportation proceedings.[322] Cases involving criminal issues were sent to USCIS's FDNS Directorate, who would forward the case to ICE for detention and prosecution decisions. ICE could request that USCIS schedule an interview to arrest applicants. USCIS was only required to issue NTAs in cases where fraud was verified and part of the reason for denial. While the guidance highlighted the availability of prosecutorial discretion in issuing NTAs, it stated "an NTA should normally be prepared" where denial would leave the applicant subject to a ground of removability.[323]

USCIS again amended NTA guidance in 2011.[324] It expanded requirements to issue NTAs in fraud cases to include those where the denial was not based on fraud, so long as there was a substantiated Statement of Findings of fraud.[325] Cases with criminal issues were required to be referred to ICE directly by the ISO rather than FDNS, and USCIS was prohibited from issuing NTAs based on criminal concerns.[326] Under this guidance, USCIS had strict standard operating procedures for when to issue NTAs and when to exercise prosecutorial discretion by refraining from issuance or filing. One such guidance document reminded adjudicators, "USCIS has prosecutorial discretion when deciding whether to issue, serve or file [a] Notice to Appear. . . . USCIS is under no legal requirement to institute removal proceedings for every denied application."[327]

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320. Aytes Memorandum, *supra* note 12.

321. *Id.*

322. *Id.*

323. *Id.* at 7.

324. Amended to conform with ICE's new articulation of priorities for enforcement. Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011); Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (Nov. 7, 2011) [hereinafter Revised Guidance on Referrals and NTAs].

325. Revised Guidance on Referrals and NTAs, *supra* note 324, at 3.

326. *Id.* at 3–4. The 2011 guidance also created an NTA Review Panel for naturalization applications that USCIS was considering filing an NTA. *Id.* at 7–9.

327. Penn State Dickinson Sch. of Law, *To File or Not to File a Notice to Appear: Improving the Government's Use of Prosecutorial Discretion*, A.B.A. COMMISSION ON

The current requirements arose from a policy memo issued in 2018 that drastically limited USCIS officers' prosecutorial discretion to refrain from initiating removal proceedings and usurped ICE's role in many of these prosecutorial decisions.[328] The new policy has led to a considerable increase in situations where individuals applying for immigration benefits will be subject to enforcement actions, where previously many benefits applications were viewed as largely separate from enforcement efforts.[329]

The 2018 policy made it mandatory for USCIS to issue NTAs in a wide range of circumstances.[330] The most dramatic shift includes issuing NTAs where a denial of a benefit leaves the individual without lawful status, regardless of the reason for denial.[331] Additionally, fraud cases that previously required a substantiated Statement of Facts now only need to show "fraud, misrepresentation, or evidence of abuse of public benefit programs is part of the record."[332] In cases with criminal issues, USCIS is now required to issue NTAs if the case is denied and the individual is removable, usurping ICE as the decision-maker in most cases.[333] If USCIS does not issue the NTA in cases with criminal issues, presumably because the application has been approved, they are now required to refer cases to ICE after adjudication.[334]

In addition to combined prosecutorial functions, the system also encourages enforcement-focused investigatory duties, including assisting FDNS and ICE. For example, as described in Part II.B., adjudicators have been facilitating ICE arrests using field office interviews as a lure.[335] Additionally, ISO duties will often involve assisting officers from FDNS whose role encompasses aiding in both application-focused investigations, such as fraud and credibility, but also enforcement-focused investigations, such as collaborating with other law enforcement agencies in

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IMMIGR. 33 (Oct. 2013), https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/NTAReportFinal.pdf [https://perma.cc/22CX-B5GC].

328. Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, *supra* note 188, at 10–11; Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017).

329. Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, *supra* note 188; *cf.* Revised Guidance on Referrals and NTAs, *supra* note 324.

330. Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, *supra* note 188.

331. *Id.* at 7–8.

332. *Id.* at 5.

333. *See id.*

334. *Id.* It also eliminated the NTA Review Board for naturalization cases and rather stated that in the situations described concerned naturalization, USCIS may issue an NTA. *Id.* at 8–9.

335. *See supra* Part II.

cases presenting criminal or national security concerns.[336] In 2019, there was a 22 percent increase in field office referrals to FDNS.[337] Further, there is no prohibition on ex parte communications with ICE or FDNS officers and ISOs. There is also no requirement for physical separation of ISOs from these enforcement officers, and though ICE officers are generally not located within a field office, FDNS officers are.[338]

2. RIGHT TO REPRESENTATION

An additional safeguard that is insufficient in providing a meaningful opportunity to be heard is the stifled provision of legal representation. Presenting an immigration case can be a daunting task, given the substantive and procedural complexities of immigration benefits adjudications.[339] As the Ninth Circuit explained, given the complexity of immigration cases, "[a] lawyer is often the only person who could thread the labyrinth."[340] Though the APA and regulations provide applicants in field office adjudications the right to bring an attorney, there is no right to appointed counsel.[341] This leaves a large majority of individuals forced to navigate the increasingly treacherous labyrinth alone.[342]

In addition to the APA's provision of the right to bring counsel, the regulations provide further authority for the role of the attorney. These include the right to introduce evidence, submit briefs, cross-examine

336. *Job Announcement Immigration Service Officer, supra* note 284. *See, e.g.*, Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, U.S. Citizenship & Immigration Servs., to Field Leadership, Clarification and Delineation of Vetting and Adjudication Responsibilities for Controlled Application Review and Resolutions Program (CARRP) Cases in Domestic Offices (2009) (Instruction for ISOs and FDNS officers involved in national security cases under the extreme vetting program the Controlled Application Review and Resolution Program (CARRP): "Both FDNS-IOs and CARRP-ISOs have distinct duties to perform in the processing of CARRP cases; however, close cooperation and coordination of effort between Officers is necessary in order to bring each case to completion.").

337. *Cuccinelli Announcement*, *supra* note 14.

338. *About Us: Fraud Detection and National Security Directorate*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security-directorate [https://perma.cc/8E7P-GVYX] (last updated Mar. 13, 2020).

339. *See supra* Part II.

340. *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (quoting *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987)).

341. 5 U.S.C. § 555(b); 8 C.F.R. § 103.2(a)(3).

342. Family, *Administrative Law Through the Lens of Immigration Law*, *supra* note 19, at app. (showing that representation rates differ widely based on the time of benefit, ranging from 27 percent for family-based applications and 89 percent for employment-based, where the prospective employer retains the attorney).

witnesses, and make objections.[343] The regulations limit the attorney's role when adversarial interrogations call for statements under oath.[344]

The USCIS's Adjudicator's Field Manual (AFM) also contained guidance for attorneys at interviews.[345] The AFM stated, "[t]he attorney's role at an interview is to ensure that the subject's legal rights are protected."[346] It permits attorneys to advise clients on points of law, ask additional questions of the applicant at the end of the interview, introduce documents and evidence to clarify issues the adjudicator has with the application, and object to lines of questioning.[347] Attorneys also may request a supervisory review.[348] The 2012 revision to the AFM made clear that attorneys have a right to sit next to their client but makes an exception for space concerns.[349]

Though the official provisions seem to permit attorneys to have a fairly robust role even in this informal agency adjudication, agency culture limits performance of these rights. The "potted plant" form of representation, where attorneys are expected to sit in the back of the room and refrain from participation, has become the norm.[350] Attorneys are aware that deviations from this role risk negative outcomes for clients or attorneys' reputations, which has consequences for future clients.[351]

The most recent large-scale report of attorney experiences with USCIS was conducted in 2012.[352] Pennsylvania State University Law School and the American Immigration Council's report *Behind Closed Doors* detailed serious concerns about legal representation in USCIS field office interviews.[353] 58 percent of attorneys surveyed felt that they had been restricted in their representation before USCIS.[354] Respondents reported limitations on communications from the attorney, either to the client or adjudicator, including the ability of attorneys to properly explain or clarify questions and legal issues.[355] Restrictions also involved attorney

343. 8 C.F.R. § 292.5(b).

344. *Id.*; USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.8.

345. USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, §§ 12.4–.5, 15.2, 15.7–.8.

346. *Id.* § 15.8.

347. *Id.* § 12.4–12.5; 8 C.F.R. § 292.5(b).

348. USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.

349. *Id.* § 15.2.

350. *Id.*

351. Penn State L. Immigrants' Rts. Clinic & Am. Immigr. Council, *Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel*, PENN ST. L. ELIBRARY 13 (May 5, 2012), https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1006&context=irc_pubs [https://perma.cc/XM7E-TQQ6].

352. *See id.*

353. *Id.* at 13–14.

354. *Id.* at 13 n.11.

355. *Id.* at 13.

submissions and seating.[356] While improvements may have been made incident to the 2012 AFM revisions, most of these concerns are still voiced by attorneys today.[357]

The *Behind Closed Doors* report also yielded ISO training slide decks on interacting with attorneys.[358] These trainings give a fascinating insight into USCIS culture surrounding attorneys. Some slides indicate an understanding of the job of the attorney in the room: trainings explicitly say attorneys are "expected to zealously represent their clients."[359]

However, other slides show hostility toward non-passive attorneys.[360] One troubling undated version of the training had inaccurate content and was exceptionally antagonistic in tone and visuals.[361] A slide titled: "You [the lawyer] can choose . . ." indicated the attorney's willingness to play ball would lead to either:

> [A] cooperative, relaxed interview where information is freely exchanged, eligibility issues are identified, explored and developed, and adjudication is possible upon consideration of the evidence presented.
> -Or,
> Discomfort all around, accusations of lack of professionalism, lack of knowledge, some sort of bias, or misconduct,

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356. *Id.*

357. *Id.* at 21–22.

358. The American Immigration Council filed suit against USCIS for failure to appropriately respond to FOIA requests concerning a history of restrictions on attorneys. USCIS was ordered to supply the requested documents. The result included said training slides. *Access to Counsel Before USCIS Production – April 12, 2013*, AM. IMMIGR. COUNS. 46–95, https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_foia_uscis_requests_and_docs_4-12-13.pdf [https://perma.cc/T9CM-WQAK] (last visited Oct. 17, 2020) [hereinafter *April USCIS FOIA Request*]; *Access to Counsel Before USCIS Production – May 13, 2013*, AM. IMMIGR. COUNS. 170–88, https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_foia_uscis_requests_and_docs_5-13-13.pdf [https://perma.cc/E32S-LF2Q] (last visited Oct 17, 2020) [hereinafter *May USCIS FOIA Request*].

359. *April USCIS FOIA Request*, *supra* note 358, at 70.

360. *See id.* at 46–70; *May USCIS FOIA Request*, *supra* note 358, at 170–88.

361. A slide titled "The Attorney's Role" cites to INA § 292, which governs the right to counsel in removal proceedings. The slide says "[n]ote that our interviews are not contemplated by Section 292 [of the INA], as we are not conducting removal or appeal proceedings. Technically, this means that attorneys are permitted to attend interviews only as a matter of courtesy. They do not, in fact, have a *right* to attend." This logical fallacy does not mention regulations or the APA that do in fact give applicants the right to an attorney at field office interviews—rather USCIS trainers show an inapplicable statute and cite to its inapplicability as support for a lack of right. *May USCIS FOIA Request*, *supra* note 358, at 176.

> [i]nterview gets hopelessly sidetracked into non-issues, and adjudication becomes tremendously difficult.[362]

This flowery language very clearly exemplifies the expectation that the attorney act passively, seemingly placing the burden on the attorney to maintain a level of civility in the face of concerns of adjudicator professionalism, bias, or misconduct. In a telling visual depiction of this sentiment, the next slide puts two pictures side by side and asks the attorney: "with whom would you rather have *your* interview?"[363] The first picture is of an adjudicator in a Santa Clause hat, smiling at the camera.[364] The second picture shows a person holding a knife in front of an American flag.[365]

3. NOTICE

An additional area of deficiency in terms of safeguards for applicants concerns notice. USCIS provides notice to applicants concerning the place and time of the hearing and reasons for denials, in line with traditional Due Process and APA minimum requirements.[366] However, broader questions arise in terms of applicants' access to the record on which enforcement actions or adjudications are made, as well as the provision of information concerning the availability of benefits and the nature of procedures, including enforcement consequences.[367]

An initial issue concerning notice is access to the information that led to the decision, enabling meaningful rebuttal to an adverse action. ISOs are permitted to base their decisions on information not contained within the record of proceedings.[368] Though adjudicators must disclose adverse information to applicants, certain information is explicitly withheld from applicants, including information that is classified or confidential, or from another government agency with disclosure restrictions.[369] Further, there are no limits on ex parte communications between enforcement-focused officers and ISOs.[370] There are similarly no limitations on

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362. *Id.* at 178.

363. *Id.* at 179.

364 *Id.*

365. *Id.*

366. *See* USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, §§ 10.3(h), 15.1; 8 C.F.R. § 103.3(a)(1)(i).

367. A similar phenomenon occurs in the welfare arena. As Professor Gustafson notes, "The crackdown on welfare cheats has raised concerns about a lack of notice that criminal proceedings have begun, and a lack of clarity as to when the investigative process ends and the adversarial process begins." Gustafson, *supra* note 113, at 709.

368. USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 10.2(b).

369. *Id.*; *see also* 8 C.F.R. § 103.2(b)(16)(ii), (iv) (citing Exec. Order No. 12356, 47 C.F.R. 14874 (1982)).

370. Revised Guidance on Referrals and NTAs, *supra* note 324.

ISOs communicating information to enforcement officers, and it may, in fact, be required.[371] As such, an applicant can unknowingly be ensnared in the immigration enforcement system due to the applicant's desire to obtain an immigration benefit, even if that benefit is ultimately approved.[372]

Of particular concern regarding inadequate notice in USCIS adjudications is the public accessibility of information on the nature of these "non-adversarial" proceedings, specifically the exposure to enforcement actions. Though USCIS is a bureau within DHS and therefore its procedures are likely exempt from Executive Order 13,892, the requirements are nonetheless instructive of the procedural design deficiencies given USCIS's growing enforcement functions.[373] The Executive Order requires public notice of an agency's jurisdiction over and legal standards of the enforceable conduct in "a manner that would not cause unfair surprise."[374] USCIS's jurisdiction over enforcement actions is not statutory. In fact, reading the organic statute, the Homeland Security Act, it is clear that USCIS was supposed to be separated from enforcement functions.[375] Regulations provide the jurisdiction of USCIS to issue Notices to Appear; however, except in limited circumstances, it does not describe the standards under which USCIS may use its authority. Rather, USCIS relies on often-opaque subregulatory guidance to create structures, procedures, and standards.[376]

There has been an effort by USCIS to consolidate all of its subregulatory guidance into a Policy Manual, which is available on the USCIS website.[377] However, the Policy Manual does not contain all agency guidance, and a significant amount of detail and information was eliminated or redacted in the consolidation of the Adjudicator's Field Manual to the new Policy Manual.[378] Notably, at the time of writing, no guidance on the issuance of NTAs has been incorporated into the Policy Manual. Though the NTA guidance is publicly available on the website, locating

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371. *See id.*

372. Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, *supra* note 188; *see supra* text accompanying notes 313–319.

373. Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, 84 Fed. Reg. 55,239, 55,240 (Oct. 15, 2019).

374. *Id.* at 55,241.

375. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. § 101).

376. Family, *supra* note 3, at 44–50; Family, *Immigration Law and a Second Look at the Practically Binding Effect*, *supra* note 4.

377. *Id.* at 5.

378. *Compare* USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18*, with Policy Manual*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 22, 2020), https://www.uscis.gov/policy-manual [https://perma.cc/6AYT-WLQV]*, and* USCIS ADJUDICATOR'S FIELD MANUAL—PUBLIC REDACTED VERSION 2011, *supra* note 285.

it requires an understanding of the internal administrative law used by USCIS and the legal terminology for the enforcement action.[379]

Improvement of self-help systems is a key way to increase notice safeguards.[380] USCIS is taking steps to improve online services to enhance the accessibility of information on available benefits and the initial application process.[381] Crucially, however, access to information as notice to prospective applicants—and those already in the process—about the extent to which enforcement actions are intertwined with USCIS proceedings is still generally absent. Potential for enforcement action is not shown on the applicant-facing website, Policy Manual, applications, or form instructions. Though it may be justifiable to limit access to certain procedures that relate to the agency's enforcement efforts, in USCIS's context, this would only be its own enforcement efforts related to uncovering fraud and ineligibility, rather than those aimed at enforcement that could lead to detention and deportation.[382]

IV. RECOMMENDATIONS FOR REFORMS

Agencies are given wide latitude in creating informal adjudication models that balance the need for fairness, efficiency, and accuracy. However, as the USCIS field office interview model for adjudication shows, this deference can lead to insufficient safeguards for private parties, particularly where individuals are called to appear before agency decisionmakers. In the case of USCIS, reliance on the agency to create a fair system of adjudication raises concerns as the agency has deviated from its congressionally mandated service mission. Given the increased enforcement aims of USCIS and the clearly articulated interests that are unfavorable to applicants, enhanced safeguards should be provided to ensure fairness and acceptability of proceedings. This Part suggests areas for internal administrative law changes to enhance procedural safeguards.[383]

Given the varied interests at stake and resulting procedural rights due in the many types of in-person adjudications conducted by USCIS, it

379. *Notice to Appear Policy Memorandum*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum [https://perma.cc/7Z7N-ZHCQ] (last visited Oct. 17, 2020).

380. *See* Verkuil, *supra* note 32, at 774.

381. Daniel Shoer Roth, *It Is Hard for Immigrants to Get Green Cards and Other Benefits. These Tools Help.*, MIA. HERALD (March 1, 2019, 11:24 AM), https://www.miamiherald.com/news/local/immigration/article226946304.html; *see* VOGELMANN, *supra* note 109, at 23.

382. Lockhart, *supra* note 157, at 177.

383. Walker & Turnbull, *supra* note 4, at 1227–28 (describing internal administrative law as a "critical safeguard" given the limitations of judicial review).

is hard to contemplate a model that has a one-size-fits-all approach.[384] That being the reality, however, it is best to cater safeguards to those with heightened interests at stake. That is not to say that immigration adjudications should become trial-like, with full adoption of all trappings of formal adversarial procedures. However, increasing procedural safeguards across the board in USCIS adjudications may go toward all three goals of administrative adjudication of acceptability, accuracy, and even efficiency.[385]

Given the magnitude of adjudications performed by USCIS and the detriment that untimely adjudication can have on applicants, the goal of efficiency is particularly important in immigration benefits adjudications. Increased process and formality would no doubt cause some inefficiencies.[386] There is an argument, however, that though the day-to-day adjudications might be slowed down by increased safeguards, USCIS and the broader immigration system as a whole could see increased efficiency through more protections at the front end. If more formality leads to greater accuracy and acceptability early in the process, it will result in decreased appeals and removal proceedings, saving the time and energy of the AAO, ICE attorneys, and immigration judges. Furthermore, if individuals are taken into ICE custody, catching errors earlier on can save the government money spent on detention.

The goals of accuracy and acceptability favor increased safeguards. A key consideration in determining the appropriate process required to increase accuracy is the complexity of immigration law and its procedures. Further, the goal of acceptability pushes the needle strongly toward increased safeguards given concerns about unfavorable attitudes towards applications, increased enforcement actions, and public dissemination of subregulatory guidance concerning procedures.

Through internal administrative law, the President, DHS, or USCIS leadership could increase procedural safeguards for applicants that would lead to increased perceptions of acceptability and fairness. Such efforts,

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384. It would be an interesting exercise to explore a tracking approach to immigration benefits adjudication where more robust safeguards are triggered by different defined sets of circumstances. Verkuil discusses analogizing a "zone of interests" approach to different levels that may require different safeguards. *See* Verkuil, *supra* note 32, at 785–86. Tracking is done in other adjudications, for example with EPA enforcement where claims are under 25,000 receive a different process from those that exceed that amount. Issues that may trigger additional protection are non-discretionary cases and those involving termination of benefits granted as in *Richardson v. Perales*, as well as cases where immigration enforcement is initiated. *See generally Richardson v. Perales*, 402 U.S. 389 (1971).

385. *See* Verkuil, *supra* note 32, at 745; David A. Martin, Mandel, Cheng Fan Kwok, *and Other Unappealing Cases: The Next Frontier of Immigration Reform*, 27 VA. J. INT'L L. 803, 805 (1987); Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1637–38 (2009).

386. *See* Sofaer, *supra* note 314, at 361–63.

however, would require a willingness and desire to create a fairer process for immigration applications, which realistically is inconceivable while President Trump remains in office. That said, in a fascinating dichotomy, the Trump Administration's moves to *limit* the integrity of agency adjudication systems,[387] if applied to USCIS adjudications, would actually serve the face-value purpose of increasing procedural protections for applicants.[388] Unsurprisingly, given the Administration's anti-immigration policies, the Executive Order explicitly exempted any actions related to "national or homeland security" functions.[389] An argument could be made, however, that in assuming these functions, USCIS is acting outside its congressionally delegated service-oriented mission and should therefore be subject to the Executive Order.[390]

A. Towards a Fairer Hearing

Importantly, efforts should be made to provide a more meaningful opportunity for applicants to present their cases. This can be accomplished through internal administrative law measures aimed at increasing the impartiality of adjudicators and the role of attorneys at proceedings.

First, to strengthen the integrity of the system and acceptability of results, USCIS can and should take steps to increase the impartiality of adjudicators, both actual and perceived, even if it goes above what is minimally required.[391] Most importantly, efforts should be made to increase the independence of immigration benefits adjudicators from policy-making and enforcement-focused functions.[392]

A crucial step in increasing impartiality is dismantling the combined function model.[393] The organic statute articulated congressional concern

387. Peter M. Shane, *Trump's Quiet Power Grab*, THE ATLANTIC (Feb. 26, 2020), https://www.theatlantic.com/ideas/archive/2020/02/trumps-quiet-power-grab/607087/ [https://perma.cc/62EX-HY26].

388. Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (Oct. 9, 2019).

389. *Id.*

390. 6 U.S.C. § 111 (b)(1)(E) (DHS's statutory mandate includes that "the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected . . . .").

391. Frye, *supra* note 38, at 265–66; Verkuil, *supra* note 32, at 750–51; Friendly, *supra* note 62, at 1279–80, 1289 ("In addition, there is wisdom in recognizing that the further the tribunal is removed from the agency and thus from any suspicion of bias, the less may be the need for other procedural safeguards[.]"); Verkuil, *supra* note 271, at 1189 ("To achieve the goals of the legalization program, the decision system must be divorced from INS, or more elaborate guidance mechanisms must be employed than are required by minimum due process.").

392. Barnett, *supra* note 20, at 533–34.

393. *Id.*; Lee, *supra* note 173, at 1111 n.84 ("As one commission on immigration reform observed: '[P]lacing incompatible service and enforcement functions within one agency creates problems: competition for resources; lack of coordination and cooperation; and personnel practices that both encourage transfer between enforcement and service

of the combination of the service and enforcement functions and its intent to separate functions.[394] As combining prosecutorial and adjudicatory duties raises the greatest concerns, USCIS should aim to remove all prosecutorial duties from USCIS adjudicators, including, most importantly, the initiation of removal proceedings through NTA issuance.[395] Instances where USCIS issues or files NTAs should largely be restricted. The simplest step would be to revoke the subregulatory guidance that requires the filing of Notices to Appear in a vast number of cases. However, larger reassessment of the circumstances in which USCIS initiates removal proceedings, including regulations that require issuance that were in place before the separation of agencies by functions, should be conducted.

Discussion of combined investigatory and adjudicatory functions is murkier.[396] Though immigration benefits adjudications are investigatory in nature, the ISO's primary investigatory duties should be with respect to determining approvability of the application, rather than those that are enforcement-focused. Collaboration with enforcement-focused agents whose investigations bear no weight on the approvability of the application should be minimized and left to the enforcement agencies within DHS.[397] Further, efforts should be made to physically separate adjudicators from enforcement-focused agents.[398] This includes removing FDNS agents from field offices and prohibiting ICE arrests at field offices in most circumstances.

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positions and create confusion regarding mission and responsibilities. Combining responsibility for enforcement and benefits also blurs the distinction between illegal migration and legal admissions.'" (citing *Alternative Proposals to Restructure the Immigration and Naturalization Service: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 109–10 (1998) (statement of Susan Martin, Former Director, U.S. Commission on Immigration Reform))).

394. 6 U.S.C § 291(b) (Executive reorganization authority "may not be used to combine, join, or consolidate functions or organizational units."); *id.* at § 298(b) ("It is the sense of Congress that—(1) the quality and efficiency of immigration services rendered by the Federal Government should be improved after the transfers [of immigration functions from INS to separate bureaus] take effect; and (2) the Secretary should undertake efforts to guarantee that concerns regarding the quality and efficiency of immigration services are addressed after such effective date."); *see* STEPHEN R. VINA, CONG. RSCH. SERV., RS21450, HOMELAND SECURITY: SCOPE OF THE SECRETARY'S REORGANIZATION AUTHORITY 6 (2005).

395. *See* Barnett, *supra* note 117, at 1741–42 (citing *Model Adjudication Rules*, ADMIN. CONF. U.S. 2018, https://www.acus.gov/sites/default/files/documents/ACUS%20Model%20Adjudication%20Rules%20%28June%202018%20Draft%29_0.pdf [https://perma.cc/7K8S-FYTR]).

396. Lee, *supra* note 173, at 1111 n.84.

397. USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.1(c)(1).

398. *See* Verkuil, *supra* note 32, at 751 ("[T]here should be every incentive to maximize the independence of deciders within each agency by insulating them from contact with enforcement and investigatory personnel.").

To further reduce impartiality concerns, USCIS should seek to increase adjudicator independence, an important safeguard against agency culture pressures promoting anti-immigration policies.[399] Rather than striving for complete independence of USCIS adjudicators, which seems an implausible goal given the continuing struggle in deportation adjudications, improvements can be made through many of the mechanisms used by agencies to ensure impartiality and adjudicator independence.[400] These may include reassessing components of performance evaluations, removal protections, and hiring decisions.[401] Review of decisions should be limited for quality checking for legal sufficiency and bias. Looking to other agencies' measures, litigant input, peer review, and reversal rates provide tools that can be utilized to minimize agency-culture concerns.[402] Additionally, hiring qualifications should be studied to determine if prior government employment, particularly in enforcement-focused agencies, impacts outcomes.[403]

Finally, USCIS should take intentional steps to adjust agency culture to meet its service mandate. This includes comporting institutional rhetoric, training, and hiring that focuses on service over enforcement. This culture shift must also seek to cultivate an attitude towards lawyers that is in line with the rules and regulations. USCIS must ensure its adjudicators understand that representation is a right and not a privilege. In a field office interview, the right to counsel is not merely the right to have an attorney act as a silent witness—it is the right to have a representative who can advocate in a manner that is consistent with both the written guidance and their ethical duties. Furthermore, adjudicators who do not permit attorneys to participate fully should be appropriately disciplined.[404]

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399. Barnett, *supra* note 20; Frye, *supra* note 38, at 270–71, 341.

400. *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, INNOVATION LAW LAB & S. POVERTY LAW CTR. 7 (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [https://perma.cc/manage/create?folder=19517]; Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006); Dana Leigh Marks, *I'm an Immigration Judge. Here's How We Can Fix Our Courts*, WASH. POST (April 12, 2019, 2:31 PM), https://www.washingtonpost.com/opinions/im-an-immigration-judge-heres-how-we-can-fix-our-courts/2019/04/12/76afe914-5d3e-11e9-a00e-050dc7b82693_story.html [https://perma.cc/GKB7-ZPYP].

401. Barnett, *supra* note 117, at 1704–07.

402. Barnett, *supra* note 20, at 552–55.

403. *Id.* at 546–47; SCHOENHOLTZ, SCHRAG & RAMJI-NOGALES, *supra* note 8, at 179–80.

404. DEP'T OF HOMELAND SEC. OFF. INSPECTOR GEN., *supra* note 310, at 40–45 ("DHS does not have sufficient policies and procedures to address employee misconduct."); U.S. CITIZENSHIP & IMMIGR. SERVS., MANAGEMENT DIRECTIVE NO. 256-002, DISCIPLINE AND ADVERSE ACTIONS, app. A 8–13 (2010).

B. Ending the Non-adversarial Fiction and Enhancing Notice of the Nature of Proceedings

USCIS should also take steps to improve notice to applicants, particularly concerning the nature of proceedings. This first requires addressing the "non-adversarial" classification of field office interviews. Inferences conjured through describing adjudications as non-adversarial run as an undercurrent in all safeguards prescribed. When looking beyond official guidance, it is clear that the current USCIS field office interview model cannot be described as purely non-adversarial. The label is imprecise at best and deceptive at worst. The inaccuracy of the non-adversarial label has a harmful signaling effect that is counter to acceptability goals.[405] Improperly identifying the nature of the adjudications gives applicants and the public an incorrect understanding of the proceedings.[406]

USCIS's unfavorable sentiments toward applications and heightened enforcement-focused policies, combined with existing formality in the model, remove proceedings for immigration benefits from the purely non-adversarial box. The term is misapplied to an agency that is not charged with treating applications favorably or with sympathy.[407] As demonstrated by recent institutional rhetoric, the interests of the agency do not align with those of applicants.[408] Public perceptions of the "gotcha mentality," "culture of no," and "fraud first" mentality, combined with official statements, further demonstrate this diverging interest and may, in fact, show USCIS's hostility to the applications.[409] Being true to a non-adversarial model would require a change in USCIS culture to adhere to its statutory mission that would require many intentional actions by the agency.[410]

Further, existing safeguards, though limited, indicate that the nature of proceedings cannot be classified as non-adversarial. Professor Paul Verkuil addressed this discordance between the non-adversarial guidance in asylum proceedings. Pointing to existing procedural safeguards, he noted, "[i]t is difficult to see how this [non-adversarial] directive could

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405. USCIS is aware of the signaling that occurs from the choice of descriptive terms for interview procedures. In the 2012 revisions to the AFM, USCIS departed from using "interrogations" or "questioning" and replaced such language with "interviewing." USCIS ADJUDICATOR'S FIELD MANUAL, *supra* note 18, § 15.4. *See* Family, *supra* note 112, at 572–73.

406. See Verkuil, *supra* note 32, at 752–54.

407. *Id.* at 784 n.189.

408. *Cuccinelli Announcement*, *supra* note 14; USCIS, *Mission and Core Values*, *supra* note 6.

409. *See supra* Part III.

410. *See* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV'T L. REV. 1, 17, 23–25, 35 (2009).

be carried out in practice, since the bills also provide for procedural ingredients such as cross-examination, oral presentation of evidence, confrontation, and the right to retain an attorney. These ingredients will undoubtedly create an adversarial environment."[411] Field office adjudications similarly provide an ability for cross-examination, oral presentation if compelled to appear for an interview, and the right to be represented by counsel, which further makes the non-adversarial classification a dubious one.[412]

But if the "non-adversarial" label is eliminated, how *should* these interviews be classified? The approach that may best bridge the government's concerns of balancing administrative efficiency and Due Process with the reality of the adjudications is to merely erase the "non-adversarial" label in official documents and guidance materials. This could mean simply removing the adjective and referring to the proceedings as "examinations," "interviews," or something similarly benign. Replacing "non-adversarial" with "inquisitorial" would be more accurate. However, as Judge Friendly indicated, even that term has undesirable connotations, suggesting instead "investigatory."[413]

USCIS should also take additional steps aimed at providing greater transparency, clarity, and availability of subregulatory guidance used by the agency.[414] Publicly accessible information remains misleading in terms of the commingling of enforcement efforts with benefits adjudications. Applicants for benefits can easily and unknowingly walk into minefields.[415] What may seem like a simple check in a box could lead to a denial of the application, initiation of removal proceedings, and possible detention. Increased transparency and self-help availability at the outset would improve perceptions of fairness and acceptability, but also efficiency as the agency would save on the time taken during interviews as the applicants will be better prepared to present their cases.[416]

Procedures should be instituted to provide notice to applicants of initiated enforcement actions occurring consequent to the benefits proceedings. This should include limiting ex parte communications for USCIS adjudicators, including with FDNS and ICE enforcement officers that are not performing an investigation that is part and parcel of the application decision process.[417] It may be appropriate to receive input

411. Verkuil, *supra* note 271, at 1199.

412. *See supra* Part III.

413. Judge Friendly points out that the term "inquisitorial" has undesirable connotations. Friendly, *supra* note 62, at 1290.

414. Walker & Turnbull, *supra* note 4, at 1239–41 (citing ACUS proposed guidelines for agency published guidance).

415. Frost, *supra* note 291, at 28.

416. Verkuil, *supra* note , at 773–75.

417. Barnett, *supra* note 117, at 1740–41 (citing *Model Adjudication Rules*, ADMIN. CONF. U.S. 2018,

from outside officers that relates to application-focused investigations, such as credibility, fraud, or other issues of eligibility. Input of this nature should be written statements that are provided to both the adjudicator and the applicant to ensure that the applicant is properly notified and able to rebuke the information.

Additionally, applicants for immigration benefits should have easy access to information concerning available benefits as well as the relevant subregulatory rules and procedures. Crucially, this must include facilitating access to subregulatory guidance on enforcement efforts within the benefits adjudication system. USCIS should continue efforts to consolidate guidance to improve access, but it must be done in a more transparent manner, including providing access to policy guidance that relates to enforcement actions resulting from the benefits application process. It also must be in a user-friendly manner using plain language principles that are accessible to all applicants.[418] Further, all forms, instructions, and relevant website pages should include notice of enforcement actions that may result from involvement with the immigration benefits system. USCIS's self-diagnostic "Explore My Options" tool on the website should be further developed to walk individuals through eligibility requirements for benefits, but also flag common issues where enforcement actions are likely.

V. CONCLUSION

Contrary to express congressional intent, USCIS continues to move closer to becoming a third enforcement branch of the Department of Homeland Security. Through analyzing USCIS's immigration benefits adjudication model utilizing an agency adjudication theorization as a framework, this Article exposed the current insufficiencies of procedural safeguards provided to applicants. This Article described how the agency's attitude toward applications and the increased combination of enforcement functions of USCIS adjudicators have shifted the nature of proceedings, hereby positing that the long-established notion that immigration benefits adjudications are non-adversarial, thus requiring limited protections for applicants, must be rejected. As such, this Article established the USCIS immigration benefits adjudication process is lacking adequate procedural safeguards for applicants that would ensure fair proceedings and can result in grave consequences for applicants.

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https://www.acus.gov/sites/default/files/documents/ACUS%20Model%20Adjudication%20Rules%20%28June%202018%20Draft%29_0.pdf [https://perma.cc/7K8S-FYTR]).

418. Family, *supra* note 19, at 571–72; VOGELMANN, *supra* note 109, at 21–22.