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UNCOVERING COORDINATED INTERAGENCY ADJUDICATION

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UNCOVERING COORDINATED INTERAGENCY ADJUDICATION

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Administrative adjudication often involves interagency coordination. This Article establishes that this phenomenon, which it terms "coordinated interagency adjudication," exists in many areas of public law with large administrative adjudication caseloads. These areas include immigration and customs, general employment policy and employment discrimination, domestic security, and health and safety. Interagency adjudication requires special attention because of the rule-of-law and jurisdictional matters implicated by the extension and coordination of adjudication across institutional boundaries.

The aim of coordinated interagency adjudication is to employ the resources of multiple agencies to improve determinations of statutory violations or of administrative claims for benefits. However, coordinated administrative adjudication across agencies may have problematic consequences. For example, in the area of immigration, poorly administered coordination between the Department of Homeland Security and the Department of Justice caused gross violations of the rights of asylum seekers and mentally incompetent noncitizens. These events, in turn, led to two recent high-profile class action lawsuits against the government. Just as importantly, the phenomenon of coordinated interagency adjudication highlights broader questions concerning the reach of judicial review of administrative activity and the breadth of agencies' authority to determine their own jurisdiction.

Despite the significance of interagency coordination to large swaths of administrative adjudication and the complications it has caused in the immigration context, scholars, the courts, and even the executive branch itself remain relatively unaware of it. This Article remedies this lack of awareness. It brings to light coordinated interagency adjudication processes by presenting instances of this phenomenon in a comprehensive typology involving a number of different executive branch agencies.

In addition, it argues that, because of the complexities of adjudication across agency boundaries, these processes escape the evaluation necessary to ensure their quality. Therefore, executive branch oversight is required both to prevent coordination fiascos such as those wrought in the immigration context and to ensure that agencies remain within reasonable jurisdictional bounds. As such, this Article proposes the establishment of context-specific, narrowly focused, ex ante executive branch oversight of coordinated adjudication processes.

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INTRODUCTION

Public benefits and penalties are often determined by adjudications that span multiple administrative agencies. Agencies collaborate and sometimes clash in processes that grant asylum benefits, resolve claims of discrimination under Title VII of the Civil Rights Act of 1964,[1] determine whether imported and exported drugs are illegal, and inspect food for safety during periods of national crisis, among many other examples. These adjudications vary in structure and in the types of coordination they involve. Some may involve independent agency adjudications that require the efficient and timely communication of decisions and the sharing of case files between agencies. Others may entail a large-scale game of "pass the ball." Still others require agencies to come together on an ad hoc basis to make critical decisions in times of crisis. The coordination required to further these types of interagency adjudications both affects their outcomes and implicates broader matters of administrative jurisdiction and deference.

Despite the significant volume of administrative adjudication that crosses agency borders, scholars have not written in depth about this topic. By contrast, there is significant literature on coordination in rulemaking (sometimes referred to as "shared regulatory space"),[2] a

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[1] 42 U.S.C. §§ 2000e to 2000e-17 (2012).

[2] *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); *see also* Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. F. 78 (2012). Subtopics in the discussion of coordinated rulemaking include the concept of and challenges inherent in duplicative delegation of rulemaking tasks. *See, e.g.*, Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237, 240 (2011) (using Environmental Protection Agency (EPA) and Occupational Safety and Health Administration case studies to demonstrate that jurisdictional overlap can "create regulatory synergy rather than dysfunction"); Jacob E. Gersen & Adrian Vermeule, Essay, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2234–35 (2012) (discussing the difficulty courts face in determining which agency they ought to defer to "[w]hen multiple agencies must interpret a given statute," *id.* at 2235); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011) (explaining the use of "antiduplication institutions" by all three branches of government, *id.* at 198, and how these institutions can screen out duplication and shape agency behavior by providing strong incentives for agencies to coordinate well, *id.* at 210). In general, the agency coordination literature has focused abundantly on agencies participating in environmental regulation. *See, e.g.*, Aagaard, *supra*; Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000); Cameron Holley, *Removing the Thorn from New Governance's Side: Examining the Emergence of Collaboration in Practice and the Roles for Law, Nested Institutions, and Trust*, 40 ENVTL. L. REP. 10,656 (2010). Prior to the interest in shared regulatory space, there was also some discussion of the ways in which agencies interact with one another outside of coordination, including monitoring one another and lobbying for self-interested changes. *See, e.g.*, Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009) (describing the possibility of interagency monitoring as a means of improving agency performance); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105

process that is fundamentally different from adjudication.[3] Coordination in the rulemaking context often (but not always) refers to multiple agencies working together to develop a regulation under the same statutory authority, otherwise known as "joint rulemaking." However, when multiple agencies further a single administrative claim — which this Article calls "coordinated interagency adjudication" — agencies do not usually have shared authority to implement the same statutory provision. Rather, agencies have, at best, separate authority over different parts of the same adjudicative process. This dynamic, which is unique to coordinated adjudication that spans institutional boundaries, raises jurisdictional and rule-of-law questions specific to the administrative context.

In some cases, coordinated interagency adjudication involves nonstatutory directives to coordinate. These coordinated adjudications result from either an explicit interagency focus or the need to coordinate separate sources of adjudicative authority. This facet of coordinated administrative adjudication also differs from many instances of shared regulatory space, such as joint rulemaking, which often involve coordination under a single, statutory directive.[4] For these reasons, the frameworks scholars have developed concerning coordinated and joint rulemaking are not necessarily applicable to coordinated inter-

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COLUM. L. REV. 2217 (2005) (arguing that Congress can use interagency lobbying as a mechanism to induce agencies to comply with their mandates).

[3] The exclusion of adjudication from the coordination scholarship may be partially due to the fact that the academic focus on agency coordination is itself fairly new. Agencies often work together to fulfill their statutory obligations. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1883 (2013) (Roberts, C.J., dissenting) (pointing out that "statutes that parcel out authority to multiple agencies . . . 'may be the norm, rather than an exception'" (quoting Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 208)). However, administrative law scholarship has only recently concerned itself with the problems and efficacies of interagency interactions. *See, e.g.*, Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745 (2011); Freeman & Rossi, *supra* note 2; Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183 (2013). As Professors Jody Freeman and Jim Rossi note, prior to 2012, administrative law scholarship was "generally focuse[d] on individual agency procedures and policy choices, and not on the interplay among agencies." Freeman & Rossi, *supra* note 2, at 1135. Professor Jacob Gersen's 2006 piece may be among the oldest in this new area of study. *See* Gersen, *supra*.

[4] This characterization of coordinated rulemaking, while often true, has exceptions. For instance, agencies may coordinate in order to more efficiently implement duplicative statutory provisions. *See* Marisam, *supra* note 2, at 184–85. Or they may coordinate more informally, even when Congress has not mandated joint rulemaking, for instance to "remedy inconsistencies that have resulted from regulations they initially issued separately or to address conflicts that arise from newly adopted legislation." Freeman & Rossi, *supra* note 2, at 1167; *see also* Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal*," 35 HARV. ENVTL. L. REV. 343, 358–64 (2011) (describing voluntary joint rulemaking by the EPA and the National Highway Traffic Safety Administration (NHTSA) to set national auto policy for greenhouse gas emissions and fuel efficiency standards).

agency adjudication, although some of the conclusions and solutions to relevant problems bear on the coordinated adjudication context.

This is not to say that the schemes discussed in the administrative coordination literature are wholly inapplicable to the adjudicative focus of this Article. One significant example includes the permitting world, which inhabits a gray area between rulemaking and adjudication and thus offers useful lessons for examining adjudication.[5] Another example includes the varied literature that references, however briefly, interagency interaction outside the rulemaking context (whether directly or by virtue of removing the discussion of coordination

[5] For instance, in their discussion about interagency consultations and agreements, Freeman and Rossi reference a few circumstances in which agencies collaborate to issue permits. *See* Freeman & Rossi, *supra* note 2, at 1157 (EPA consultation with other federal agencies on applications for pesticide registration); *id.* at 1159 (Federal Energy Regulatory Commission consultation with other federal agencies required before issuing hydropower licenses); *id.* at 1163–64 (nine agencies involved in permitting decisions on electric transmission lines). For a fascinating discussion of regulatory permits, see Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133 (2014). Some of the analysis in the instant Article maps on to the permitting world. The different permit types Professors Eric Biber and J.B. Ruhl identify appear to be outcomes of processes such as rulemaking, adjudication, and others that are hybrids of the two or distinct altogether. *See id.* 143–45. In a sense, then, many permits (those not purely general or specific) represent the outcomes of processes inhabiting the space between rulemaking and adjudication. Further, the authors suggest that the processes leading to the issuance of general permits are akin to rulemaking (or actually are rulemaking, like in their example of the administration of section 404 of the Clean Water Act), given (for instance) the potential for duplication and the requirement of a notice-and-comment period when such permits are revoked, while specific permits are often orders resulting from adjudication. *See id.* at 143–50, 160–64. If I were to begin tracking process and outcome in keeping with this thinking, they might be organized as follows:

PROCESS:	Rulemaking	<—Hybrid process ("adjudication-lite")—>	Adjudication
OUTCOME:	General permit	<—Hybrid general/specific permit ("specific-lite")—>	Specific permit

While this model appears to weigh rulemaking and adjudication evenly, I'd suggest that any circumstance in which a general permit is tailored to more specific circumstances requires some adjudication of applications (leading to permits resulting from adjudicative outcomes such as orders, sanctions, or relief). The model's inherent emphasis on adjudication sheds light on a fundamental challenge pertaining to the study of administrative adjudication as a whole and coordinated interagency adjudication in particular: how to ensure the quality of the variety of administrative activities that are not rulemaking, but also not the formal, structured, hearing-centered processes perhaps popularly associated with adjudication. To the extent that permits are the outcome of adjudications or the outcome of processes inhabiting the gray area between rulemaking and adjudication, Freeman and Rossi's examples shed light on the discussion and typology presented in this Article — particularly on the collaborative category of interagency adjudication. *See* Freeman & Rossi, *supra* note 2, at 1145 (noting that one type of multi-agency interaction occurs when "agencies must agree in order for an activity to occur (as when several agencies must approve a permit or license)").

from the context of any specific agency action).[6] However, an intensive, sustained discussion of adjudication alone is missing from the literature.[7]

A focused academic discussion of the unique structure of "shared adjudicative space" in the administrative context is merited for a number of reasons. One is to illuminate unique institutional problems implicated by the growing prevalence of adjudicative coordination across formal agency boundaries. Another is to consider the problems of and possible solutions for unwieldy, unseen, and unchecked interagency coordination in administrative adjudication. Still another is to enhance the coordination scholarship as a whole and balance its skewed focus on the rulemaking inquiry. This Article begins the conversation about coordinated interagency adjudication by substantiating both its pervasiveness and its importance across many agencies and varied substantive fields, discussing its implications for our understanding of broader administrative frameworks, and providing (nonexhaustive) insights about its impact on the government's evaluation, creation, and implementation of public law.

Given the variety of substantive areas from which this Article draws its data, I remain relatively agnostic about the actual benefits and drawbacks of coordination in any given administrative adjudicatory regime. I note that poor coordination across agencies can lead to problems, perhaps similar in kind but more severe than those caused by poor coordination within a single agency, and that greater examination of the variety of interagency coordination is required to determine whether it is of poor quality and to what extent it weakens adjudicative processes and outcomes. The broader concern motivating this Article's empirical focus is the extent to which the traversal of agency boundaries uniquely impacts the substance and function of coordination.

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[6] Biber suggests that there has been "discussion of interagency interaction in the nonrulemaking context, mostly in the environmental and natural resources area." Email from Eric Biber, Professor, Univ. of Cal. Berkeley Sch. of Law, to author (May 5, 2014, 12:42 EDT) (on file with author); *see also* Freeman & Farber, *supra* note 2, at 796 (discussing the "modular" conception of environmental regulation as reliant "on a mix of formal and informal tools of implementation, including both traditional regulation and contract-like agreements"); Freeman & Langbein, *supra* note 2, at 109–21 (presenting data supporting negotiated rulemaking); Holley, *supra* note 2, at 10,683 (discussing contexts in which successful "new environmental governance" collaboration is likely to occur).

[7] Whether coordinated interagency adjudication enforces authority, makes policy, furthers the interpretation or implementation of a statute or regulation, or fulfills some other administrative function does not take away from its unique structure as adjudication — a process that, as Professor Kate Andrias has noted, "is so understudied and invisible" that it merits explicit description. Email from Kate Andrias, Assistant Professor, Univ. of Mich. Law Sch., to author (May 29, 2014, 15:04 EDT) (on file with author).

Coordination certainly exists in the intra-agency context; indeed, it serves as a meaningful case study in my separate discussion of judicial deference to the outcomes of interagency coordination.[8] As such, one might assume it is the contextualized specifics of coordination that determine the quality of the coordinated process, and not whether the coordination happens across institutional boundaries. To some extent, this assumption may be true (especially, for instance, in the private law context where efficiency can more easily be the primary motivation for structural shifts). However, this Article and its typology emphasize the importance — in the administrative law context — of jurisdictional and rule-of-law concerns implicated by adjudication across institutional lines. First, as will be discussed in reference to a few brief case studies,[9] the assumption in the intra-agency context that courts have access to information about disputes between internal agency decisionmakers is not applicable to the interagency coordinated adjudication context. As such, courts are relatively unaware of the substance and import of interagency coordination in administrative adjudication.

While this Article takes a relatively negative view of this fact within the context of its immigration case studies, it does not necessarily critique the outcomes of all disjointed decisionmaking.[10] Rather, it merely points out that this disjunction is a phenomenon uniquely associated with agency boundaries in coordination and one worth examining. While this Article focuses more on the means available to the executive branch to increase awareness of this phenomenon, a related project discusses the equally important and complex matter of possible changes to the role of judicial review in this framework.[11]

Like the courts, the executive branch lacks a full grasp of the overall breadth and substantive impact of its own interagency adjudica-

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[8] As I note elsewhere, coordination-specific judicial deference doctrine has arguably developed primarily in response to the assumption that coordination is dictated by a single, statutory authority, as is often the case in rulemaking, but not necessarily in coordinated adjudication. *See generally* Bijal Shah, Deference to Coordinated Interagency Adjudication (Mar. 12, 2014) (unpublished manuscript) (on file with author) (analyzing approaches to the judicial review of and deference to the results of interagency processes). As such, the doctrine itself maintains incorrect assumptions about the materials and authority that courts may access when evaluating the results of interagency adjudication.

[9] *See infra* pp. 814–18.

[10] For instance, a lack of coordination may render agency decisions in a single process more independent, thus allowing the public "two bites at the apple" while seeking administrative (immigration or other) benefits. *See* Freeman & Rossi, *supra* note 2, at 1150 (noting that, in some instances, Congress may have sought to "insulate one agency's functions from another's, either to promote independence or for some other salutary purpose"). Nonetheless, even in those instances, some level of coordination (for instance, the timely and efficient transfer of case files from one agency to another) may be necessary.

[11] *See generally* Shah, *supra* note 8.

tion. As a previous Research Director of the Administrative Conference of the United States (ACUS) notes, the ACUS once attempted to oversee a study of these types of multi-agency administrative adjudication processes but found it impossible to do so in a systematic manner.[12] While it is unclear to what extent portions of the executive branch are aware of coordinated adjudication in its various manifestations, executive branch leadership has not considered coordinated adjudication as a unified, coherent phenomenon.

Further, jurisdiction in interagency adjudication is not clearly delineated by Congress, nor are agencies authorized to determine this jurisdiction for themselves, as they are in the intra-agency adjudication context. An agency may typically determine how to parse out the procedural responsibilities of a decisionmaking process contained entirely within its own halls. Indeed:

> The recent decision in *City of Arlington* found Justice Scalia leading the charge to allow agencies to negotiate the scope of their authority as long as it is "based on a permissible construction of the statute," which could imply that bureaucrats could potentially make their own decisions regarding how to interpret a statute that may be administered by multiple agencies.[13]

It is not clear, however, whether or when the involved agencies themselves, as opposed to outside overseers, should be allowed to transfer or even simply determine agency jurisdiction. Significant examples of moments when agencies do so — seemingly without awareness from

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[12] I would like to thank Professor Jeff Lubbers for this insight. For over a decade, "Professor Lubbers was the research director of the Administrative Conference of the United States, where he is now Special Counsel." *Jeffrey Lubbers*, AM. U. WASH. C. LAW, http://www.wcl.american.edu/faculty/lubbers (last visited Nov. 23, 2014) [http://perma.cc//8PQG-L2SQ]. The ACUS currently notes: "Most studies of federal agency adjudication — by the Conference or others — took place years ago or assessed only limited aspects of the adjudication process. There is no single, up-to-date resource that paints a comprehensive picture of agency adjudications across the federal government." *Federal Administrative Adjudication*, ADMIN. CONF. U.S., http://www.acus.gov/research-projects/federal-administrative-adjudication (last visited Nov. 23, 2014) [http://perma.cc/C9RL-4EWN]. To rectify the continued lack of information available about administrative adjudication, the ACUS is now undertaking a project "to map the contours of the federal administrative adjudicatory process," which includes a plan to "explore the wide variety of agency adjudicatory schemes across the federal government and their related rules of practice and case management techniques." *Id.* Note that the ACUS study focuses on "both 'formal' adjudication conducted under the Administrative Procedure Act [(APA)] and 'informal' adjudication," just as this Article does. *Id.*

[13] Shah, *supra* note 8, at 4 n.6 (quoting City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013)). More specifically, Justice Scalia warned of a "false dichotomy" between jurisdictional and nonjurisdictional agency interpretations, cautioning that setting up such a distinction would transfer too much power from agencies to courts. *City of Arlington*, 133 S. Ct. at 1872–73. As such, Justice Scalia's point favors preserving the post-*Chevron* allocation of agency power. While Justice Scalia acknowledged dissenting Chief Justice Roberts's concern that agencies already have too much power, he dismissed the worry that agencies are exercising legislative or judicial power by arguing that agency functions are, by definition, executive. *Id.* at 1873 n.4.

Congress, the courts, or even executive branch leaders — could include situations when one agency wishes to alleviate its own burden by making use of another agency's expertise, or when more than one agency wishes to lay claim to the same responsibility or task.[14] These overarching jurisdictional conflicts in one iteration or another motivate the structure of the typology presented in this Article.

This Article proceeds in two Parts that identify the overlooked phenomenon of coordinated interagency adjudication and offer a multifaceted framework to help evaluate and constrain its potentially severe consequences. Part I utilizes the example of immigration as a stepping-stone to a broader exploration of coordinated adjudication throughout the government. Further, this Part "crack[s] open the black box of agencies"[15] by presenting a typology of interagency adjudicative processes involving a number of different administrative regimes. Resolving administrative claims often involves interagency coordination throughout the process. Agencies coordinate throughout their investigations and claim development by sharing both facts and legal analyses with one another. Coordinated adjudication also often involves various junctures at which agencies either unilaterally, bilaterally, or multilaterally transfer adjudicative jurisdiction between or among themselves. Thus, this Part both uncovers the great breadth of coordination pervading administrative adjudication processes and serves as a foundation for a broader discussion about the relationships between agencies in the adjudication context.[16]

Part II is animated by the fact that coordinated adjudication processes have thus far been underexamined by the courts, the executive branch, and scholars.[17] For this reason, the relationships between

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[14] Administrative adjudication can even be understood as a method by which to "enforce" agency jurisdiction (for instance, to levy a penalty). *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1042 (2013) ("[W]hen [agencies] find noncompliance, they take a range of actions, including administrative enforcement actions, conducted before agency adjudicators."). *But see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3160 n.10 (2010) ("[M]any administrative law judges of course perform adjudicative rather than enforcement or policymaking functions . . . .").

[15] Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1032 (2011) (discussing the dearth of legal scholarship regarding agencies that is not "localized" or "confined to particular contexts").

[16] As Gersen notes, "the mere fact of [agency] jurisdictional overlap leaves unresolved the important subsequent question of whether [the relevant agencies'] authority is equal or hierarchical," and thus, for example, which agency's interpretation of a statute will control in a coordinated process. Gersen, *supra* note 3, at 210.

[17] For reasons of scope, this piece focuses primarily on executive oversight, as opposed to the reorganization of congressional priorities to more closely oversee complex adjudicative coordination. Broadly speaking, Congress may be limited in its ability to address agency coordination. *See* INS v. Chadha, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."); Note, *A* Chevron *for the House and Senate: Deferring to Post-Enactment Con-*

agencies in administrative adjudication have completely lacked oversight, which has reduced the quality and hindered the improvement of these relationships. Given the weakness of review by courts in this context and the continued lack of well-hewn legislative involvement, this Part argues for executive oversight of coordinated agency adjudications. In part, it draws from scholarship championing the unitary executive, including scholarship calling for greater upper-level executive branch supervision of administrative enforcement activity. Further, to realistically apply this suggestion to the adjudication context, this Part wrestles with the controversial "decisional independence" doctrine. This doctrine has allowed administrative law judges to sidestep oversight because of their role as adjudicators, despite the fact that these bureaucrats are not Article III judges, but civil servants with a solid place in the executive branch hierarchy. Part II neutralizes this doctrine by concluding that coordination functionally reduces decisional independence in adjudication. This diminished independence renders executive oversight of coordinated agency adjudication theoretically less problematic, especially if the oversight focuses on the coordination itself, as opposed to the substance of agency decisions. The Article concludes by proposing executive oversight that is both reasonable in light of decisional independence doctrine and effective overall: ex ante review of coordinated adjudication by a high-level executive branch leader or by an executive body that is not governed by any of the agencies involved in the coordinated adjudication.

I. UNCOVERING COORDINATED INTERAGENCY ADJUDICATION

A. Short Case Studies in Immigration

Interagency coordination in adjudication is of great importance in immigration. This coordination occurs because of the division of immigration functions between the Department of Justice (DOJ) and the Department of Homeland Security (DHS).[18] For instance, the respon-

gressional Resolutions that Interpret Ambiguous Statutes, 124 HARV. L. REV. 1507, 1508 (2011) ("[T]he Supreme Court, in *INS v. Chadha*, limited Congress's role in administering statutes, despite its institutional advantages over courts — and, in some respects, over agencies — in developing policy." (footnote omitted)). In any case, despite the great influence of coordinated adjudication, Congress is unlikely to establish an oversight process that considers the details of coordinated agency adjudication closely, as doing so is simply not in keeping with its broad, legislative role.

[18] Prior to 2002, all parts of the immigration adjudication process were housed in one agency, the DOJ. After the creation of the DHS, a portion of the functions comprising the immigration adjudication process was moved to this new agency. *See* ANDREW I. SCHOENHOLTZ ET AL., LIVES IN THE BALANCE 2 (2014); *see also* Freeman & Rossi, *supra* note 2, at 1153–54 ("DHS now comprises what were previously over forty agencies scattered throughout the government, yet whether this consolidation improved efficiency or effectiveness is highly debatable.").

sibility of completing the initial adjudication of asylum applications was transferred from the DOJ to the DHS when the latter was created in 2002.[19] As a result of this move, the adjudication of many asylum claims is now shared by at least two agencies. The components of asylum claim adjudication that must now be coordinated between agencies include investigation and factfinding, as well as the issuance of both initial and appellate-level administrative decisions. Further, the State Department may weigh in on those DHS asylum officers' adjudications implicating international relations, and the Department of Health and Human Services (HHS) may be part of DOJ immigration judges' factfinding in cases of mentally incompetent or minor noncitizens.[20]

When these coordinated interagency adjudication relationships falter, the consequences can be dire. One example of this impact in immigration asylum cases involves the inability of the DHS and the DOJ to coordinate effectively to determine when the "asylum clock," by which the lifetime of an asylum claim is measured, stops and starts.[21]

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[19] *See* SCHOENHOLTZ ET AL., *supra* note 18, at 2. Cases may be appealed from the DHS to the DOJ. *See* TURID OWREN ET AL., AM. IMMIGRATION LAWYERS ASS'N, APPEALS TO A HIGHER AUTHORITY: AAO AND BIA 1–3, 5 (2012), http://www.ailawebcle.org/resources/seminar120503resources.pdf [http://perma.cc/ G6X9-6CG7]. Further, an undocumented noncitizen who is not granted asylum by the DHS will be referred to the DOJ for additional adjudication within the context of removal proceedings. *See* SCHOENHOLTZ ET AL., *supra* note 18, at 7–8. In these cases, the DHS also plays an enforcement role, which includes, on many occasions, detaining noncitizens and placing them into deportation proceedings. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 489 (2007).

[20] *See* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 627 (2010); Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331, 335 (2013); *see also* SCHOENHOLTZ ET AL., *supra* note 18, at 8; Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 397 (2011); Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 229 (2006).

[21] *See* NADINE WETTSTEIN ET AL., UP AGAINST THE ASYLUM CLOCK: FIXING THE BROKEN EMPLOYMENT AUTHORIZATION ASYLUM CLOCK, http://www.legalactioncenter.org/sites/default/files/docs/lac/Asylum_Clock_Paper.pdf (last visited Nov. 23, 2014) [http://perma.cc/3U3T-XWB3]; *Asylum Clock*, IMMIGR. POL'Y CENTER, http://www.immigrationpolicy.org/litigation/asylum-clock (last updated Feb. 5, 2014) [http://perma.cc/WB79-QG3G] ("Attorneys and asylum applicants across the country regularly experience problems with the 'asylum clock' — a clock which measures the 150 days after an applicant files an asylum application before the applicant can apply for an employment authorization document (EAD). These problems include a lack of clear guidance about how immigration agencies — both [in the DOJ] and [DHS] — should interpret and implement the law governing the clock, the lack of a formal review process when an EAD is denied, and a general lack of transparency in [DHS]'s administration of the clock. As a result of these problems and increasing court backlogs, asylum applicants often wait much longer than the legally permitted timeframe to receive a work permit and are thus unable to support themselves and their families while their applications are pending.").

This metric governs access to work authorization for an asylum applicant whose claim has not yet been adjudicated due to government delay.[22] In large part, it is the DHS's and the DOJ's inability to collaboratively manage the asylum clock of many asylum applicants that caused immigrants' rights groups to bring a class action lawsuit in *A.B.T. v. U.S. Citizenship & Immigration Services*.[23]

A.B.T. challenged DOJ and DHS "policies and practices that unlawfully prevent[ed plaintiffs, asylum seekers in removal proceedings,] from working even though their pending asylum claims have not been adjudicated within the six-month time period prescribed by statute."[24] Indeed, the asylum clock tracks the 180-day time period after an asylum applicant files his or her completed asylum petition forms — a time frame whose completion is required (and which is commonly reached, due to administrative delay) before an applicant can receive an employment authorization document.[25] The 180-day clock can be tolled, thus causing additional delay. Technically, this tolling should occur only when requested or caused by the applicant.[26] Often, however, the asylum clock is tolled arbitrarily and without the knowledge of the applicant.[27] This is because, prior to *A.B.T.*, there was "no mandatory procedure in place to ensure that [applicants were] informed that the asylum [employment authorization document] clock [was] being stopped or not started or restarted or to inform asylum applicants in all instances of the reasons for taking these actions related to the asylum [employment authorization document] clock."[28] Thus, by delaying their ability to seek lawful employment, this system impeded asylum seekers from becoming independent and productive members of society.

Exacerbating the problem was the extent to which the DOJ and the DHS were often unable to effectively communicate regarding when one agency was tolling the clock, both because they were not keeping sufficient track of it themselves (due to bureaucratic ineptitude) and because they rarely shared this information with one another (due to inefficiencies and firewalls set up by the division of the asylum process between the two agencies). In fact, both the DHS and the DOJ were

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[22] *See, e.g.*, Memorandum from Brian M. O'Leary, Chief Immigration Judge, Exec. Office for Immigration Review, U.S. Dep't of Justice, to All Immigration Judges et al. 3 (Nov. 15, 2011), http://www.justice.gov/eoir/efoia/ocij/oppm11/11-02.pdf [http://perma.cc/57EH-K9GK].

[23] No. C11-2108, 2013 WL 5913323 (W.D. Wash. Nov. 4, 2013); *see also Asylum Clock*, *supra* note 21.

[24] Complaint for Injunctive & Declaratory Relief at 2, *A.B.T.*, 2013 WL 5913323 (No. 2:11-cv-02108).

[25] *See* 8 C.F.R. § 1208.7(a)(1) (2014).

[26] *See id.* § 1208.7(a)(2).

[27] *See* WETTSTEIN ET AL., *supra* note 21, at 16.

[28] Complaint for Injunctive & Declaratory Relief, *supra* note 24, at 3.

well aware of the public's concerns about the asylum clock, but neither was able to hew to a course of action.[29] As a result, an applicant on appeal before a DOJ immigration judge may have had his application tolled by the DHS far earlier in the process, without his knowledge. A key issue resulting from this lack of coordination was insufficient notice to applicants whose asylum clocks had been stopped, and who were thus ineligible for work permits.

Another example illustrating the effects of problematic interagency coordination in administrative adjudication involved California-based DOJ immigration judges coordinating with the DHS under interagency initiatives to aid mentally incompetent individuals in immigration proceedings.[30] As a result of this poor coordination, another class action lawsuit was brought against the government.[31] This case, *Franco-Gonzalez v. Holder*,[32] concerned the lack of a nationwide policy for aiding immigration detainees with serious mental disorders that may render them incompetent to adequately represent themselves in litigation.[33] One major interagency coordination problem underlying the systemic marginalization of mentally disabled noncitizens in immigration proceedings was the lack of communication between DHS enforcement officials and DOJ immigration judges regarding the mental health of detainees that the DHS brought before the DOJ.[34] The DHS

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[29] Representatives of the American Immigration Lawyers Association (AILA) raised concerns with the Executive Office for Immigration Review (EOIR) at least as early as 2000 and were rebuffed. *See EOIR/AILA Liaison Meeting, March 30, 2000*, U.S. DEP'T JUST., http://www.justice.gov/eoir/statspub/qaeoiraila.htm (last visited Nov. 23, 2014) [http://perma.cc/7PQM-8ZXL]. Such responses were typical of interactions between the two groups. *See generally EOIR/AILA Liaison Meeting Q & A's – Archive*, U.S. DEP'T JUST., http://www.justice.gov/eoir/ailaarchive.htm (last visited Nov. 23, 2014) [http://perma.cc/SL4N-S6WV] (providing agendas, as well as questions and answers, from liaison meetings between the EOIR and AILA dating from 2000 through 2013). The 2012 agenda indicates that the EOIR refused to reply to related inquiries due to pending litigation. *See AILA-EOIR Liaison Meeting Agenda*, U.S. DEP'T JUST. (Nov. 15, 2012), http://www.justice.gov/eoir/statspub/AILA%20EOIR%20Fall%202012%20Agenda.pdf [http://perma.cc/UN6Z-M4MJ].

[30] *See* Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 3674492, at *2 (C.D. Cal. Apr. 23, 2013).

[31] *See Franco-Gonzales v. Holder*, ACLU (Apr. 24, 2013), https://www.aclu.org/immigrants-rights/franco-gonzales-v-holder [http://perma.cc/CWX6-HF79].

[32] 2013 WL 3674492.

[33] *See id.* at *16. One major point of contention was the lack of counsel available to this population of immigrants. *See id.* at *5–6. In short, any person charged with being "removable" is entitled to be represented by counsel, 8 U.S.C. § 1362 (2012); however, undocumented immigrants are often unable to afford such legal counsel, *see Franco-Gonzalez*, 2013 WL 3674492, at *19. This problem is compounded in the mentally disabled noncitizen community, members of which frequently are detained by the DHS. *See, e.g.*, *id.* at *4. Thus, unrepresented noncitizens in immigration removal cases risk a higher chance of deportation, and this risk is further increased for those with mental disorders. *See Franco-Gonzales v. Holder*, *supra* note 31.

[34] *See* HUMAN RIGHTS WATCH & ACLU, DEPORTATION BY DEFAULT 34, 48 (2010), http://www.hrw.org/sites/default/files/reports/usdeportation0710webwcover_1.pdf [http://perma.cc/U58X-P2G8].

often had more insight into whether a detainee was mentally disabled or exhibited the types of characteristics that might lead an immigration judge to find the detainee incompetent (and thus unable to move forward with immigration proceedings).[35] Due to the DHS's reluctance to expend resources to adequately evaluate those detainees showing signs of mental illness and its inability to coordinate a reliable, uniform system of communication with the DOJ within the context of removal proceedings, many detainees were deported despite being unfit to represent themselves at trial.[36] Major weaknesses in DOJ policy concerning mentally incompetent noncitizens' statuses and lack of access to counsel, insufficient oversight of immigration judges' required coordination with the DHS and their application of relevant policy, and failures in communication at both the ground and highest level of DOJ and DHS leadership all compounded the problem.

The *Franco-Gonzalez* litigation eventually led the DHS and the DOJ to hastily issue a nationwide policy in anticipation of an impending negative ruling from the Central District of California.[37] However, there is no guarantee that this policy will be implemented any more effectively than previous interagency policy governing the immigration adjudication of mentally incompetent individuals' cases, or that it will improve the failures of coordination that arguably underlie the problems suffered by the class.

While these issues are specific to the immigration context, they also serve as a cautionary tale for other areas of public law that utilize co-

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[35] *See Franco-Gonzalez*, 2013 WL 3674492, at *8.

[36] *See* HUMAN RIGHTS WATCH & ACLU, *supra* note 34, at 48.

[37] On April 22, 2013, the day before the decision in the class action was issued, the DOJ and the DHS issued a "new nationwide policy for unrepresented immigration detainees with serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings." *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions*, U.S. DEP'T JUST. (Apr. 22, 2013), http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html [http://perma.cc/Y8A8-7B2C] (noting that the "policy entails implementation of new procedural protections," including DHS screening for serious mental disorders or conditions that must be subsequently communicated to the DOJ; DOJ and DHS joint identification of detainees with serious mental disorders or conditions in immigration detention facilities; DOJ and DHS coordinated competency hearings and independent psychiatric or psychological examinations; procedures to make available qualified representatives to detainees who are deemed mentally incompetent; and bond hearings requiring the DHS to coordinate travel to DOJ immigration courts for "detainees who were identified as having a serious mental disorder or condition that may render them mentally incompetent to represent themselves and have been held in immigration detention for at least six months"). This decision was likely the result of intensive, unprecedented coordination between the DOJ and the DHS resulting from bureaucratic panic at the potential for an expansive court ruling. The next day, the district court determined that the Director of U.S. Immigration and Customs Enforcement, the Attorney General, and the Executive Office of Immigration Review must provide qualified legal representatives to immigrant detainees with mental disabilities who are facing deportation "in all aspects of their removal and detention proceedings." *Franco-Gonzalez*, 2013 WL 3674492, at *20.

ordinated administrative adjudication. Problems resulting from poor-quality or convoluted interagency relationships may manifest and grow in almost any type of adjudicative setting. Yet despite this potential, courts typically do not review the coordination in these processes. In both the DHS/DOJ coordination frameworks discussed here, courts were unaware of the extent of the problem and how it was exacerbated by poor coordination until these facts were brought to their attention via class action lawsuits.

While I note drawbacks to the fact that courts do not currently reach and review the actions of the DHS and coordination between the DHS and the DOJ in the immigration context, I remain agnostic about how much of a disadvantage this fact is. Whether freedom from judicial review is good, bad, or irrelevant to the quality of an adjudication likely depends on the specific context in which the adjudication occurs. In some cases, for instance, poor effort by a primary agency may be adequately reflected in the final product of an adjudication, even if it is not directly attributable to the primary agency. With or without judicial review of this primary agency's actions — in other words, even if the court isn't aware that the problem originated in an agency not before the court — the agency that was held responsible in court may in turn hold the primary agency accountable moving forward. In a separate regard, we may actually want an initial review process to be fully shielded from second-tier administrative and appellate court review in order to allow an applicant "two bites at the apple" for an administrative benefit. Still, arguing whether these dynamics are problematic or even beneficial across the executive branch is not the point of this particular, introductory discussion.

Rather, I wish to make a broader, more structural point: the existence of coordination in administrative adjudication dislocates certain overarching administrative review and deference expectations. In judicial review of traditional intra-agency processes, the court has the opportunity to look through the record. Generally, in judicial review of administrative activity, the court may decide whether examining the substance or procedure of the disagreements between different agency components involved in the review is worthwhile for determining the quality of the final agency determination. In coordinated interagency adjudication, the ability of a court to have access to and to review these agency determinations becomes frustrated because the role of each agency might be ill-defined and traces of disagreement might be hard to uncover and harder yet to scrutinize, thus shifting the review and deference paradigm in a manner that merits close attention.

Given limitations of space and scope, this Article is primarily focused on introducing coordinated interagency adjudication into the literature and discussing the appropriate level of executive control over the relevant dynamics. My companion piece to this Article wrestles with questions of judicial review of and deference to the re-

sults of interagency coordination.[38] However, the incompleteness of the judicial review of interagency adjudication is a characteristic unique to the results of coordination across institutional borders, and one that helps render this phenomenon worthy of study and (as I argue later) oversight.

B. The Broader Phenomenon

Coordinated administrative adjudication is not unique to the immigration context. Indeed, it can be found in other areas of administrative law with large adjudication caseloads. These areas include customs; general employment policy and employment discrimination; health, safety, and security; and other matters in which the resources or expertise of more than one agency may be gathered to help evaluate and adjudicate an administrative claim for benefits or a determination of a statutory violation.[39] Administrative law in these areas fundamentally affects the large population that depends on the complete, expert adjudication of their individual administrative claims. Given the exceptional impact that adjudication has on individual rights, and its great potential for benefiting or harming the exercise of public law, the influence of coordination on these systems is significant.

Any given agency adjudication, including and beyond the immigration setting, has at least two necessary parts. The first is factfinding prior to the application of law in the case.[40] The second is the application of law to the facts gathered.[41] In the administrative adjudication model as it is traditionally understood, the investigation and factfinding fall to the same, single agency with jurisdiction over the only (and thus final) decision in the adjudication. In practice, however, this is often not the case. Instead, as this Article finds, the factfinding and investigation in an administrative case may be conducted by one or more agencies that are not the final adjudicator. Or the factfinding may be complemented by information or advice provided by another nonadjudicative agency or, in some cases of coordinated interagency adjudication, by an agency that has another, more decisive, and possibly adjudicative role in the process. In addition, there are processes in which an agency may advocate against (or, very rarely, for) the claimant. This role of "agency as representative" may in fact be played by

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[38] *See generally* Shah, *supra* note 8.

[39] *See infra* pp. 883–905.

[40] *See* Magill & Vermeule, *supra* note 15, at 1067.

[41] *See id.* Often, the adjudicative process incorporates more than these two elements. *See, e.g.*, Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 101 (2003) ("To adjudicate an issue, the agency must provide interested parties with notice of the subject matter to be decided, conduct a hearing, and then issue a decision based upon the record of the hearing."). Nevertheless, at its core, adjudication in any setting involves gathering facts and applying the law to those facts.

an agency that has served previously in either an adjudicative or neutral "expert witness" capacity in the same administrative proceeding. Furthermore, the road to resolving a single claim may involve more than one adjudicative decision.

This Article establishes, more specifically, that administrative adjudication processes may involve agencies finding facts for other agencies' appellate-level adjudications; agencies transferring their adjudicative jurisdiction to other agencies, thus allowing one agency to effectively substitute for another in a given administrative claim; or even agencies working together in relatively equal partnership to determine a claim or adjudicate a violation. Further, coordination may occur in agency case determinations big and small. In immigration and other contexts, these determinations include adjudicative processes with multiple "individualized hearing[s]"[42] that resemble the full-blown, adversarial process that is found in a civil or criminal court proceeding.[43] In other administrative settings, many key adjudication decisions are made on the basis of paper-based evidence alone.[44]

In the end, one commonality among all coordinated interagency adjudications is that more than one agency plays an important role in moving each case toward a final determination. Coordination, as I employ the term here, differs from but may be included under the umbrella concept of agency interactions. "The basic mechanism of agency interactions is that one agency's freedom of action is somewhat restricted by the control or influence that other agencies have over its choices."[45] Interagency coordination, as I use the term here, refers to the organization and quality of the different elements of a complex activity (such as interagency adjudication) that enable agencies to work together effectively to achieve a shared goal. Interaction may refer merely to the inclusion of more than one agency in a process, or it may refer to the coordination required between agencies to further the required process. Thus, coordination more specifically refers to "working together," that is, to the explicit and somewhat formalized collaboration or communication required to further an interaction. For example, the adjudication of asylum applications requires both interagency interaction, in that DHS and DOJ activities both bear on the process, and coordination, to the extent that the DHS and the DOJ actively work together (for example, by sharing information, creating joint policy governing these adjudications, harmonizing their adjudication timetables in individual cases influenced by both agencies, and the

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[42] Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1900 (2013).

[43] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976).

[44] *See, e.g.*, *id.* at 343–45.

[45] Bradley, *supra* note 3, at 750 (discussing agency interactions within the context of rulemaking).

like) to further the process. While the relative level of coordination in any given agency interaction may vary, acts of coordination likely serve as the joints of most mechanisms of agency interaction.[46]

Further, the nature of the relationships between and among agencies substantively affects coordinated administrative adjudications. Certainly, it is important to an individual claimant to be aware when more than one agency is involved in a given process. For instance, to draw on the immigration context again, both the DHS and the DOJ contribute to the resolution of an individual claimant's case, much like trial- and appellate-level courts contribute to the life of a single civil or criminal case. In coordinated agency adjudication across various contexts, a claimant's interaction with government bureaucrats at multiple agencies may be difficult to manage and her understanding of the complicated process may be obscured.

Overall, there are both benefits and drawbacks to having these multiple, often tiered, relationships within the context of a single administrative claim. The need for varied expertise in complex subject areas that have a broad impact on the population, such as the areas of administrative law discussed in this piece, draws multiple agencies into a single adjudication process as a result of congressional allocation of statutory authority, or based on agencies' own assessment of the need for coordination or jurisdiction transference. Thus, a possible benefit of coordination is the opportunity for multiple experts to consult with one another and apply their knowledge to the processing of the case.[47] This cross-pollination allows for the incorporation of varied governmental perspectives and priorities whose import may not be obvious to any one agency.[48] Another benefit is the opportunity for the individual claimant to have more than one "bite at the apple," or the opportunity to appeal to other government officials so that her fate is not necessarily in the hands of a single administrative adjudicator acting as lord of the claim. Additional benefits — which also constitute reasons why agencies and Congress may be motivated to construct coordinated adjudication schemes — include agency interest in taking advantage of other agencies' efforts and resources; the narrowing and reduced expenditure of an agency's own claimed expertise and/or resources to adjudicate; and congressional oversight committees' desire to expand their power by increasing the jurisdiction of their pet agencies, even incrementally, over parts of an adjudication process.

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[46] I note that while the typological/rule-of-law goals of this Article do not necessarily require drawing the distinction between interaction and coordination, the solution of executive oversight explored in Part II is more concrete when focused on coordination more specifically.

[47] *See* Marisam, *supra* note 3, at 184–85.

[48] *See id.* at 188.

However, potential drawbacks abound. For instance, the duplication of the same adjudication by different agencies may waste government resources.[49] Further, there are often no longstanding or formal mechanisms for tracking, making consistent, or ensuring the quality of interagency communication, which is often involved in the shared factfinding that underlies each adjudicative decision.[50] There may also be problems with ensuring administrative due process over the lifetime of a claim that is influenced by the actions of multiple agencies — a problem that may be of particular concern in adjudication.[51] While the benefits of coordination mean that interagency relationships in adjudication processes are normatively desirable, the drawbacks may outweigh the benefits, especially if the coordinated adjudication has components that are unseen and unchecked by courts or executive branch leaders. As I will argue later in this Article, a framework of executive oversight could ensure that the benefits outweigh the drawbacks and that the quality of coordinated agency adjudication continues to improve, or at least does not deteriorate, as adjudications grow more complex over time. This framework could also mitigate some of the concerns that courts and Congress should have about the legitimacy of agency self-determination of jurisdiction in interagency adjudication processes by serving to clarify and improve agency relationships in this setting.

As suggested in the introduction, coordination processes in the adjudication context are as important as, but distinct from, agency coordination in rulemaking. The Administrative Procedure Act[52] (APA) separates adjudication from rulemaking by stating that adjudication is an "agency process for the formulation of an order"[53] and an order is a final disposition "in a matter other than rule making."[54] Scholars have further distinguished between agency rulemaking and agency adjudi-

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[49] *See* Marisam, *supra* note 2, at 198.

[50] *See* Freeman & Rossi, *supra* note 2, at 1156–57.

[51] *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1213 (2013) ("[D]ue process imposes greater obligations in adjudication than in rulemaking."). *Compare* Londoner v. City & Cnty. of Denver, 210 U.S. 373, 386 (1908) (finding that due process protections attach to adjudicative agency activities), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (finding no right to individualized hearings where matters involve generalized determinations). Note that when I refer to administrative due process, I call on the requirements of accuracy, efficiency, and fairness, often required of substantive decisionmaking; the development of procedure; and the provision of ample and timely notice; among other criteria that uphold the general dignitary approach to administrative due process (commonly understood as articulated by Professor Jerry Mashaw). *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 162–67 (1985); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886–87 (1981).

[52] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[53] 5 U.S.C. § 551(7) (2012).

[54] *Id.* § 551(6).

cation, both to diminish the value of administrative adjudication[55] and to rescue administrative adjudication from critics.[56] Thus, the distinction between administrative rulemaking and administrative adjudication is broadly recognized.

The distinction between the two cannot, however, be taken to reflect a lack of real-world impact by agency adjudication, which agencies are free to choose as their vehicle for policymaking.[57] Indeed, while "[r]ulemaking is the primary vehicle for formulating and announcing agency policy[,] . . . the adjudicative process, as the judicial process, necessarily evolves agency policy" as well.[58] As is the case with rulemaking, an agency adjudicative order can by turns constrain or expand policy, limit or inflate agency responsibilities, and expand or contract executive discretion. Like regulations, administrative orders can spur an evolution and specification of Congress's expectations of agencies, or drastically alter an agency's commitment to legislative requirements over time. Take, for example, the addition of the "social visibility" test for asylum applicants seeking protection on the basis of

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[55] *See, e.g.*, Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 622 (1970) (noting that a shift to "rule making may help reinvigorate agencies now settled into dull, time-consuming, and relatively unproductive adjudicatory routines that are unequal to growing case loads and the increasing complexity of the areas to be regulated"); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 279, 281 (1991); Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 259–61 (1936); William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 103; Carl McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 433–38 (1961); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308–09.

[56] *See, e.g.*, E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491–92 (1992); Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 550–53 (2005); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 514–28 (1970); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 972 (1965).

[57] *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) ("[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

[58] 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 5:67 (3d ed. 2010); *see also* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 812 (2013) ("Adjudication also allows agencies to conduct policymaking in a less visible form than rulemaking."); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1383 (2004) ("Most agencies can rely on policymaking tools that look like legislating, enforcing, *and* adjudicating.").

membership in a particular social group.[59] This test, which is the direct result of agency adjudication by the DOJ,[60] now requires many applicants to fulfill significant and controversial additional criteria of proof in order to establish asylum claims.[61] In addition, it allows the DHS and the DOJ greater freedom to deny asylum claims without any additional justification on their part. Indeed, while rejected by the Third[62] and Seventh[63] Circuits and criticized by other courts of appeals for running counter to congressional intent,[64] the "social visibility" test continues to alter the landscape of asylum law because of the agency's expansive jurisdiction over asylum applicants nationwide.

Despite the distinction between regulatory and adjudicatory agency activity, and the substantial impact of agency adjudication on public policy, the literature on coordinated agency activity has not yet focused on interagency adjudication. It is unclear whether agency adjudication has been purposely excluded from the coordination scholarship because of an assumption that discussions of coordinated rulemaking naturally apply to coordinated adjudication, or whether coordinated rulemaking has simply garnered attention first.

The former explanation, while true in some cases, nonetheless leaves incomplete the account of coordinated adjudication. In the regulatory context, one fundamental form of coordination is joint rulemaking, in which agencies write a regulation together (or in tandem), often under the same, commonly statutory, authority.[65] In coordinated adjudications, agencies have authority to adjudicate different parts of the same claim separately. This adjudication can be described as coordinated not because of the presence of shared statutory authority, but because these agencies must work together to further a single adjudication process. In those coordinated adjudication cases that are somewhat analogous to joint rulemaking, such as in the "collaborative" model described later in this Part,[66] adjudicatory jurisdiction may be relatively "joint," in that more than one agency has the authority to

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[59] *See* Kristin A. Bresnahan, Note, *The Board of Immigration Appeals's New "Social Visibility" Test for Determining "Membership of a Particular Social Group" in Asylum Claims and Its Legal and Policy Implications*, 29 BERKELEY J. INT'L L. 649, 658 (2011).

[60] *See* C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006); *see also* A-M-E & J-G-U-, 24 I. & N. Dec. 69, 73–74 (B.I.A. 2007).

[61] *See A-M-E & J-G-U-*, 24 I. & N. Dec. at 73–74; Bresnahan, *supra* note 59, at 658–61.

[62] Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 603–09 (3d Cir. 2011).

[63] Gatimi v. Holder, 578 F.3d 611, 615–17 (7th Cir. 2009).

[64] *See, e.g.*, Arteaga v. Mukasey, 511 F.3d 940, 946 (9th Cir. 2007).

[65] *See, e.g.*, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 76 Fed. Reg. 74,854 (Dec. 1, 2011) (to be codified at 49 C.F.R. pts. 523, 531, 533, 536, and 537) (discussing a joint rulemaking by the EPA and the NHTSA promulgated under the authority of 49 U.S.C. §§ 32,902–32,904 (2012), among other statutory provisions).

[66] *See infra* section I.C.3, pp. 846–50.

further the same adjudicative task. However, this "joint" authority is often determined by regulation, interagency agreement, or memorandum of understanding (MOU), as opposed to explicitly by statute. Coordinated interagency adjudication also generally does not involve the complete overlap of jurisdiction that may then be fully and cleanly balkanized. Rather, coordinated agency adjudication is usually a multi-authority interagency process.[67]

Coordination in rulemaking also exists outside of the joint rulemaking context. For instance, the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration have, to some extent, coordinated their respective rules in areas in which the agencies overlap.[68] Often, agencies comment on other agencies' proposed rules, either through the public comment process or through the Office of Management and Budget (OMB) review process. There are also generalized descriptions of interagency coordination in regulatory activity that do not adhere to the joint rulemaking formulation described above.[69] However, these types of coordination in rulemaking also do not map cleanly onto adjudication; indeed, the implications of interagency coordination in adjudication require tackling on their own terms.[70]

By "adjudication," I generally refer to both formal and informal adjudication processes.[71] A formalist definition of adjudication serves as one set of guiding factors I use to cull systems that I deem coordinated "adjudication" from the morass of nonrulemaking interagency activity. In this Article, adjudication may be characterized by the "neutrality" of the decisionmaker, the binding effect of past administrative decisionmaking (precedent, of sorts) on the decision, and the degree to which the determination binds the outcome.

In addition, there are a few types of agency interactions related to adjudication that I do not classify as "coordination" for purposes of this Article, because they do not involve the complications inherent in processes that require furtherance by multiple agencies. The first is when an agency transfers a claim to another agency after a clear de-

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[67] For additional discussion of these processes, see generally Shah, *supra* note 8.

[68] I would like to thank Professor Todd Aagaard for this insight. *See generally* Memorandum of Understanding Between the U.S. Dep't of Labor Occupational Safety & Health Admin. and the U.S. Envtl. Prot. Agency Office of Enforcement (Feb. 13, 1991), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=238&p_table=mou [http://perma.cc/7AW8-KCWU].

[69] *See, e.g.*, DeShazo & Freeman, *supra* note 2, at 2231–34.

[70] An exhaustive study of the ways in which coordination in the regulatory context bears on coordination in adjudication is a potentially important goal deserving of its own series of separate articles, but it is not the focus of this Article.

[71] *See, e.g.*, United States v. Mead Corp., 533 U.S. 215, 236 (2001) (distinguishing between "formal adjudication" and other types of administrative processes). I also include both the constitutional and statutory elements of adjudication in my study, to the extent either or both are furthered by any given coordinated interagency process.

termination that no part of the claim process falls under the first agency's jurisdiction at all. One such instance is when the Secretary of the Department of Housing and Urban Development discovers that a discriminatory housing claim actually "involves the legality of any State or local zoning or other land use law or ordinance," and thus transfers the claim to the Attorney General.[72] A related circumstance that this Article does not classify as coordination is one in which multiple agencies adjudicate different statutory claims arising from the same individual claimant but are not required to work together to further a single claim. One such occurrence is when the Equal Employment Opportunity Commission (EEOC) and other agencies investigate different types of complaints in sync.[73] One more interagency dynamic excluded from the umbrella term of coordinated agency adjudication is when an agency may not adjudicate a claim until it has received approval to do so as a result of another agency's adjudication in a related, but separate, claim. For instance, an agency may occasionally withhold the grant of an administrative benefit unless it obtains a certification of quality from another agency, or if there is a pending violation before another agency. One such example is that the U.S. Customs and Border Protection (CBP) will often not grant certain vessels clearance unless they have obtained certification from the Coast Guard,[74] Federal Maritime Commission,[75] Department of Agriculture (USDA),[76] and HHS.[77]

Another set of circumstances not included in my typology of coordinated adjudication constitutes those in which an agency has been delegated the authority to enforce a decision on a claim made by a different agency, a phenomenon that has been referred to as the "split-enforcement model."[78] Despite the consensus that enforcement is one of the executive branch's most all-encompassing functions, there are

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[72] 42 U.S.C. § 3610(g)(2)(C) (2012).

[73] Under the federal regulations, the EEOC may investigate and make determinations in claims implicating Title VII of the Civil Rights Act or the Equal Pay Act of 1963, while other agencies individually contend with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the State and Local Fiscal Assistance Act of 1972, as amended, and provisions similar to Title VI and Title IX in federal grant statutes. *See* 29 C.F.R. § 1691.5 (2014).

[74] The Coast Guard must ensure that there is no pending violation under the International Voyage Load Line Act or the Coastwise Load Line Act, and that the vessel is not subject to a civil penalty for discharging oil or hazardous substances. *See* 19 C.F.R. §§ 4.65a, 4.66a–4.66c (2014).

[75] *See id.* § 4.68.

[76] *See id.* § 4.72.

[77] *See id.* § 12.7.

[78] Richard H. Fallon, Jr., *Enforcing Aviation Safety Regulations: The Case for a Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L.J. 389, 392 (1991) (internal quotation marks omitted) ("Under the 'split-enforcement model,' . . . one agency promulgates rules and exercises prosecutorial responsibilities, while another agency acts as an independent adjudicator."); *see also* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 315 (1987).

few (or no) satisfying definitions of agency enforcement that are cleanly divisible from adjudication. Whether the enforcement of a claim can be rightly considered part of an administrative adjudication process is not certain, even if the process is fully contained within a single agency.[79] In the Article III adjudication context, the court makes a decision and the executive branch enforces the decision. However, in the administrative adjudication context, agencies may be involved in the enforcement of their own decisions. In addition, agency enforcement of administrative decisions does not fall under the rulemaking function. Thus, arguably, agency enforcement forms a continuity of administrative process in conjunction with agency adjudication, or at least contributes additional complexity to coordinated administrative adjudication. In this Article, I examine adjudications that fall within the formal core of this continuity, and I generally exclude split-enforcement and other peripheral situations from the analysis.[80] However, the discussion in this Article likely is also relevant to agency actions on this spectrum that fall outside the formal core.

Another offshoot of collaborative adjudicative processes excluded from this Article's typology involves agency investigations that may result in prosecutions by other federal agencies. Such investigations may be conducted by an agency working alone, with other federal agencies, or with state agencies. One example is when the Department of Labor (DOL) and HHS coordinate their inspections of potential Occupational Safety and Health Act (OSHA) violations under agreement or MOU for the purpose of substantiating possible future civil prosecution.[81] Similarly, as specified by regulation, the DHS works with federal law enforcement to grant victims of trafficking temporary or permanent (nonimmigrant or immigrant) residence in the United States so that they may serve as witnesses in civil trafficking cases.[82] In a third example, the Department of Transportation (DOT) investigates complaints that public or private providers of transportation have not complied with the Americans with Disabilities Act of 1990[83] require-

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[79] *See, e.g.*, Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 955–56 (2011).

[80] To the extent I examine enforcement — for instance, in the discussion of the DHS's dual role as adjudicator and prosecutor in asylum decisions — it is because of the direct impact enforcement has on some of the values of adjudication (the importance of specialization, process values associated with separating functions, and perhaps, improving consistent decisionmaking) and the increase it may cause in risks associated with both the core adjudication and split-enforcement models (inefficiencies and delays, incomplete participation, uncontrolled factfinding, a lack of transparency, and institutional bias). The focus remains primarily on adjudication.

[81] *See* Memorandum of Understanding Between the U.S. Dep't of Labor Occupational Safety & Health Admin. and the U.S. Envtl. Prot. Agency Office of Enforcement, *supra* note 68.

[82] *See* 22 U.S.C. § 7105(c)(3)(A) (2012).

[83] 42 U.S.C. §§ 12,101–12,213 (2012).

ments.[84] The DOT has jurisdiction to seek compliance from or initiate formal action against these providers,[85] but may also refer the matter to the DOJ for enforcement in federal court, thus serving as the DOJ's initial investigator in these cases.[86] In addition, by regulation, the DOJ may conduct additional investigation and legal analysis, and it does not necessarily rely on the initial DOT investigation in deciding whether to litigate.[87] One last example relates to the Dodd-Frank Wall Street Reform and Consumer Protection Act.[88] Under this Act, both the DOJ and the Consumer Financial Protection Bureau (CFPB) have jurisdiction to protect against discriminatory lending under the Equal Credit Opportunity Act[89] (ECOA).[90] Thus, the DOJ has the authority to enforce the ECOA against any creditor that violates the Act, including those based on referrals from federal bank regulators such as the CFPB.[91] However, the CFPB may also bring public enforcement actions for violations of the ECOA.[92] Additionally, the CFPB refers pattern or practice complaints to the DOJ;[93] yet, "[b]ecause a referral to the Justice Department does not affect the CFPB's authority to pursue its own supervisory or enforcement action, the CFPB and the Justice Department [generally] coordinate their efforts to avoid unnecessarily duplicative actions."[94]

Each of these examples is laced through with elements of coordination. However, the DOJ is often the final stop for cases for which the executive branch is seeking resolution of civil and criminal law issues. Including such investigatory interactions as part of my typology would broaden the meaning of "coordinated interagency adjudication" so

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[84] *See* 49 C.F.R. §§ 27.123(c), 37.11(a) (2014).

[85] *See id.* § 27.123(d)(1).

[86] *See id.* §§ 27.125(a)(1), 37.11(b)–(c).

[87] *See* 28 C.F.R. §§ 36.502–36.503 (2014).

[88] Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

[89] 15 U.S.C. §§ 1691–1691f (2012).

[90] *See* Memorandum of Understanding Between the Consumer Fin. Prot. Bureau and the U.S. Dep't of Justice Regarding Fair Lending Coordination (Dec. 6, 2012), http://www.justice.gov/crt/about/hce/documents/fair_lending_mou_12-6-12.pdf [http://perma.cc/A5YZ-P79S]. ECOA makes it illegal for creditors to discriminate against applicants in credit transactions because of race, color, religion, national origin, sex, marital status, age, income derived from a public assistance program, or an applicant's exercise of certain consumer protection rights. 15 U.S.C. § 1691(a).

[91] 15 U.S.C. § 1691e(g).

[92] *Id.* § 1691c(b).

[93] *Id.* § 1691e(h).

[94] Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau and Justice Department Pledge to Work Together to Protect Consumers from Credit Discrimination (Dec. 6, 2012), http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-and-justice-department-pledge-to-work-together-to-protect-consumers-from-credit-discrimination [http://perma.cc/KJ75-XKJR].

much that it might be rendered less meaningful.[95] Therefore, this Article excludes these cases so that the contours of the unique phenomenon of coordinated interagency adjudication may be better defined.

The rest of this Part presents a nonexhaustive set of coordinated agency adjudication examples, both formal and informal, but not including claim transference, coadjudication, enforcement, or DOJ prosecution scenarios like those I have just discussed. This Part establishes, overall, that coordinated adjudication processes fall into three general multi-agency categories: the "phased," "substitutable," and "collaborative" models. Each of these models is unlike the traditional agency adjudication model, in which an administrative case remains at all times within and is impacted by the actions of only one agency.[96] The Appendix serves as a comprehensive guide to this Part, in that it contains a broad overview of these models. It also provides a breakdown of coordinated agency adjudication by governing authority, which includes statutory, regulatory, and MOU/interagency agreement–based authority, and by subject matter, which includes broadly impactful categories of immigration, customs, employment/employment discrimination, domestic security, and health and safety. The next section discusses in depth all three components of the typology, each of which highlights a unique jurisdictional or rule-of-law outgrowth of interagency adjudication.

C. Typology

That the dynamics between agencies in coordinated adjudication vary across substantive legal areas — no one model is used to the exclusion of others by any set of agencies. In addition, the roles of coordinating agencies may not be fixed even within a single type of administrative adjudication, although they tend to be most fixed in the phased model and least in the collaborative model. Finally, consulting the Appendix periodically while perusing the various examples may

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[95] Investigations that exist under concurrent jurisdiction between federal and state agencies create additional issues. Scholars such as Gersen note that the trend in federalism jurisprudence involving agency investigations in which state and federal agencies have concurrent jurisdiction "mirrors the proposed shift toward supporting concurrent jurisdiction for federal agencies." Gersen, *supra* note 3, at 237. Such a trend may further complicate problems at the intersection of coordination and judicial deference and at the intersection of coordination and executive oversight that this Article presents, because the motivations behind judicial review and executive oversight of an intra-executive process differ from similar review of a process involving both the executive branch and state agencies. This difference may be the reason that scholars' "recent focus on concurrent administrative jurisdiction has mostly failed to acknowledge the states." Abbe R. Gluck, Essay, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 557–58 (2011). Scholarship focusing on this issue would fill a hole in the literature.

[96] *See* Magill & Vermeule, *supra* note 15, at 1067–68.

help the reader to clarify her understanding of the variations on each model.

The first part of this section discusses in more depth the first broad, phased category, which is the primary and most formalized model by which coordination in interagency adjudication occurs. Overall, the phased model tends to incorporate more formal adjudication and to be dictated by statute more so than the other categories of coordinated adjudication discussed later in this section. Conversely, to navigate potential statutory overlap and "underlap"[97] in their varied, coordinated adjudicatory activities, agencies in the substitutable and collaborative categories rely greatly on MOUs and similarly informal interagency policies to divide and assign the tasks necessary to the process of deciding a claim. However, the "relative informality" of MOUs[98] is part of why much of coordinated adjudication is often, like some joint rulemaking, "ad hoc[,] . . . limited and transitory."[99] There are a few ways to conceptualize the ad hoc nature of these two categories. Although there is usually only one agency that is responsible for issuing the final adjudication in the following coordinated processes, these processes do not have a necessarily preordained, successive structure like many in the phased model. Further, in the latter two models, agencies that do not issue the final adjudication need not always play a required (statutory or even regulatory) role in furthering the adjudicative process; instead, their role may be relatively informal and agency agreement–based and thus vary more than the stock role of the initial agency in the phased model.

1. Phased. — In the phased model, two agencies handle different pieces of the adjudicative process, most commonly by adjudicating the same case one after another in a chronological, successive process. This structure is similar to the relationship between trial- and appellate-level judicial bodies, and also apparently like an iteration of a similar relationship between agencies and reviewing Article III courts.[100] As Appendix A shows, the phased model spans a variety of public law areas, and the type of review in each process differs based on the substance of the adjudication.

As Professors Elizabeth Magill and Adrian Vermeule have observed in the intra-agency context, adjudicative factfinding is often conducted "at least initially, in adjudicatory proceedings that are pre-

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[97] *See generally* Gersen, *supra* note 3 (discussing the overlapping and underlapping jurisdiction that can be created by statues that share jurisdiction between multiple political institutions).

[98] Freeman & Rossi, *supra* note 2, at 1195.

[99] *Id.* at 1156; *see also id.* at 1195–96.

[100] *See* Merrill, *supra* note 79, at 939 ("American administrative law is grounded in a conception of the relationship between reviewing courts and agencies modeled on the relationship between appeals courts and trial courts in civil litigation.").

sided over by decisionmakers who in some respects resemble trial judges."[101] Even in fully intra-agency adjudication processes, there may be both initial and appellate-level adjudicators who issue decisions at different points in the life of one case. In phased adjudication, the decisionmaker resembling a trial judge is housed in a separate agency from the decisionmaker who makes the final determination in the case, thus casting two separate agencies (as opposed to simply two separate bureaucrats within the same agency) in the initial and appellate-level decisionmaking roles.

Further, agencies in the phased model may closely follow the Article III trial/appellate model by restricting factfinding to the initial adjudicative agency. Alternatively, both the initial and the appellate agency may each engage in its own factfinding. Often, both the initial and appellate bodies in this scenario are also jointly responsible for ensuring administrative due process. Arguably, determinations made as a result of the phased model are centralized in either one or the other of the two main agencies involved, depending on which agency conducts the bulk of the adjudication process. Or adjudicative responsibilities for the process as a whole may be relatively evenly divided if both agencies are equally involved in investigating and making determinations regarding the claim. Occasionally, the appellate-level agency also has the opportunity to replace the initial agency's determination with its own.

The phased model is the form of coordinated adjudication found in the immigration/asylum context. In this example, statute dictates that the DHS make initial determinations on whether to grant affirmative asylum applications.[102] If the DHS "refers" an asylum application (that is, if it decides not to grant the asylum application of an undocumented immigrant), the application is transferred to the DOJ for a second adjudication of the same claim within the context of removal proceedings.[103] At this point, the DOJ adjudicates de novo the applications denied by the DHS during its interview process.[104] By design, much of the removal proceedings are duplicative of the DHS interview process.[105] In another example, also based in statute, the DOT may issue initial determinations revoking vessel authorization because the

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101 Magill & Vermeule, *supra* note 15, at 1067.

102 *See* 8 C.F.R. § 208.2(a) (2014); *see also* Jessica Marsden, Note, *Domestic Violence Asylum After* Matter of L-R-, 123 YALE L.J. 2512, 2548 (2014) ("DHS now has jurisdiction over affirmative asylum applications in the first instance . . . .").

103 8 C.F.R. § 208.14(c)(1). *See generally* Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655 (2006) (reviewing the evolution of the immigration court system).

104 *See* Marsden, *supra* note 102, at 2548.

105 *See* SCHOENHOLTZ ET AL., *supra* note 18, at 14.

vessel smuggled illegal goods.[106] These decisions may then be appealed to the Secretary of the Department of Treasury (Treasury).[107] In this case, unlike in the previous immigration/asylum example, the Treasury retains case facts obtained from the DOT's investigation and does not necessarily conduct its own factfinding.

An initial agency may also play the role of both "trial court" and "prosecutor" (in defense of the agency's decision before the appellate-level agency).[108] In the immigration/asylum context, the DHS takes on the role of advocate for the government in administrative appeals before the DOJ.[109] Thus, the agency acting as the initial-level adjudicator of the asylum case becomes the asylum applicant's adversary at the agency appeals level. Another example involves the applications of individuals seeking exemptions to the Labor-Management Reporting and Disclosure Act of 1959[110] and the Employee Retirement Income Security Act of 1974[111] (ERISA). In these cases, regulation allows the DOL to file official approvals or disapprovals with the administrative law judge from the DOJ Parole Commission that is also assigned to the claim.[112] By regulation, the Secretary of Labor may effectively act as final decisionmaker in the case by filing an approval with the Commission.[113] If there is a request for an oral hearing by either the DOL or (more likely) the claimant, the Commission may hear the case, but the DOL then switches from adjudicator to prosecutor, with the ability to provide evidence to the Commission and to cross-examine claimants during the appellate hearing.[114]

In other versions of the phased model, one or more initial agencies may act only as factfinders and investigators for another agency's sole adjudication of a claim. In other words, the initial-level agency will never adjudicate the claim at any point in the process. Yet in this incarnation of the model, the initial agency is responsible for both

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106 19 U.S.C. § 1704 (2012).

107 *Id.*

108 While agencies are not generally viewed as "prosecuting" administrative applicants when defending their decisions before other agencies, I employ the term here to extend the analogy to the Article III courts — an extension that is supported, in part, by the formal, court-like way in which some of these "appellate"-level adjudications proceed (including, for instance, active adversarial processes such as cross-examination). *See infra* note 114 and accompanying text.

109 *See* Durham, *supra* note 103, at 658–60; *see also* Rivens, 25 I. & N. Dec. 623 (B.I.A. 2011) (describing the burdens of proof placed on the DHS in this prosecutorial role).

110 29 U.S.C. §§ 401–531 (2012); *see also id.* § 504 (functioning in part to bar individuals who have been convicted of certain crimes from working with labor organizations or employee retirement plans).

111 Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

112 28 C.F.R. §§ 4.10–4.14 (2014).

113 *See id.* § 4.10.

114 *Id.* § 4.11(b).

factfinding and evaluating which facts are relevant to the case, even though it never conducts its own adjudication. Then, the appellate body relies on those facts to complete the sole and final adjudication of the case by itself, without additional input from the agency that supplied the underlying facts. Thus, the agency with authority to accept an initial claim or complaint serves primarily as an assistant to the agency whose administrative law judge will ultimately decide the case. Despite its lack of adjudicatory authority, the factfinding agency may also be primarily in charge of actions implementing administrative due process safeguards, such as the determination of timeliness and the provision of notice to claimants.

The potential reasons for limiting factfinding to an initial-level agency (and for limiting an initial-level agency to factfinding) vary. In some cases, the initial, investigative agency may have substantive factfinding expertise. Or that agency may be the public face of the issue and therefore the natural recipient of certain complaints; its role as the direct recipient of these claims thus spurs it to investigate them. For example, claims made under the Uniformed Services Employment and Reemployment Rights Act[115] are decided by the DOL,[116] but the Department of Veterans Affairs (and state agencies[117]) conducts investigations and gathers facts for the DOL adjudication under a Memorandum of Agreement (which is similar to an MOU).[118] In some cases, more than one nonadjudicatory, initial agency have a shared responsibility to engage in factfinding and implement administrative due process. In such situations, these functions may be divided among agencies. For example, under regulations written to implement the Energy Employees Occupational Illness Compensation Program Act,[119] the DOL adjudicates claims, HHS is responsible for providing estimates

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115 38 U.S.C. §§ 4301–4335 (2012).

116 *Id.* § 4322.

117 See *supra* note 95 for a brief discussion of state agency involvement in scenarios such as this one.

118 National Memorandum of Agreement Between Dep't of Veterans Affairs, Veterans Benefits Admin., Vocational Rehab. & Emp't Serv. and Dep't of Labor, Veterans' Emp't & Training Serv., *in* U.S. DEP'T OF LABOR VETERANS' EMP'T & TRAINING SERV. & U.S. DEP'T OF VETERANS AFFAIRS VOCATIONAL REHAB. & EMP'T SERV., TECHNICAL ASSISTANCE GUIDE 47–50 (2008), http://www.dol.gov/vets/VPLS/VPL%20Attachments/VPL%201-09,%20Attch%203%20-%20TAG.pdf [http://perma.cc/ZP6C-PL57]. If the DOL transfers the case to the DOJ for prosecution in the court system, the DOL's adjudication also serves an investigatory/factfinding function. *See* 38 U.S.C. § 4323; U.S. DEP'T OF LABOR, UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 FY 2013 ANNUAL REPORT TO CONGRESS 5 (2014), http://www.dol.gov/vets/programs/userra/USERRA_Annual_FY2013.pdf [http://perma.cc/FU2D-SQ77] (stating that each DOL referral to the DOJ includes the DOL investigative file and that "[u]pon receipt of a referred USERRA claim from DOL, DOJ reviews the complete DOL investigative file and analysis," which informs the DOJ's decision whether to initiate an action in federal court).

119 42 U.S.C. §§ 7384 to 7385s-15 (2012).

on radiation exposure and for other investigative/factfinding functions, and the DOJ and the Department of Energy (DOE) must notify claimants and submit evidence in a timely manner.[120]

In other phased adjudication processes, the initial-level agency may render a decision, but not on its own terms. Instead, it must receive approval from the appellate body for even its initial-level decision. Under regulations written to implement the Program Fraud Civil Remedies Act of 1986,[121] the DHS (the initial agency) may not issue a violation (or "complaint") against an individual party unless the DOJ (the appellate agency) approves the complaint in writing.[122] In some ways, this approach renders the process more of a "joint" adjudication in which two agencies share decisionmaking authority at virtually the same point in the process. In this case, the appellate body can veto the initial-level agency's decision prior to its issuance, instead of overturning it ex post.

Conversely, in other coordinated adjudications, the case may be determined by the initial administrative body and then be directly appealed to the federal courts, thus leapfrogging the appellate agency. For example, both the EEOC and the Federal Communications Commission (FCC), which have overlapping statutory jurisdiction in certain matters,[123] have agreed under an MOU to pursue their "common goal — the elimination of discriminatory employment policies and practices at broadcasting stations . . . and at cable systems."[124] Generally, the EEOC makes the initial determination on claims of discrimination and the FCC acts as the appellate body.[125] However, the EEOC (or the complainant) may elect to pursue the matter in the federal courts even as the FCC is still making its determination, thus rendering the FCC adjudication secondary or moot.[126]

The initial adjudicative agency may also make decisions in the name of the appellate agency. For instance, under OSHA, the DOL may both investigate[127] and issue citations for a variety of purpos-

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120 *See* 20 C.F.R. § 30.2 (2014).

121 31 U.S.C. §§ 3801–3812 (2012).

122 6 C.F.R. §§ 13.6–13.7 (2014).

123 *See* 42 U.S.C. § 2000e-5 (providing for EEOC enforcement to prevent any person from engaging in discriminatory employment practices); 47 U.S.C. § 554 (2012) (requiring the FCC to certify that cable communications systems do not discriminate in employment based on protected categories).

124 Memorandum of Understanding Between the Fed. Commc'ns Comm'n and the Equal Emp't Opportunity Comm'n (1986), http://www.eeoc.gov/policy/docs/mou-fcc.html [http://perma.cc/KY3L-QXA3].

125 *Id.*

126 *Id.* The FCC itself may choose to defer its decision until the case is resolved in court, but it is apparently not required to do so, with the result that its determination may occur at the same time as that of the federal courts. *Id.*

127 29 U.S.C. § 657(a) (2012).

es.[128] If the cited employer does not rebut, the order becomes final.[129] However, this final order is not considered a DOL order, even though it was in fact issued by the DOL.[130] Rather, it is deemed a "final order of the [Occupational Safety and Health Review] Commission," even if the Commission never sees the complaint.[131] As in other phased interagency adjudication processes, the Commission may hold an appellate hearing and issue an order based on its own findings, but only if the employer rebuts the initial decision.[132] Thus, the DOL serves as the initial-level agency adjudicator in fact, while the Commission retains apparent adjudicative authority at the initial level and actual authority at the appellate level. Further, the DOL also has the option to affirm or modify abatement requirements in the appellate-level Commission's order.[133] Though it is primarily an initial adjudicator, the DOL thus has a say in the Commission's requirements for the employer to correct his violation.[134] In addition, the DOL can obtain federal court review of the Commission's final order, which allows the initial agency to force judicial review of an appellate agency decision.[135]

Another permutation of apparent authority in the phased model can be found in the coordinated adjudication accomplished by the DOJ Drug Enforcement Administration (DEA) and HHS via regulations written to implement the Controlled Substances Act[136] (CSA).[137] In this instance, like in the previous example of OSHA, initial-level HHS decisions deeming applications meritorious are represented as DEA decisions.[138] If HHS determines that an application is not meritorious, then the DEA, "if requested by the applicant, [shall] hold a hearing on the application."[139] In this case, the initial agency may also take an adversarial role against the claimant in appellate proceedings.

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128 *Id.* § 658(a).

129 *Id.* § 659(a).

130 *See id.*

131 *Id.* The Commission is an independent agency that rules on contested citations and penalties that result from inspections. *See id.* § 661.

132 *Id.* § 659(c).

133 *Id.*

134 Further, in a future claim that the violation was not corrected, the DOL is the initial determiner of the claim's validity. *See id.* § 659(b).

135 *Id.* § 660(b). Furthermore, a person "aggrieved by an order of the Commission" can also appeal it to a U.S. court of appeals, although the appeal does not automatically stay the Commission's order. *Id.* § 660(a).

136 21 U.S.C. §§ 801–904 (2012).

137 21 C.F.R. § 1301.32(a)–(c) (2014).

138 *See id.* § 1301.32(c). Under the CSA, HHS makes initial determinations regarding certain applications to conduct research with controlled substances. 21 U.S.C. § 823(f). If the protocol in the application is defective, HHS asks the applicant to cure it. 21 C.F.R. § 1301.32(b). If the application is meritorious, HHS notifies the DEA; the Administrator of the DEA then issues a certificate of registration on the basis of the HHS determination. *Id.* § 1301.32(c).

139 21 C.F.R. § 1301.32(d).

During the appellate-level DEA adjudication, the initial agency (HHS) can "furnish testimony and documents pertaining to [the] determination at such hearing,"[140] thus switching roles from adjudicator to expert witness or prosecutor of sorts. This multiplicity of roles is similar to examples such as the DHS and DOJ interaction in the immigration/asylum context discussed earlier, in which the DHS actively defends before the DOJ its own decisions that it previously adjudicated.

The broad similarities of the phased model to Article III courts' trial- and appellate-level system make it a comfortable, recognizable form of organizing adjudication. This familiarity may be why Congress implements this type of agency coordination in particular. On the other hand, despite the apparent similarities of the phased model to the Article III court system, there are a number of variables in each type of phased adjudication that make it far from uniform. Unlike Article III adjudication, the nature of phased coordination varies, for instance, depending on whether the initial agency adjudicates an initial decision or simply engages in factfinding on behalf of an appellate-level agency, or on whether the initial agency makes secondary decisions on behalf of the appellate agency.

The phased model also exists in — but is not the only coordination model of choice for — almost every large subject area discussed in this Article (which includes immigration, customs, employment/employment discrimination, domestic security, and health and safety).[141] An examination of the chart in Appendix Part B,[142] which organizes the examples in this Article by governing law, further reveals that agencies themselves have also organized coordinated adjudication into the phased model via regulation and even interagency agreement. It is likely that both Congress and agencies have established phased coordinated processes because allowing "two bites at the apple" solidifies due process protections. This framework occasionally gives claimants the opportunity to present their cases more than once and benefit from different types of adjudication processes administered by bureaucrats with distinct objectives and priorities. This benefit is theoretical, however; in practice, poor communication and coordination may weaken agency protection of individual claimants' rights, as in the *A.B.T.* and *Franco-Gonzalez* cases discussed earlier.[143] Another reason for the popularity of the phased structure is that agencies are able to divide and delegate the total adjudication process into more manageable chunks than they could if only one agency were responsible for the entire process. In addition, immigration and domestic security

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[140] *Id.*

[141] *See infra* Appendix Part C, pp. 899–905.

[142] *See infra* Appendix Part B, pp. 892–98.

[143] *See supra* pp. 815–18.

may favor the phased model because its apparently hierarchical construction serves as a safety net for the matters of broad international policy implicated by these types of adjudications. In other words, the fact that initial determinations are reviewed internally may render them of higher quality and defensibility should they eventually be subject to court, congressional, or public scrutiny. However, by the same token, individual agency responsibility in coordinated adjudication may be reduced because of the opportunity and incentive to shift responsibility to other agencies involved in the process.[144]

In addition, the phased model may waste agency (and taxpayer) resources by requiring duplication of both the process and expertise necessary to adjudicate an administrative claim. This duplication may nonetheless have some benefits. Because the phased model features a hierarchy among agencies, in which one agency can essentially unilaterally veto the decision of another, agencies coordinating under this model may avoid the indeterminacy problem that presents itself when "agencies disagree about the best course of action"[145] and each agency lacks the ability to proceed unilaterally.[146] One more reason the unilateral veto improves the quality of the outcome is that it incorporates a built-in checking mechanism in which one agency's errors that are obscured from court view may be policed by the agency responsible for the final determination. Of course, it may also disincentivize improvement by the obscured, initial-level agency. Furthermore, these agencies do not benefit from the case-specific bilateral exchanges that characterize other types of agency coordination, although they may engage in some conversation about coordinating general policy.

One interesting arrangement associated with the phased model, noted earlier as occurring in the immigration and certain employment-law contexts,[147] is when the trial-level agency acting as neutral adjudicator also acts as prosecutor before the appellate agency later in the same adjudicative process. This format elides administrative due process,[148] a problem that might be ameliorated by removing the prosecutorial function from the agency serving as adjudicator.[149] In this situa-

144 *See* Shah, *supra* note 8, at 19–21.

145 *See* Marisam, *supra* note 3, at 210.

146 *See id.* at 205–11 (discussing the problem of indeterminacy in interagency policymaking contexts).

147 *See supra* p. 833.

148 *See* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 951 (2003) (noting that "separat[ing] the prosecutorial and adjudicative functions" is one way through which agencies can "function according to norms of due process that ensure neutrality"); *see also* Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 612, 612–13 (1948).

149 *Cf.* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1673 (2010) (noting criticism of a scheme that "allow[s] the nation's chief prosecutor and law enforcement officer to direct and supervise adjudicatory tribunals").

tion, the prosecuting agency differs from the adjudicator before which it argues the lower administrative decision, but some of the possible concerns remain. One concern includes occasional, but problematic, instances in which DHS prosecutors influence the neutrality of immigration judges.[150] Another issue is the continued influence that DHS attorneys may have on adjudicators within the DHS, such as asylum officers, whose decisions may be shaped by broader DHS enforcement policies indicating which types of decisions are less resource or time consuming to defend before the DOJ. Here, the seemingly interagency nature, and the fact that the DOJ is the appellate-level agency whose decision alone will appear before courts of appeals, hides the unique and potentially problematic impact of DHS enforcement attorneys on the neutrality and quality of administrative due process in decisions made by DHS adjudicators.[151]

Finally, coordinated interagency adjudication's myriad elements are generally shielded from court review, even if the final adjudication in the process is subject to appeal, as in the phased model. Thus, even when courts have the authority to review appeals of decisions that result from interagency coordination, they primarily take into account the involvement of the final adjudicator. For instance, although the DHS adjudicates many immigration asylum cases, those adjudications (including both the factfinding and the legal standards applied) are rarely examined by Article III judges.[152] In some cases, the DHS decision may be appealed to the DOJ (which often has little knowledge of the DHS's adjudicatory thought process, for better or worse). However, the DHS's role will rarely be judicially reviewed because the coordination between the DHS and the DOJ becomes nearly opaque if a DOJ decision is further appealed to the circuit court.

As such, unlike in the intra-agency context, the authority of courts to look through a final decision to determine the import of disagreement among adjudicators is curtailed in the interagency setting, while coordinated agency adjudications in other areas of public law may not be subject to review at all. For instance, although an initial agency's factfinding may be rarely directly reviewed, we might assume that if this function had an impact on the appellate agency's final decision, then judicial review would indirectly take it into account. Thus, os-

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150 *See id.* at 1668.

151 Note that fairness concerns led Congress to explicitly state in the APA that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review." 5 U.S.C. § 554(d) (2012).

152 *But see* Brezilien v. Holder, 569 F.3d 403 (9th Cir. 2009) (remanding a BIA decision after holding that the agency had "engaged in improper factfinding and exceeded its scope of review to overturn key factual findings made by the [DHS immigration judge]," *id.* at 411–12).

tensibly, poor investigation (or any number of poor agency practices) would negatively impact an appellate agency decision such that the court would reject it, while good factfinding, even if hidden from the Article III court, would render the appellate agency's decision proper. The calculus is, of course, not that simple. Poor factfinding, like poor process of any kind, may not appear lacking in the abstract. Instead, it may (as in immigration cases) lead adjudicators to apply law that is facially correct but would not be applicable were the true facts uncovered, and the court may not be able to identify the flawed information precisely because the initial agency is often not before the judge in these cases. Further, a harmless error cannot necessarily be assumed in such cases with apparently reasonable outcomes, because harmless error doctrine "is to be used only 'when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached.'"[153] Thus, regardless of how effective judicial analysis may be in ensuring and increasing the quality of administrative adjudication, it cannot sufficiently influence those processes that it does not typically review or cannot review fully. In addition, with limited judicial awareness of multi-agency functions beyond the final agency adjudication, the government may have less incentive to remedy breakdowns in its many coordinated interagency adjudication processes.

2. Substitutable. — In the substitutable model, agencies with concurrent authority to adjudicate certain cases often transfer initial- and appellate-level jurisdiction to one another. This includes circumstances in which agencies delegate to other agencies part or all of the jurisdiction they hold in an adjudication process, which may even include delegation of the authority to make the final case determination. The likelihood of transference depends on factors such as which agency processed the initial case intake and which agency claims to have fewer resources to adjudicate the case. In these cases, while multiple agencies may be part of the hierarchy of jurisdiction transference, many of the adjudicatory responsibilities may be centralized in one or two agencies alone.

This type of transfer may require an interim determination by the agency that initially receives the claim to determine whether a transfer is necessary. One example is the interagency relationship between the Occupational Safety and Health Administration and the EPA, both of which can investigate and refer workplace hazard claims to each other

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[153] U.S. Steel Corp. v. EPA, 595 F.2d 207, 215 (5th Cir.) (quoting Braniff Airways, Inc. v. Civil Aeronautics Bd., 379 F.2d 453, 466 (1967)), *reh'g granted on other grounds*, 598 F.2d 915 (5th Cir. 1979).

under an MOU.[154] In this situation, there is an element of "pre-adjudication" required by the agency referring the claim. Thus, each agency has to understand the factors that may lead to a successful claim as a result of pre-adjudication and processes.[155] Adjudications shared under an MOU by the EEOC and the DOL Office of Federal Contract Compliance Programs (OFCCP) provide another example. The EEOC, acting under Title VII of the Civil Rights Act, and the OFCCP, acting under Executive Order 11,246,[156] both must "ensur[e] equal employment opportunities for applicants and employees."[157] In practice, the OFCCP not only acts as the EEOC's agent for the purposes of receiving Title VII complaints but may also "investigate, process, and resolve allegations of discrimination of a systemic or class nature on a Title VII basis in . . . complaints/charges" that are filed with both the EEOC and the OFCCP.[158] To do this, the OFCCP makes an initial decision in the case by determining whether there is "reasonable cause" for the Title VII complaint.[159] If the OFCCP determines there is not, the case is closed without any EEOC involvement and without the option of appeal by the claimant.[160] Alternatively, after the OFCCP informs the EEOC that it is investigating a Title VII claim on the EEOC's behalf, the EEOC may request that the claim be referred back to it for the reasonable-cause determination "to avoid duplication of effort and to ensure effective law enforcement."[161] As a result, the OFCCP may sometimes engage in factfinding for the EEOC without making a reasonable-cause determination at all because the EEOC has decided to (re)claim authority to make that determination itself.

Further, in substitutable processes, an agency may discretionarily delegate its entire statutory authority to adjudicate a certain type of claim to another agency, although without closer examination of these statutes it is unclear whether they should be read to prohibit delegation or to allow it unless Congress specifies otherwise. In these cases, an immense act of coordination underlies the claim adjudication pro-

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154 *See* Memorandum of Understanding Between the U.S. Dep't of Labor Occupational Safety & Health Admin. and the U.S. Envtl. Prot. Agency Office of Enforcement, *supra* note 68.

155 *See id.*

156 30 Fed. Reg. 12,319 (Sept. 28, 1965).

157 Memorandum of Understanding Between the Equal Emp't Opportunity Comm'n & the U.S. Dep't of Labor Office of Fed. Contract Compliance Programs Regarding Coordination of Functions (Nov. 9, 2011), http://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm [http://perma.cc/VE4D-T68Z].

158 *Id.*

159 *See id.*

160 *Id.* The EEOC may adjudicate the claim or may decline to pursue further action if the OFCCP rules that there is reasonable cause. *Id.*

161 *Id.* In addition, there is a similar exchange of information and adjudicative duties for disability complaints/charges. *See* 29 C.F.R. §§ 1641.1–1641.6 (2014); 41 C.F.R. §§ 60-742.1 to 60-742.6 (2014).

cess. As a result of this coordinated delegation, the adjudication process is furthered primarily by an agency or agencies not initially authorized by Congress to do so. One significant example of this pattern involves agency determinations of whether imported and exported drugs are illegal. Here, a federal statute authorizes the Secretary of the Treasury to issue notices refusing admission of certain drugs into the United States.[162] The Secretary of the Treasury, in turn, has delegated this responsibility to the CBP.[163] This delegation may have occurred because of the desire to maintain certain responsibilities within the CBP that were originally part of the U.S. Customs Service (USCS), originally a component of the Treasury until the creation of the DHS and the transformation of the USCS into the CBP.[164] However, the logic of this transference does not resolve the question of whether and to what extent the Treasury was authorized to make a delegation of administrative responsibility across agency lines. Further, the extent of delegation in this process does not end with the CBP. Indeed, this responsibility has been even further delegated by the CBP to Food and Drug Administration (FDA) district offices.[165] Thus, while the FDA is guided to literally "rubber stamp" its decisions with the CBP's signature,[166] the decision is in practice made by the FDA. If necessary, the FDA also has authority to conduct related import/export hearings.[167]

The extensive delegation of this adjudicative function from the Treasury to the CBP, and then to the FDA, appears to centralize the adjudicative process — including the authority to conduct hearings and to make decisions based on those hearings — within the FDA. As a result of the relatively informal (non-congressional) delegation in this process, the agency with the original jurisdiction in this matter, the Treasury, has reduced its responsibilities. However, the connection between the high-level entity authorized by Congress to adjudicate the issue and the actual adjudication of the issue is significantly attenuat-

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[162] 21 U.S.C. § 381(a) (2012); *see also* FDA, REGULATORY PROCEDURES MANUAL § 9-9, at 36 (2013), http://www.fda.gov/downloads/ICECI/ComplianceManuals/RegulatoryProceduresManual/UCM074300.pdf [http://perma.cc/BU4M-6WC6].

[163] FDA, *supra* note 162, at 36.

[164] *See* Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth., 414 F.3d 50, 51 n.1 (D.C. Cir. 2005); Gregory W. Bowman, *Thinking Outside the Border: Homeland Security and the Forward Deployment of the U.S. Border*, 44 HOUS. L. REV. 189, 202 n.39 (2007).

[165] FDA, *supra* note 162, at 36.

[166] As the FDA's Regulatory Procedures Manual states:

> Each FDA district shall have a facsimile stamp of the signature of the Regional or District Director of CBP prepared for this purpose and supplied to the appropriate personnel, or have written delegation of authority from the District Director of CBP to issue the Notice of Refusal of Admission under FDA personnel signature. A new stamp should be prepared each time there is a change of personnel in the Regional or District Director of CBP position.

Id.

[167] 21 U.S.C. § 381(a) (2012); *see also* FDA, *supra* note 162, at 34–36.

ed. Furthermore, it is unclear whether the FDA has the requisite expertise to make reliable determinations in these types of cases (although the FDA may have developed this expertise, albeit over time). At the very least, Congress may have believed the Treasury to be the agency best suited to conduct these types of adjudications, an intention that would be frustrated by agency-instigated delegations of adjudicatory duties.[168]

In addition, the CBP, an agency often delegated enforcement authority by regulation, again plays an enforcement role in this adjudicative process. While this Article does not include enforcement as part of the agency adjudication process, the CBP's enforcement role is in this instance an interesting component of the transfer of responsibility over the lifetime of a single adjudicatory matter. In these cases, after the FDA has made a decision regarding (and rubber-stamped the CBP's signature on) a "Notice of Refusal of Admission" regarding an imported drug, the CBP then becomes both the investigator and the enforcer of any subsequent "bond violations."[169] This is so despite the fact that the initial adjudication of whether or not to refuse an import was transferred from the CBP to the FDA. In sum, in these types of cases, both the adjudication responsibility itself and enforcement of the adjudication have been delegated by Congress to one high-level entity — the Secretary of the Treasury — and then delegated further by the Treasury to the CBP. In one more iteration of delegation, the CBP transfers to the FDA the adjudication function it inherited from the Treasury. However, the CBP retains responsibility for enforcement of the FDA's decisions, perhaps primarily because enforcement is a function that falls particularly within the CBP's expertise.

In this and other circumstances, an agency authorized by statute to conduct an adjudication may in fact be "outsourc[ing this] task[] to other agencies with more relevant expertise."[170] For instance, under the authority of an MOU, the USCS (now the CBP) delegated to the FDA its authority to "determin[e] . . . compliance status, and the sampling procedures of imported electronic products subject to the Radiation Control for Health and Safety Act."[171] This includes, primarily,

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168 *But see* Gersen, *supra* note 3, at 213–15. Gersen argues that agency expertise can and often does develop over time, *id.* at 213–14, and that "Congress might well prefer that ambitious agencies be rewarded for developing expertise and asserting an interpretation of a statutory term not clearly within their jurisdiction," *id.* at 226.

169 *See* FDA, *supra* note 162, at 45–47.

170 Marisam, *supra* note 3, at 186.

171 Memorandum of Understanding Between the Dep't of the Treasury U.S. Customs Serv. and the Food & Drug Admin. (Mar. 20, 1974), http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm115878.htm [http://perma.cc/VF6S-LFEZ]. The FDA and the USCS stated in a later MOU that:

the adjudication of decisions regarding whether to accept or reject declarations that products are compliant under this Act.[172] Interestingly enough, the CBP retains the responsibility of delivering declarations to the FDA, as well as notification to and requests for samples from importers.[173] In other words, the CBP has focused its own responsibilities on the acceptance of applications and provision of notice to applicants — while the FDA fulfills the CBP's statutory adjudicative function — thus leaving for itself a significant responsibility of ensuring administrative due process within seemingly mundane administrative tasks.

The substitutable model is not necessarily prescribed by statute or regulation,[174] despite the often huge transference of authority involved or the large number of cases decided in some of these processes, both of which occur, for instance, in the Treasury/CBP/FDA transference of power to adjudicate the legality of imported and exported drugs. There are likely multiple reasons for this lack of prescription. It is easy to imagine that Congress intended those agencies to which it initially delegated power to be significantly involved in the relevant adjudication processes. Conversely, it is unlikely that Congress would undercut its own initial delegation of power by dictating a wholesale transfer of that power from one agency to another (or a series of agencies), either in the initial statute or over time. As such, this type of coordination raises broader questions about the extent to which administrative redelegations can alter statutory delegations.[175]

When Congress has instigated delegations in the adjudicatory context, its actions have resulted in the phased model in which there may be shared authority over the process, but one agency (likely, the agency

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> [T]he [Food, Drug, and Cosmetic Act] vests in the Secretary of the Treasury authority to deliver samples of imported products to FDA for analysis [and thus] . . . has always been construed as identifying the Secretary of the Treasury as having the authority to collect the samples and issue the corresponding 'Notice of Sampling.' . . . In actual practice, FDA personnel at most ports, [sic] collect the samples, issue the appropriate notice of sampling, and, where applicable, having determined that an article is in violation of the Act and may not be brought into compliance, issue a refusal notice.

Memorandum of Understanding Between the U.S. Customs Serv. and the Food & Drug Admin. (Aug. 14, 1979), http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm116223.htm [http://perma.cc/7T45-YS2R].

172 *See* Memorandum of Understanding Between the Dep't of the Treasury U.S. Customs Serv. and the Food & Drug Admin., *supra* note 171.

173 *See id.*

174 *See* Appendix section A.2, pp. 888–89 (the substitutable coordinated adjudication processes presented in this Article are all dictated by MOU or informal interagency agreement).

175 *See, e.g.*, F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 191 (2013) (arguing that when a statute contains an unambiguous delegation of power to an agency, courts should adopt a presumption against redelegation of that authority by the agency).

initially delegated the authority in a previous iteration of the statute) retains at least some, often supervisory, power. Such is the case, for instance, in the immigration context. Here, some of the immigration functions initially delegated to the DOJ were transferred to the DHS upon its creation. However, unlike in the agency-driven substitutable model, the DOJ remains both involved in the process and arguably a leader of it. The lack of legislative intent to allow for wholesale transfers of authority in the substitutable model may also be why regulations dictating such transfers are relatively uncommon. Since regulatory initiatives are primarily dictated, and even defined, by statutory authority, bureaucrats would be hard-pressed to find ample legislative intent such that this type of transfer could justifiably be concretized by regulation.

So why are these types of transfers happening? Perhaps large agencies with myriad responsibilities such as the DOL and the Treasury seek ways to take advantage of the expertise and resources offered by other agencies. For instance, the Treasury may intend to capitalize on the CBP's expertise in customs matters by delegating to it the review of imported and exported drugs. The CBP, perhaps audaciously, then regifts this authority to the FDA, which has both longstanding expertise in the area and a significant nationwide presence.[176] As a result, agencies that view adjudication as a burden are able to pass on responsibility.[177] The dynamics inherent in the substitutable model may be in part why congressional oversight of coordinated agency adjudication does not exist, even though congressional committees have a great interest in defending their jurisdiction. Agencies with significant influence are able to construct informal agreements that seemingly thwart legislative intent, without any review of or constraint on the processes resulting from these large delegations of adjudicative authority.

Even if these cases end up in the courts, it is unclear how closely judges look at all the coordinated components of the process. Courts have the opportunity to hold the original delegatee of authority responsible. Thus, they should critically examine interagency agreements that alter Congress's original delegation of jurisdiction. However, the courts are likely inconsistent or incomplete in their recognition of which agencies are involved in any given interagency adjudication,

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176 *See, e.g.*, *About FDA: ORA Offices & Divisions*, U.S. FOOD & DRUG ADMIN. (Aug. 13, 2014), http://www.fda.gov/AboutFDA/CentersOffices/OfficeofGlobalRegulatoryOperationsandPolicy/ORA/ucm135269.htm [http://perma.cc/S7A3-7Z7J].

177 *See* Shah, *supra* note 8, at 25 ("[D]espite its potential to increase agency discretion, adjudication is . . . primarily seen as a necessary drain on resources. Unlike rulemaking, adjudication is not perceived by agencies to be clear evidence of the agency's executive authority and application of the agency's interests.").

even with those that are dictated by statute, due to the incompleteness of the record below. If this is so under circumstances in which multiple agencies have been delegated coordinated authority by statute, a court is likely to be that much more confused in situations involving the substitutable model, where authority has been transferred from one agency to another without congressional approval. Further, beyond the specific impact of transferring jurisdiction on the quality of adjudication, this model raises questions about the extent to which agencies may not only dictate their own jurisdiction, but also transfer that jurisdiction across institutional lines. If agencies have the power to make such transfers relatively unchecked, then this is an expansion of executive power that has not been adequately explored in the midst of current controversies concerning the presidential power to institute policy via executive order, make judgments of war, and establish immigration and foreign policy without congressional or judicial acquiescence.

3. Collaborative. — The collaborative model is the closest in kind to joint rulemaking, in that agencies will share jurisdiction over the same part of a coordinated interagency adjudication process. Unlike joint rulemaking, however, these agreements are not based in statute, but rather dictated by regulation or (more often) MOU. Agencies coordinate under this model when each has specific knowledge and resources that benefit the process. Thus, the emphasis in this model is not on hierarchy or process, but rather on the concentrated contribution of substantive expertise.

In some of these types of case adjudications, the locus and subsequent division of substantive expertise is fairly clear. For example, under this model, the DOJ and the DOT both have de facto lead roles in determining whether proposed airline mergers are reasonable.[178] This is unlike other antitrust cases, where the DOJ makes the determination alone, given its statutory authority to enforce the antitrust laws.[179] This is because, in the airline merger context, the DOT has the expertise to determine whether to approve claims to consolidate those airlines' international routes, without which a merger likely cannot happen.[180] Another example involves the decision to grant a reward for the provision of information regarding nuclear energy diver-

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[178] *See* 15 U.S.C. §21(b) (2012); 49 U.S.C. § 41,308 (2012); *see also Mergers and Acquisitions: Overview*, U.S. DEP'T TRANSP., www.dot.gov/policy/aviation-policy/competition-data-analysis/mergers-acquisitions (last updated Sept. 12, 2012) [http://perma.cc/E7DR-WK4P].

[179] *See* 15 U.S.C. §21(b).

[180] *See State of American Aviation: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. & Infrastructure*, 113th Cong. 3–5 (2013) (statement of Susan L. Kurland, Assistant Secretary for Aviation & International Affairs, U.S. Dep't of Transp.), http://testimony.ost.dot.gov/test/pasttest/13test/kurland2.pdf [http://perma.cc/UMP5-JAT6].

sion. In these cases, regulation dictates that the DOJ must consult with the Nuclear Regulatory Commission and the DOE, agencies with particular expertise in nuclear energy that the DOJ does not have.[181] In another scenario, under ERISA, the DOL has the opportunity to comment on applications to create a "qualified trust" (which forms part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries) pending before the Treasury.[182] While participation by the DOL is voluntary in these cases,[183] it benefits the adjudication when made available, due to the DOL's expertise in matters of employment. In another circumstance also dictated by statute, the DOT may authorize an individual who carries out air transportation security duties to carry firearms and to make arrests without warrants, but only with the approval of the Attorney General and Secretary of State,[184] who contribute expertise in law enforcement and international safety. In one more example, even an action as seemingly simple as approval for a vessel to electronically file certain information about export commodities is required by regulation to be informally, but unanimously, approved by multiple agencies with differing areas of expertise, including the Census Bureau and the CBP.[185]

In other cases, the distinction between the resources and knowledge that each agency brings to the process is not as clear. Instead, there is overlapping, or shared, expertise among the agencies involved in the determination. For example, the FDA and the USDA collaborate under MOU to make food-grade determinations, but only in times of crisis — for instance, to inspect food during an "immediate post-attack period"[186] — in order to determine any sources of radiation used in the production of meat and poultry products.[187] Often, one agency will take the lead in this particular coordinated adjudication effort. When appropriate, the agency in the role of the "consulting agency" — which may be the USDA or the FDA — "will [then] provide its evaluation on relevant parts of submission to the other agency in writing."[188] Final-

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181 *See* 28 C.F.R. § 13.5(a) (2014).

182 *See* 29 U.S.C. § 1203(a) (2012).

183 *See id.*

184 49 U.S.C. § 44,903(d) (2012).

185 *See* 19 C.F.R. § 192.12(a) (2014).

186 *See* U.S. FOOD & DRUG ADMIN., INVESTIGATIONS OPERATIONS MANUAL § 3.2.1.4(5) (2014), http://www.fda.gov/ICECI/Inspections/IOM/ucm122519.htm [http://perma.cc/Q7LG-3X5W]. The FDA also serves as an "advisor" to the Secret Service regarding the food to be consumed by Secret Service "protectees." *See id.* § 3.2.5.2.

187 Memorandum of Understanding Between the Food Safety & Inspection Serv. U.S. Dep't of Agric. and the Food & Drug Admin. U.S. Dep't of Health & Human Servs. (Jan. 31, 2000), http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm112604.htm [http://perma.cc/E7KJ-ATXD].

188 *Id.*

ly, in another example of the collaborative adjudication model, there is flexible coordination among the Federal Bureau of Investigation, DHS, USDA, and FDA to further adjudications under the Federal Anti-Tampering Act[189] and agroterrorism initiatives of the Homeland Security Act of 2002.[190] In both types of claims, antitampering and agroterrorism, these agencies also coordinate at the investigation stage for the purposes of setting up criminal cases to be brought by state or federal authorities.[191]

The reasons that agencies with shared expertise collaborate to complete an agency adjudication are not as clear as the reasons behind collaborations in which agencies contribute different substantive knowledge. Perhaps crisis requires the resources of and accountability from multiple agencies with overlapping expertise, when inspections under more ordinary circumstances generally need the attention of only one without the redundancy of an additional agency with a similar mission. Alternatively, bringing similar agencies together consolidates the relevant expertise and ensures that no perspective is excluded from the process. Or perhaps the collaborating agencies have related but still distinct types of expertise, which is both particularly beneficial during a crisis and nonredundant in any setting. Broadly speaking, the existence of multiple agencies with similar or the same areas of responsibility and expertise indicates larger, structural redundancies in the organization of administrative agencies. That agencies with similar missions attempt to coordinate, especially in circumstances of crisis or on high-profile matters, may be indicative of a fundamental sense that resources and knowledge are not adequately centralized in the executive branch as a whole. Thus, agencies may combine their efforts to ensure the completeness of the expertise that is brought to bear in adjudications and other tasks within even single-issue areas of public law such as employment and health and safety.[192]

While the collaborative model is rarely concretized by statute, it is often created via regulation.[193] This fact implies that, unlike the substitutable model, collaborative arrangements may have been intended or at least theoretically anticipated by legislation that thus serves as

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189 18 U.S.C. § 1365 (2012); *see also* U.S. FOOD & DRUG ADMIN., *supra* note 186, § 3.2.6.3.

190 Pub L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of the U.S. Code); *see also* STRATEGIC PARTNERSHIP PROGRAM AGROTERRORISM (SPPA) INITIATIVE, FIRST YEAR STATUS REPORT: SEPTEMBER 2005–JUNE 2006 (2006), http://www.usda.gov/documents/8-10-06%201%20yr%20report%20SPPA%20agroter5.pdf [http://perma.cc/D8ZN-JBKV] [hereinafter SPPA INITIATIVE].

191 *See* SPPA INITIATIVE, *supra* note 190; U.S. FOOD & DRUG ADMIN., INVESTIGATIONS OPERATIONS MANUAL § 8.8.5 (2014), http://www.fda.gov/ICECI/Inspections/IOM/ucm122557.htm [http://perma.cc/59DF-RH38].

192 *See infra* Appendix section A.3, pp. 890–91.

193 *See infra* Appendix section A.3, pp. 890–91; *see also, e.g.*, 19 C.F.R. § 192.12(a) (2014).

the foundation for regulatory-based collaborative arrangements.[194] On the other hand, the generally flexible nature of collaborative agreements[195] allows agencies great freedom to adjust or warp the adjudicative process, depending on the needs of the area of public law (for instance, if they are facing a crisis that requires a change in agencies' roles), the varying resource requirements of each individual process, or the desires of agencies to reduce the burden of adjudication on themselves by shifting responsibility to another agency participating in the collaboration,[196] for instance, "to diffuse the responsibility and blame-shift, especially post-crises."[197] A problem, in this and other coordinated adjudication contexts, is that the determination of agency jurisdiction is made by agencies themselves, and it is not clear whether agencies have the authority to make these determinations. Contrast this situation with the intra-agency setting, where each piece of a coordinated adjudication is assigned by the agency, which has the authority to determine the breakdown of responsibilities *within* that agency itself. As such, a related issue is that there is no entity to which to report problematic agency behavior, especially in ad hoc procedures such as those found under the collaborative model. This lack of accountability fundamentally affects the likelihood of quality and prognosis for improvement of these often hastily implemented interagency adjudicative processes.

Overall, the collaborative model involves varying, relatively informal avenues to agency collaboration in case adjudications, although it is more often dictated by regulation than is the substitutable model. The collaborative model's flexible adjudication coordination scenarios depend significantly on the individual, substantive expertise of each contributing agency in each individual case, and are less defined by procedural responsibilities than are the phased and substitutable models of coordinated adjudication. The fundamental feature of collaborative processes is the extent to which agencies' roles are less successive or seemingly hierarchical or transferable, and more focused on cooperative interaction and coordination for the sake of adding specific expertise to the decisionmaking process — at least in theory. In practice, because of the lack of settled, uniform procedures for coordination in

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194 *But see* Shah, *supra* note 8, at 12–17 (discussing the lack of specificity ascribable to the meaning of "authority" in coordinated adjudication that is not dictated directly by statute).

195 *See infra* Appendix section A.3, pp. 890–91.

196 *See* Shah, *supra* note 8, at 26 n.93 ("*Ad hoc* processes such as those found in the collaborative model may allow for easier jurisdictional manipulation if one configuration of agency coordination proves problematic."); *id.* at 24–25 ("The involvement of multiple agencies mean[s] that another agency contributing to the process could feasibly take on additional responsibility or otherwise 'cover' for the subpar agency.").

197 Email from Jennifer Nou, Professor, Univ. of Chi. Law Sch., to author (Sept. 1, 2014, 15:44 EDT) (on file with author).

many of these cases, the actual quality of the coordination and its impact on case adjudications is difficult to evaluate and systematize. Further, this model (in addition to the substitutable model) brings up fundamental institutional questions about the extent to which agencies can determine their own administrative jurisdiction in shared processes that cross agency borders.

II. OVERSEEING COORDINATED INTERAGENCY ADJUDICATION

Unexamined and functionally unreviewable coordination is both unique to and especially important in the agency adjudication context. The roots of unchecked adjudication coordination lie in the fact that:

> Statutes often bestow enormous authority on agencies to engage in discretionary decisionmaking — authority which may not (depending on the terms of the statute) be reviewable by judicial authorities. Even in the event that there is some judicial review available for discretionary agency decisionmaking, such review is typically highly deferential, and may not place meaningful restraints on that decisionmaking.[198]

Furthermore, as Professors Jody Freeman and Jim Rossi explain, "[t]he relative informality that makes MOUs so . . . easy to deploy [in the agency coordination context] also makes them generally unenforceable and, in most cases, entirely insulated from judicial review."[199] The combination of these two fundamental elements makes coordinated administrative adjudication often untouchable by the courts.

In addition, higher-level executive oversight of adjudication — analogous to the distinct oversight of rulemaking by the OMB — does not exist, either in the intra-agency or interagency setting. Arguably, such oversight is more important in the interagency context, as crossing agency lines both exacerbates the general problem of poor coordination and implicates specific jurisdictional and rule-of-law matters. Thus, the rest of this Article explores executive oversight as a method for constraining these potentially problematic processes. More specifically, this Part argues that it is precisely the coordinated nature of interagency adjudication that demands executive oversight of these processes, despite a current lack of executive oversight of even intra-agency adjudication. This Article thus suggests executive oversight of coordinated administrative adjudication that is ex ante and narrowly focused

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198 Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 662–63 (2008) (footnote omitted); *see also* Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 862–63 (1994) (noting that agency immigration decisions are often insulated from meaningful review); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 751–66 (1997) (same); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1500–11 (1983) (providing a typology of administrative discretion).

199 Freeman & Rossi, *supra* note 2, at 1195–96.

on coordination. To justify this argument, this Part wrestles with potential obstacles to such a solution, including problems posed by the longstanding application of the adjudicator decisional independence doctrine to the administrative context.

A. The Need for Executive Oversight

Components of coordinated interagency adjudication are not generally subject to any agency constraints outside of those imposed by self-governance.[200] For instance, in the immigration/asylum context, the quality and nature of DHS asylum officer adjudication remain unchecked by any entity outside of the DHS itself.[201] Arguably, the appeal process to the DOJ serves to check the DHS's initial adjudication.[202] However, while the DOJ may substitute its own ruling for that of the DHS within any given individual case, it has no formal or strict power to change the DHS's asylum adjudication parameters, policy, or intended outcomes in any concrete or reliable way. Perhaps more importantly, the DHS does not view the DOJ as an overseeing entity, and is often motivated to issue policies counter to those suggested by the DOJ's appellate rulings, or even requested by DOJ policymakers. For instance, the DHS and the DOJ disagree about and have distinctly different policies on whether to grant asylum to noncitizen victims of domestic violence.[203]

Thus, judicial oversight is currently the only feasible check on these processes.[204] At least one leading scholar, Professor Catherine Sharkey, has discussed the role of judicial review of interagency activities, and suggested that courts should be able to function as agency coordinators by "exploit[ing] . . . overlapping agency jurisdiction. Under this model, when faced with an interpretation by an agency that operates in shared regulatory space, courts would solicit input from the other relevant agencies," and implement other practices to ensure high-quality agency adjudication.[205]

However, the application of this suggestion to coordinated adjudication that spans institutional boundaries is likely complex at best, and

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[200] Indeed, this desire for self-governance may be one reason agencies choose to engage in coordinated interagency adjudication. *See* Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1730 (2012).

[201] *See* 8 C.F.R. § 1208.14(b) (2014) (providing that an asylum officer may grant asylum "in the exercise of his or her discretion").

[202] *See id.* § 1208.14(c).

[203] *See* Bijal Shah, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. L. REV. 100, 130 n.96 (2013).

[204] I discuss limits to the judicial review of these processes in greater depth elsewhere. *See* Shah, *supra* note 8, at 21.

[205] Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 330.

possibly ineffective. This fact may be particularly true for substitutable and collaborative adjudication, which rely more heavily on regulation and informal interagency agreements — processes that are rife with potential for unchecked agency activity. (Additionally, the procedures in the collaborative model appear to be the most ad hoc and thus perhaps the most difficult to identify and to evaluate for quality.) As such, these types of interagency coordination leave fewer concrete materials and a less-formal record for courts to consult. While they may choose to grant deference under certain circumstances, courts are not generally in a position to make a complete assessment of an adjudication process — for instance, one that includes a review of the quality of each task accomplished by each agency involved, and of the nature of the communication that allowed multiple agencies to contribute to the same agency process in the first place. Indeed, courts may never review agency investigation, factfinding, procedural due process mechanisms (such as notice and the preservation of timeliness), and other components of interagency adjudication (including those comprising the decision itself), either because the agency performing these functions never appears before the courts or because the type of process itself never merits review.

As noted throughout this Article, this lack of judicial oversight has been a problem in some immigration adjudications. The impact of coordination on the outcome of the adjudication and the subsequent effects of both the process and outcome on the individual claimant can be substantial, as in the *A.B.T.* asylum clock and the *Franco-Gonzalez* mental-incompetence immigration litigation.[206] However, neither the DHS nor other collaborating agencies are represented before circuit courts reviewing the DOJ's final adjudication, even if the DOJ was only one of the agencies involved in the adjudication process leading to the final outcome.[207] This fact may weaken the courts' role as an effective monitor of coordinated adjudication. Furthermore, it is not clear that courts even wish to take on this all-encompassing reviewer function in the adjudication context, as no judicial decision has explicitly recognized, let alone confronted, the challenges of reviewing coordinated adjudication processes.

Theoretically, the lack of complete, effective oversight is more broadly problematic because hidden components of coordinated interagency adjudication may be vital to adjudicative outcomes and often implicate unique issues of due process and fundamental fairness. Unlike in the intra-agency setting, these components are obscured behind

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[206] *See supra* section I.A, pp. 814–20.

[207] *See, e.g.*, Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

opaque processes, and courts often do not have access to a full record detailing each agency's participation. As such, courts may remain unaware of the structure and quality of each agency's participation, and are thus likely unable to fully review these important functions during their judicial deference analyses. (Ideally, claimants themselves may be able to point this omission out, but often they are similarly unaware of the details of these opaque interagency interactions.) On the other hand, judicial oversight may occur in certain regimes where the nature and degree of the impact of coordination is clearer in the final result.[208] In any case, however, these dynamics merit some evaluation. As mentioned throughout this Article, a companion piece explores broader questions of judicial analysis of and deference to the outcomes of these processes.[209]

The D.C. Circuit has opined that giving deference to an administrative implementation of a statute that is jointly administered by multiple agencies effectively prioritizes the voice of the agency whose portion of the determination is under review — in other words, of the agency that gets to the courthouse first.[210] While the court was worried specifically about one agency's statutory interpretation displacing another's,[211] the potential problem it identified is precisely the construction of review already found in the coordinated interagency adjudication context. Indeed, courts have been privileging one agency's contribution to adjudication over another's in many areas of coordinated adjudication, perhaps without the opportunity to choose otherwise because of their lack of access to full administrative records. This is particularly so in phased adjudication, such as the privileging of the DOJ's contribution to immigration adjudication despite the DHS's heavy involvement.[212] Further, in the rulemaking context, there has been no judicial pushback against the fact that one agency stands in as the responsible party before the reviewing court in coordinated rulemaking. Even if the courts become fully aware of interagency coordination in adjudication[213] and incorporate that awareness into their

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208 *See, e.g.*, Brezilien v. Holder, 569 F.3d 403 (9th Cir. 2009).

209 *See generally* Shah, *supra* note 8.

210 *See* Rapaport v. U.S. Dep't of the Treasury Office of Thrift Supervision, 59 F.3d 212, 216–17 (D.C. Cir. 1995).

211 *See id.*

212 *See, e.g.*, Diallo v. INS, 232 F.3d 279, 287 (2d Cir. 2000) (privileging the DOJ's contribution to a joint adjudication in the asylum context over the DHS's contribution, despite the fact that the DOJ relied heavily on the DHS's factual findings).

213 *See* McGarity, *supra* note 200, at 1730 ("Over two decades, many agencies have migrated toward less formal policymaking tools in response to the congressional and presidential imposition of additional analytical requirements for informal rulemaking and more intense judicial review under the 'hard-look' doctrine.").

deference analyses in some way,[214] courts may never have the opportunity to review all the components of coordinated interagency adjudication processes. For instance, as Professor Katie Eyer suggests, "courts are rarely empowered to create substantive rules limiting clearly bestowed agency discretion, even where they are able to impose procedural requisites on the agency's discretionary decisionmaking process."[215]

Congress is even less involved in overseeing these processes than are the courts. Unlike rulemaking, adjudication is too nuanced and is perceived as being too narrowly drawn — in that each adjudication affects one person or private entity, as opposed to the wide impact of a single regulation — to incur substantive congressional oversight.[216] And yet, the impact of coordinated, primarily informal interagency adjudication may be too great to allow the multiple agencies involved in its myriad processes to govern themselves to the extent they do. Courts' and Congress's current lack of awareness, inability to review those processes effectively, and failure to participate in drawing jurisdictional lines have led to and will likely preserve just such a system.

Given that judicial and legislative review are inherently limited in their ability to rein in agency discretion — especially when it is constrained only informally, like in MOU-governed coordinated agency activity — additional oversight of these processes could come from the executive branch itself. The executive branch is not subject to the same restrictions on the oversight of agencies to which courts are, and thus "agencies are perhaps the best-suited governmental entities . . . to impose meaningful limitations on discretionary government action."[217]

There are many possible benefits of executive oversight of interagency adjudication. By strengthening the underlying coordination framework, oversight could increase decisions' consistency and pre-

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[214] *See* Shah, *supra* note 8, at 12–17 (arguing in favor of a deference analysis that incorporates knowledge of coordinated agency adjudication). More specifically, I argue in this other work that a "centralization-based" deference analysis could provide a way for courts to adequately review coordinated adjudication by recognizing that courts are unlikely to be able or inclined to look very closely. *See id.* Generally, the centralization analysis reaffirms this prioritization of one responsible agency's adjudication determination over a more nuanced evaluation of the coordinated activity underlying the adjudication process. *See id.* In this way, it offers a tool that is relatively easy to implement and does not require searching judicial investigations into complex, often convoluted and poorly documented agency processes. *See id.* Thus, it acknowledges the practical limitations of judicial review. As such, the centralization analysis is a compromise solution, suggested in part because courts cannot realistically function as the overseers of each portion of complicated multi-agency adjudication processes.

[215] Eyer, *supra* note 198, at 663.

[216] *Cf.* INS v. Chadha, 462 U.S. 919, 964–65 (1983) (Powell, J., concurring in the judgment) ("The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches.").

[217] Eyer, *supra* note 198, at 663.

dictability, bring to the forefront and help correct faulty institutionalized adjudicative reasoning, and encourage uniform and meaningful due process for the individual claimants interacting with multiple agencies. Formal oversight could also improve public participation by giving advocates and stakeholders a single committee to communicate with, reduce arbitrary adjudicator discretion via indirect checks on the exercise of that discretion, improve transparency in coordinated adjudicative processes, and promote agency accountability. Quite importantly, oversight could diffuse conflicts of interest, shirking of duties, overreach, conflict or duplication of institutional jurisdiction, and other flaws affecting specific interagency relationships that could harm adjudication outcomes.[218] At this point, it is unclear whether coordination will strengthen or erode formal adjudicative processes over time. Yet to the extent the latter occurs, oversight may ensure the ossification of these processes (albeit for better or for worse); in other words, if coordination destabilizes or changes adjudication processes over time, oversight that ensures greater uniformity in coordination may also reduce the variability in the influence of coordination on adjudication.[219]

These potential benefits of oversight could also provide impetus for increased judicial deference to interagency adjudication outcomes.[220] To the extent courts begin to recognize executive oversight as a legitimate mechanism for quality control, courts may offer more deference, even in those circumstances where they are unable to access a complete record or full overview of the coordinated process. Oversight may contribute to and help agencies justify — to courts or Congress — their own determinations and even transferences of jurisdiction. For instance, agencies could explain the extent to which a claim or trans-

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[218] Oversight may also improve relationships between agencies, an important value at the heart of a balanced implementation of a centralization-based theory of judicial deference, which in turn would afford greater deference to agency decisions in situations where the process of reaching that decision is centralized in a single body. *See* Shah, *supra* note 8, at 22 (discussing the impact of these factors on agency responsibility in coordinated adjudication and other multi-authority interagency processes).

[219] Improving accountability via increased executive branch oversight, monitoring, and mediation of conflicts of interest between agencies may also improve administrative due process and thus reduce the frequency of class action suits against the government. For instance, such oversight could reduce the self/process-insulating mechanism resulting from the complications of coordination that might allow agencies to shirk their responsibilities to uphold individual rights. *Cf.* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1760–61 (2013) (discussing the concept of agency "self-insulation," in which agencies use regulatory mechanisms to escape presidential review of agency activities). In the interests of space and focus, however, I reserve this topic for future work.

[220] *See* Freeman & Rossi, *supra* note 2, at 1185 (suggesting that coordination may allow decisions to merit deference in part because it may "improve[] the analytic basis for decisionmaking by adding data and expertise, and also by diversifying the perspectives an agency takes into account").

ference of power actually allows them to consolidate expertise or resources in the process.

Nor is the proposal for executive oversight of agency coordination unprecedented. More specifically, some scholars have recently considered and recommended executive oversight of coordinated administrative tasks, including both rulemaking and enforcement.[221] These scholars' reasons for suggesting that oversight would improve the quality of agency coordination apply to the coordinated adjudication context as well, whether implemented via a solidified structure or as part of an adaptive management strategy.[222] Thus, just as Professor Kate Andrias argues that coordinated enforcement activity would benefit from executive branch (in particular, OMB) oversight that focuses on coordination,[223] so too might adjudication benefit from some form of broader executive branch oversight that evaluates and checks the substance and function of interagency coordination.

However, the concept of oversight in the adjudication context is particularly charged because agency adjudicators have long been granted decisional independence as if they were Article III judges.[224] For this reason, unlike the presidential oversight of coordinated rulemaking that scholars suggest and the current OMB oversight of both intra- and interagency rulemaking efforts, executive leaders have thus far been only rarely involved in ex ante determinations of adjudicative policy. Nor are they in the practice of altering the outcome of individual cases in either the intra- or interagency contexts, despite the facts that administrative precedent often drives policymaking and that the

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[221] *See, e.g.*, Andrias, *supra* note 14, at 1101; Bradley, *supra* note 3, at 749; Kelly Everett, *Trust Issues: Will President Barack Obama Reconcile the Tenuous Relationship Between Antitrust Enforcement Agencies?*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 727, 765–66 (2009) (noting President Barack Obama's influence on the historic "turf issues" between the FTC and the DOJ); Jason Marisam, *The President's Agency Selection Powers*, 65 ADMIN. L. REV. 821 (2013) (discussing the ways in which the Executive is actually able to decide which agencies should act in a given situation); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763 (2012).

[222] "Adaptive management is a structured decisionmaking method, the core of which is a multistep, iterative process for adjusting management measures to changing circumstances or new information about the effectiveness of prior measures or the system being managed." Robin Kundis Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1, 1 (2014). The application of adaptive management strategies in the administrative law context has enjoyed a recent uptick in scholarly interest. *See, e.g.*, *id.*; J.B. Ruhl & Robert L. Fischman, *Adaptive Management in the Courts*, 95 MINN. L. REV. 424 (2010); Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 173 (2013) (discussing the challenges of adaptive management strategies for administrative environmental protection governance); Sean Hannon Williams, *Statistical Children*, 30 YALE J. ON REG. 63, 110–12 (2013) (criticizing the use of adaptive management strategies as a response to excessive pre-rulemaking assessment).

[223] *See* Andrias, *supra* note 14, at 1101–07.

[224] *See* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 348–49 (1991) (discussing traditional understandings of the decisional independence afforded to ALJs).

results of individual cases can have significant effects on the public's opinion of executive leadership.

The doctrine of "decisional independence" has remained an obstacle to implementing oversight of adjudication processes, even though a lack of oversight of agency adjudication has substantial consequences.[225] As a result of this doctrine, efforts to curtail poor adjudication practices or curb problematic trends in executive branch decisionmaking have been met with significant resistance even in the intra-agency context. For example, in immigration, the decisional independence accorded to immigration judges may be problematic for the quality of adjudicative outcomes,[226] and can serve as an obstacle to the implementation of even those broader initiatives that are rooted in legislation.[227] Given the inability and unwillingness of the courts to review coordinated adjudication closely, and the absence of nuanced congressional oversight, executive oversight is a viable option to help agencies in furthering coordinated adjudication processes to prevent fiascos such as *A.B.T* and *Franco-Gonzalez*.

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[225] One consequence is that administrative adjudicators' jurisdiction is more far-reaching than that of any court of appeals; an agency "often . . . ha[s] the power to impose consistent nationwide rules in the area of law that it administers — a power no other judicial or executive entity, with the exception of the United States Supreme Court, possesses." Eyer, *supra* note 198, at 661. Thus, administrative adjudicators have the ability to create expansive, legally binding decisions under the auspices of the executive application of law. Given the partiality and scope of administrative decisionmaking, which is both unlike judges' solitary decisionmaking processes and unmatched by any other lower-level bureaucrat, executive branch functionality may suffer because administrative law decisions are not internally reviewed. *Cf.* Rubin, *supra* note 41, at 121–23 (noting that administrative adjudicators approach the adjudication process from an ex parte perspective, albeit arguing that this is necessarily the case in informal adjudication).

[226] *See* Durham, *supra* note 103, at 656 (suggesting an increase in willingness to challenge administrative agencies' ability to faithfully administer federal immigration laws).

[227] Indeed, when executive leaders appear to direct the actions of adjudicators, they may come under fire. *See* Bruff, *supra* note 224, at 349. Much of my first-hand exposure to discussions about decisional independence indicates it may be problematic. For instance, in the immigration context, the Chief Immigration Judge issued a memorandum directing judges to issue continuances in cases that implicated the "unaccompanied alien child" provisions of the Trafficking Victims Protection Reauthorization Act in order to meet the DOJ's statutory obligations, which I suggest led to criticism of him. *See* Memorandum from Michael C. McGoings, Acting Chief Immigration Judge, Exec. Office for Immigration Review, U.S. Dep't of Justice, to All Immigration Judges et al. (Mar. 20, 2009) (on file with author); *cf.* Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1523 (2010) ("Immigration judges and members of the [Board of Immigration Appeals] are not ALJs, and their independence is more limited."). On the other hand, some have argued that the adjudicative independence should be preserved. *See, e.g.*, Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 543 (2011) ("One major problem with the system is a lack of decisional independence at the administrative level."); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372 (2006) (lamenting that "the decisional independence of both the immigration judges and the [Board of Immigration Appeals] has been steadily whittled down").

B. Forming Executive Oversight

Coordinated administrative adjudication requires efficient, effective executive oversight that takes into account the newly diluted decisional independence doctrine.[228] The first criterion for this type of executive oversight is a focus on the coordination components of interagency adjudicative processes, not on the substance of the coordinated adjudication. This criterion is similar to Andrias's suggestion that the main, or perhaps only, goal of executive branch oversight in the enforcement context should be to improve the quality of interagency coordination.[229] A focus on the coordination component alone would engender executive oversight of coordinated adjudication that is both tenable and that remains within the bounds of shifting decisional independence doctrine. If oversight does not directly target the substance of adjudicative outcomes, it is less likely to influence those outcomes and more likely to emphasize the quality of coordination in these processes *regardless* of the outcomes. One important consideration in the creation of focused oversight is whether this oversight should be ex ante or ex post.[230] The distinction between ex ante and ex post mechanisms is also particularly important within the context of decisional independence.

1. Ex Post v. Ex Ante. — Ex post executive oversight of agency adjudication is rare. One potential example of ex post oversight can be found in the immigration context. Here, the Board of Immigration Appeals (BIA) has a practice of publishing certain cases to serve specifically as guidelines for lower tribunals.[231] However, whether this particular practice is an ex post or ex ante oversight measure is up for debate — while this measure evaluates the quality of substantive outcomes after the adjudication is complete, it does so not to change those specific outcomes (which may remain untouched), but rather to provide guidance for the structure of future adjudications. This intention arguably establishes this practice as ex ante oversight. Some scholars,

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[228] *See, e.g.*, Legomsky, *supra* note 149, at 1668 (suggesting that there has been a recent "erosion" of the job security of immigration judges, which has impacted their decisional independence); James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1211 (2006) (arguing that administrative judges "were meant to be impartial decisionmakers and advancers of agency policy, not independent ones").

[229] Andrias, *supra* note 14, at 1078 ("[P]residential enforcement should be focused on facilitating interagency coordination and should not entail systematic review of individual enforcement actions."). The idea that executive oversight should focus primarily on agency coordination has thus far been discussed in only the nonadjudicative agency context.

[230] Professor Jennifer Nou has briefly discussed the concepts of ex ante and ex post congressional and presidential mechanisms of control and review in the regulatory process, but these ideas have never been applied to adjudication. *See* Nou, *supra* note 219, at 1764–67.

[231] *See* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2023 (2012).

however, could feasibly be seen as characterizing this oversight as ex post because it involves outcome review.[232]

The reason ex post review is disfavored is because courts have characterized ex post actions as more problematic for administrative adjudicators' decisional independence than ex ante oversight, due to the former's specific influence on the substance of particular adjudicative outcomes. For instance:

> To take a very well-known example, the Social Security Administration created reform programs aimed at promoting more consistency across agency [administrative law judges, or] ALJs. The programs included a peer review program, monthly production goals, and a quality assurance system that zeroed in on certain ALJs who had what the agency viewed to be skewed reversal rates. When the programs were challenged, the first two were deemed consistent with ALJ independence, but the reviewing court thought that the last measure potentially infringed ALJs' decisional independence. The bottom line is that senior agency officials can "manage" adjudication only to the extent that that supervision does not relate to the resolution of particular cases.[233]

As will be discussed later,[234] concerns about preserving decisional independence need not be as acute when considering oversight of coordinated adjudication, as opposed to purely intra-agency adjudication processes. However, courts' remaining interest in preserving decisional independence may favor ex ante measures, such as the first two implemented by the Social Security Administration in this example.[235] As Professor Jennifer Nou notes while contemplating rulemaking, "ex ante mechanisms of control . . . allow for significant agency slack and discretion over individual rules and regulatory decisions."[236] While this is precisely why "Presidents have opted for more institutionalized and systematic mechanisms of ex post oversight through regulatory review,"[237] ex ante oversight of coordinated interagency adjudication may better satisfy those who value agency adjudicator flexibility.[238]

This is not to say that ex ante oversight would necessarily sidestep all potential forms of influence on decisional independence. For instance, discussions of oversight of rulemaking hint at ways in which oversight might skew agency decisionmaking, such as by infusing the policy preferences of individual, high-level bureaucrats like the Presi-

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[232] *See id.*

[233] Magill & Vermeule, *supra* note 15, at 1075 (footnote omitted).

[234] *See infra* section II.c.2, pp. 875–81.

[235] *See* Magill & Vermeule, *supra* note 15, at 1075.

[236] Nou, *supra* note 219, at 1766.

[237] *Id.*

[238] Courts' interest in the concept of decisional independence will likely wane with the decentralizing effects of coordination on administrative adjudication and the extent to which increasing decentralization in fact limits administrative law judges' decisional independence.

dent.[239] But this concern fits into the broader set of issues scholars have had with existing forms of executive oversight (as will be discussed later in this Article), and is not endemic to ex ante oversight in particular.

Ex post oversight could avoid particular influence on substantive outcomes, but only if carefully wrought and left intact by courts; it is unclear, however, whether agencies have the resources and expertise to implement an ex post system that truly steers clear of substantive influence on individual case outcomes (such that a court would accept implementation of this system). Ideally, ex ante mechanisms that develop requirements for future coordination based on lessons learned from the past would emphasize the quality control of coordination itself as the primary function of that executive oversight, as opposed to the substantive outcomes of individual decisions. As such, the oversight entity would focus on coordination and have little to no power to intervene in individual decisions, even if intervention helped to ensure that the proceedings themselves were of high quality (based on the metrics valued by the adjudicatory schema in question).

2. The Overseeing Entity. — Perhaps surprisingly, given the recent emphasis on the unitary executive in administrative law scholarship,[240] there has been neither the suggestion of nor actual oversight of large-scale agency adjudication by higher-level executive bodies or leaders like the OMB, the President, or an appointed White House committee, despite the fact that agency adjudications result in significant quantities of "binding legal rule[s]"[241] furthered by unchecked discretion.[242] The primary control over agency adjudication comes from the agencies that are themselves involved in the adjudication. However, even these agencies are not broadly concerned with ensuring the quality of the full mass of processes they facilitate; rather, their involvement remains at the ground level. In general, an agency is unlikely to expend the resources and to take on the responsibility of overseeing all parts of coordinated adjudication, including those parts housed in other agencies. Unfortunately, the remaining occasional ad hoc oversight by an agency that is itself involved in the adjudication process neither works well consistently, nor amply serves ex ante purposes, such as the improve-

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[239] *See, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1266–67 (2006) (suggesting presidential biases in Executive Order 12,866, which "cemented OIRA review," *id.* at 1267); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) ("[P]residential control of administration, in critical respects, expanded dramatically during the Clinton years, making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda.").

[240] *See, e.g.*, Andrias, *supra* note 14; Marisam, *supra* note 221.

[241] Eyer, *supra* note 198, at 658.

[242] *Id.* at 658–59.

ment of future processes. Furthermore, it is unclear whether agencies do or should have the jurisdiction to determine, themselves, how to parcel out interagency processes (especially those processes not dictated by statute) in which they are involved. Whether they do or should, and the quality of the processes that result when they do, are matters requiring oversight and evaluation that agencies themselves could not provide — as they might within the context of intra-agency adjudication processes involving different players from within the boundaries of a single agency.

For these reasons, these processes would be better monitored by an agency that is not part of the coordinated process or an executive leadership committee, such as an independent White House committee or the delegated staff of a high-level political appointee like the Attorney General. Potentially, either an OMB-type agency or sub-agency (perhaps within the OMB, like the Office of Information and Regulatory Affairs (OIRA)), a White House committee, or the DOJ could implement a check system to ensure, on a scheduled basis, that the coordination in the largest coordinated adjudication regimes — such as immigration, employment/EEOC, and Social Security benefits administration — is implemented with a minimal level of quality and timeliness. The DOJ may be a natural choice to spearhead this oversight, given that the Department's involvement in agency adjudication is already significant, especially in cases that the Department may eventually prosecute in Article III courts. Thus, broader agency adjudication oversight by the DOJ would remain substantively in keeping with the DOJ's expertise in legal processes and could also improve the quality of the administrative decisions that the DOJ is required to defend before the courts.

Casting the DOJ as an adjudicatory overseer or "clearinghouse"[243] of sorts, while a measurable departure from the current system, is less radical than other scholars' suggestions for how best to implement oversight of agency coordination. For instance, Andrias recommends that the OMB oversee all agency enforcement efforts, in part because the Attorney General is less of a generalist and arguably not as broad an authority figure as the President (of whose office the OMB is a part).[244] However, the President's broad responsibilities reduce the likelihood that he or she as an individual could be substantially involved in the details of enforcement efforts, let alone in the details of individual agency adjudications. Indeed, the President's oversight powers — which include appointment power, removal power, formal

[243] Marisam, *supra* note 3, at 223 (describing the EPA as a "regulatory clearinghouse" for environmental decisions for other agencies).

[244] *See* Andrias, *supra* note 14, at 1103–04.

directives, and even personal appropriation — are broad, expansive, and highly political, and thus perhaps not well suited to the detail-oriented, nuanced oversight that the coordination of adjudication would likely require.[245] The centralized nature of presidential oversight is arguably ideal for ensuring "coordination," and eliminating "inconsistencies and redundancies."[246] However, the President's level of flexibility may also lead to a lack of predictable oversight in the rather nuanced adjudicatory context.[247] On the other hand, the Attorney General may not be a better option either, given the broad and formal nature of his or her oversight powers.[248] Indeed, while the Office of Legal Counsel's (OLC) authority is significant[249] and it may function to resolve interagency disputes, its process is inflexible and its neutrality has been called into question.[250]

A team of agencies or higher-level officials may be better suited to oversee agency adjudication. For instance, as Nou indicates, "any number of other agencies and [White House] entities, from only a few to many, [may] be involved in the review of a rule, depending on the political visibility and substance of the regulation at stake";[251] the same could be implemented in the coordinated interagency adjudication context. Because agencies believe that influence on adjudication outcomes implicates less political capital than making an impact on rulemaking outcomes does,[252] multiple entities may not be as interested in jointly overseeing adjudication as they are in contributing to rulemaking oversight. There may, however, be exceptions to this baseline, for example in areas with particularly influential political meaning like the larger coordinated adjudication regimes noted earlier.

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[245] *See* Kagan, *supra* note 239, at 2299; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 24–25 (1995) (noting the limited use and high political costs of using the appointment power); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 5–7 (1994) (noting the negative effects of capture and political sway on appointment power); Vermeule, *supra* note 51, at 1195 (noting the ineffectiveness of removal power in the context of the SEC).

[246] Kagan, *supra* note 239, at 2340.

[247] *See* Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1804–06 (2010).

[248] *See* Eric Messinger, *Transparency and the Office of Legal Counsel*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 239, 245–46 (2014) (detailing OLC's authority).

[249] *Id.* at 246.

[250] *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336–37 (2006).

[251] Nou, *supra* note 219, at 1802. Nou also notes, however, that this process does not always entail consensus; rather, these entities' disagreements are subject to an explicit dispute resolution process, which by executive order should formally involve the President or Vice President, though it may not always do so in practice. Email from Jennifer Nou, Professor, Univ. of Chi. Law Sch., to author (Sept. 1, 2014, 15:44 EDT) (on file with author).

[252] *See* Nou, *supra* note 219, at 1782–86.

A meaningful option in this vein would be a new office in the OMB,[253] similar in structure and intent to OIRA,[254] but with a different focus.[255] While OIRA reviews selected proposed rules for myriad substantive matters, this new office could oversee adjudication structures for procedural quality. Similar to the OMB, this new office's assessments might be "more than advisory but [perhaps] still less than mandatory."[256] Like the OMB, this office may be able to impose budgetary constraints on agencies that do not comply with its assessments, or it may motivate agencies in other ways — for instance, by requiring review of MOUs or otherwise involving itself in developing the adjudication guidelines of agencies that do not comply, or by other means specific to the context of any given adjudication.

Notably, OIRA offers advantages to judicial oversight,[257] which include its centralizing/coordinating ability, greater power of initiation, political accountability, tradition of independent leadership, and capacity to assemble officials who specialize in the subject at hand. These capabilities allow the executive branch to encourage the pursuit of both consistency and quality more than courts (which can establish merely an "acceptable" analysis).[258] Another benefit of this type of oversight is deterrence — agencies may be motivated to shore up their practices for fear of the oversight entity's involvement. This type of oversight may also help agencies improve the quality of their techniques,[259] coordination related or otherwise. An agency like this may also serve to collect information that standardizes the use and quality of coordination and communication across executive branch adjudica-

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[253] Under the Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20, the OMB controls budgetary and legislative requests of federal agencies, including independent agencies. Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 546 (1989).

[254] The Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, created OIRA, whose criteria for review include "cost-benefit analysis, equity, human dignity, . . . distributive impact," and other interests aimed at improving democracy. Vermeule, *supra* note 51, at 1205; *see also* Bruff, *supra* note 253, at 575; Pildes & Sunstein, *supra* note 245, at 17. Further, early supporters of OIRA provided two justifications for centralized review: cost reduction and coordination, which included the creation of a new body of so-called Regulatory Policy Officers to promote interagency information sharing and coordination. Bagley & Revesz, *supra* note 239, at 1264; Pildes & Sunstein, *supra* note 245, at 17.

[255] Indeed, even an author who is highly critical of the OMB suggests that "[i]ts role in coordinating related proceedings between agencies . . . [is] entirely proper." Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064 (1986).

[256] Bruff, *supra* note 253, at 560 (quoting NAT'L ACAD. OF PUB. ADMIN., PRESIDENTIAL MANAGEMENT OF RULEMAKING IN REGULATORY AGENCIES 26 (1987)).

[257] *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 455 (1987).

[258] Bruff, *supra* note 253, at 555.

[259] *See* Bagley & Revesz, *supra* note 239, at 1316.

tory functions — especially to the extent that the overseeing entity's role is to identify and convey interagency views.[260]

Finally, one other option is Government Accountability Office (GAO) oversight.[261] Since 2010, the GAO — an arguably quasi-judicial body[262] — has been statutorily required to "identify programs, agencies, offices, and initiatives with duplicative goals and activities within Departments and governmentwide and report annually to Congress on the findings . . . with recommendations for consolidation and elimination to reduce duplication identifying specific rescissions."[263] While this focus on coordination is very specifically intended to reduce government overlap, the GAO may be able to expand its focus to include other important goals such as improving adjudication in terms of coordination, efficacy, efficiency, and the protection of due process.

3. Constructing the Oversight System. — An oversight system could be holistic, uniform, and structured. Or it could be triggered on a case-by-case basis, by either an agency involved in the coordinated adjudication or high-level political interest. A broadly structured, fully inclusive system would require more extensive resources than a system that is based on situational triggers. Further, agencies may have legitimate impetus to trigger the process themselves, thus ensuring the focus is on those processes that agencies themselves have designated most need it. As Professor Jason Marisam indicates: "It is well documented in the legal scholarship that, when an agency seriously disagrees with another agency's policy proposal, it can appeal to White House officials and legislators to weigh in."[264] Similarly, agencies may choose to ask an overseeing agency to "weigh in" on the quality of their coordinated adjudication, especially if they are concerned with conflicts of interest, errors, or other problematic factors that agencies themselves may not be able to solve. Other reasons agencies may choose to trigger oversight is to reduce shirking — for instance, in a case where one agency believes that another agency is evading its re-

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[260] *See* Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013).

[261] The GAO describes itself as an "independent, nonpartisan agency that works for Congress" and "investigates how the federal government spends taxpayer dollars." *About GAO*, U.S. GOV'T ACCOUNTABILITY OFF., http://www.gao.gov/about (last visited Nov. 23, 2014) [http://perma.cc/DR58-KNDP]. More specifically, the GAO is designated as independent of executive departments and was placed under congressional control by the Legislative Reorganization Act of 1946. *See* 31 U.S.C. § 702 (2012); *see also id.* § 712 (setting forth the Comptroller General's obligations to report and investigate matters relating to public money as directed by Congress).

[262] *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1390 (1988) (suggesting that the GAO carries out both "quasi-executive and quasi-judicial functions").

[263] Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8, 29–30 (codified in scattered sections of 2 U.S.C.).

[264] Marisam, *supra* note 3, at 205 (citing Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 588 (1984)).

sponsibility to fact-find or provide expert guidance, or if an appellate-level administrative tribunal is concerned that the initial agency is referring too many cases to the appellate body;[265] to displace political blowback; or even due to a genuine interest in improving adjudicative operations. Notably, situational oversight could thus improve agency responsibility, because agencies would no longer be free to take advantage of burden-shifting without fear of review or repercussions as long as other agencies are aware of the problematic agency's activities and willing to police them, at least minimally.

On the other hand, the situational system may be thwarted by agencies that refuse to solicit oversight of their adjudication processes if left to their own devices. As Nou notes, agencies act strategically to avoid judicial review and "self-insulate" so that they can bypass presidential oversight of their rulemaking discretion.[266] Agencies may react similarly to avoid oversight of their adjudicatory discretion, and may be successful if beholden to only voluntarily entered, situational oversight of their adjudication processes. Arguably, agencies may be motivated to avoid coordination schemes if subject to nonvoluntary oversight based on the existence of coordination, due to the resulting administrative hassle or potential for a reduction in agency discretion. However, realistically, agencies are unlikely to avoid coordination altogether, due in part to the benefits perceived by agencies in coordinating (as described in the typology above[267]) or the fact that it may be statutorily delineated. At the very least, agencies are unlikely to be able to disentangle themselves from the myriad coordination systems in which they are already entrenched, which means that oversight might benefit at least the current regime.

Even if agencies actively desire review, an automated system may be more successful because agencies may not be able to effectively solicit review from higher-level executive figures under a case-by-case system. In other words, high-level officials may deprioritize adjudication oversight just as agencies might if left to their own devices. As Andrias notes, part of the reason that enforcement efforts do not receive the same upper-level involvement as rulemaking is because they do not attract the same attention from the polity.[268] Similarly, among the many responsibilities competing for the President's and other executive officials' time, there is a relative lack of political benefit in ensuring high-quality adjudicatory outcomes as compared to high-quality

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[265] An example of this dynamic would be if the DOJ is concerned that the DHS is implementing a lax standard in its review of asylum cases. *See* Shah, *supra* note 203, at 130 n.96.

[266] Nou, *supra* note 219, at 1761; *see also id.* at 1756–61.

[267] *See supra* section I.C, pp. 830–50.

[268] *See* Andrias, *supra* note 14, at 1073.

rulemaking outcomes.[269] These considerations, then, are likely to sway the interests of political appointees away from adjudication oversight, all things being equal. Because there may be little independent official interest in adjudication oversight, oversight that is structured and automatic would be better shielded from the whims of varying political priorities as well as from the self-insulation of jealous agencies. Further, should adjudicative matters drawing public interest arise,[270] politically minded higher-level officials would already be keyed into the issues involved in other relevant adjudications as a result of consistent prior oversight, and thus better suited and more quickly able to develop solutions to attendant problems.[271]

Further, a uniformly implemented system of oversight need not cast the agency as fully passive in the oversight process. As part of such a system, adjudicating agencies should be required to provide relevant information to higher-level officials. This intermediate step, suggested by Marisam for interagency dispute resolution in other contexts,[272] could help ensure the oversight committee is not overly taxed. In fact, this framework would mirror the current regulatory oversight process conducted by the OMB, in which the OMB requires agencies to submit detailed descriptions of their regulatory projects to aid its government-wide regulatory review.

Other specific questions remain. One concerns the timing of oversight — for instance, whether preapproval would be required for coordination that is not mandated by statute, or whether agencies would instead be held to a reporting requirement per the OMB's current obligations. Another question concerns the substance of review; in other words, what the reviewing body's priorities would be. For instance, the body could emphasize cost-benefit analyses in its evaluation of coordination schemes, review policies with an eye to efficiency, or prioritize due process interests. The answers to these questions — and the development of a model of oversight in any specific adjudicative setting — are dependent on context. Truly, the stakeholder interests that

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[269] *See id.*

[270] One example can be found in the immigration context, where a study showing large discrepancies in determinations of asylum cases gathered substantial negative media. *See* TRAC IMMIGRATION, SYRACUSE UNIV., IMMIGRATION JUDGES (2006), http://trac.syr.edu/immigration/reports/160 [http://perma.cc/75V6-UQ5E]; *see also, e.g.*, Rachel L. Swarns, *Study Finds Disparities in Judges' Asylum Rulings*, N.Y. TIMES (July 31, 2006), http://www.nytimes.com/2006/07/31/us/31asylum.html.

[271] *See* Marisam, *supra* note 3, at 205 (citing Magill & Vermeule, *supra* note 15).

[272] *See id.* Marisam notes that in the context of disputes within interagency administration:

> Long before the White House and Congress may get involved, an agency can elevate a decision by an acting agency to a higher level official within that acting agency. Just as circuit courts and not the Supreme Court handle most appellate work, this intermediate elevation step within agencies is likely how the bulk of interagency disputes are handled.

Id. (footnote omitted).

are especially important in one setting may not be as important in another. For instance, in large adjudicatory schemes with tenuous financial structures such as Social Security, cost-benefit analyses may be the most salient concern of an overseeing entity. Alternatively, in settings where adjudication is intended to be responsive to matters of national security, efficiency in coordination could be more important. Or in light of recent immigration class action lawsuits,[273] oversight in this context might reasonably emphasize the impact of coordination on due process.

Finally, there are broader, related inquiries that concern those very institutional matters implicated by interagency adjudication. One inquiry is whether the coordinating entity's impact should be reflected in reviewable records, and if so, to what extent. Another inquiry concerns whether and how courts may oversee the coordinating entity. It is also worth considering when legislation would be required to set up the system, and when the President might otherwise do so by executive order. Each of these matters, which I believe represent important dynamics that administrative law scholars must confront so as to fully comprehend the executive branch, is one I hope to grapple with in future work.

As noted, this Article is intended to start the conversation about what such oversight might look like in practice, but cannot provide the kind of detail necessary to implement any new oversight scheme from scratch. However, to bring the topics covered in this Article full circle, the next section focuses on the possible connection between the structure of oversight and the specific typology introduced earlier.

4. Oversight by Typology. — Finally, this section briefly explores the potential application of executive oversight to each category of coordinated administrative adjudication identified by this Article, including the *A.B.T.* and *Franco-Gonzalez* cases discussed earlier, the underlying adjudicatory processes of which fall into the phased category. Indeed, the phased model is somewhat common in that it is part of almost every substantive area discussed in this Article. Further, because executive oversight would help to ensure the quality of high-volume coordinated adjudication processes — like immigration, employment, and Social Security — it would be especially beneficial to the phased model. The often-statutory delineation of this model does not mean it does not require oversight. For instance, despite the fact that immigration is a statutory coordination regime, Congress is largely unaware of the actual quality of immigration adjudications and the impact of poor quality interagency communication and coordination

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[273] *See, e.g.*, Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

on individual claimants' rights.[274] Oversight may improve these functions and even shore up applicants' access to "two bites at the apple," by preventing a shift of responsibility from the initial agency to the one that is more visible in court, incentivizing improvements by the initial agency, and perhaps providing a level of bilateral exchange that is otherwise absent from the unilateral veto system typified by the phased model.

Outside oversight could have alleviated the problems with immigration adjudication that led to both the *A.B.T.* and *Franco-Gonzalez* cases. In *A.B.T.*, ineffective communication and an inability to commit to a joint timeline for coordination and notice led to the significant issues underlying the litigation.[275] Much like in the regulatory context, in which agencies are pressured to develop effective rules in an efficient and responsive manner, an overseeing entity in this case could have observed and constrained the poor communication, coordination of processes, and development of policies to align the agencies' asylum clock to ensure accurate and timely notice.

Similarly, in *Franco-Gonzalez*, oversight could have both benefited the quality of the coordination and reduced the underlying multiagency marginalization of mentally disabled noncitizens in immigration proceedings.[276] Oversight might have spurred the DHS and the DOJ to expend the appropriate resources to accurately evaluate (and better communicate their respective evaluations of) those immigrants at risk for due process violations, and to train and foster communication among the individuals who handled their cases, including DHS enforcement (and related "medical" staff) and DOJ immigration judges. In addition, oversight could ensure that the joint DHS/DOJ nationwide policy that has been issued[277] is well implemented both within and across institutional boundaries and that relevant adjudicatory

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[274] For instance, congressional discussion about updates to the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.), and potential comprehensive immigration reform are very high level. For all the discussion of the failure of the immigration system, congressional and public conversations do not focus on the failure of immigration coordination. *See, e.g.*, David Abramowitz, *Passage of Human Trafficking Bill Sends Clear Message*, THE HILL: CONGRESS BLOG (Mar. 8, 2013, 8:45 PM), http://thehill.com/blogs/congress-blog/foreign-policy/287087-passage-of-human-trafficing-bill-sends-clear-message [http://perma.cc/HC6Y-M6UK]; Michael D. Shear & Ashley Parker, *Boehner Is Said to Back Change on Immigration*, N.Y. TIMES (Jan. 2, 2014), http://www.nytimes.com/2014/01/02/us/politics/boehner-is-said-to-back-change-on-immigration.html [http://perma.cc/K9VJ-NUR3].

[275] *See* A.B.T. v. U.S. Citizenship & Immigration Servs., No. C-11-2108, 2013 WL 5913323 (W.D. Wash. Nov. 4, 2013); *see also* Complaint for Injunctive & Declaratory Relief, *supra* note 24, at 4–5.

[276] *See Franco-Gonzalez*, 2013 WL 3674492, at *10–13.

[277] *See supra* note 37 (discussing this joint policy).

processes remain of high quality even after some of the press coverage and related public pressure have passed.

Further, mindful oversight could help reduce agency duplication of both the process and the expertise necessary to adjudicate an administrative claim. At the very least, oversight might be especially important for those phased processes that both are not defined by statute and have no consistent circuit court appeals process — in other words, those processes for which coordination is particularly shielded from transgovernmental authority.

Coordination in the substitutable model often begins with a unique, isolated transfer of jurisdiction that results in an ongoing process that is attenuated from legislative intent. As such, this type of coordination raises broader questions about the extent to which administrative redelegations can alter statutory delegations. In this model, coordination is likely to be defined by interagency agreements that remain unexamined precisely because they dislocate the agency jurisdiction originally determined by statute. Thus, oversight of the substitutable model should be two-fold: both front-loaded and ongoing. Ideally, oversight would thus ensure both that holistic transfers of jurisdiction are evaluated (and constrained, if problematic due to specific quality or broad institutional reasons) and that once these transfers occur, the agency or agencies to which the jurisdiction has been transferred function effectively. Otherwise, wholesale agency transfers of jurisdiction not only thwart legislative intent, but may also mutate administrative deference and even harm the quality of adjudicative processes in the long run. For example, the FDA currently has complete, nationwide control over the review of the legality of imported and exported drugs, even though it is twice removed from the agency (Treasury) to which Congress in fact delegated authority to accomplish this task.[278] Executive oversight would ensure that extensive delegation that was authorized by only interagency agreement both does not violate nondelegation principles and results in high quality outcomes.

Additionally, uniform, definitive oversight would be beneficial to the collaborative model for a number of reasons. Like the substitutable model, many of these types of coordinated adjudication relationships are defined extra-statutorily and without the potential for court review. More specifically, the determination of agency jurisdiction may also be made by agencies themselves without sufficient clarity regarding whether agencies have the authority to make these determinations. In addition, many (including, for instance, the joint FDA, USDA, and law enforcement collaboration reviewing the quality of

[278] *See supra* pp. 842–44.

food during times of crisis[279]) are part of adjudicative processes that may not be appealed to the courts, effectively ensuring the entire collaborative coordinated process is rather concealed. And yet, general coordination problems are in fact intensified in the collaborative model.

For instance, the flexible, changeable nature of the coordination in cases under the collaborative model lends a scattered quality to the relevant adjudication structures and may contribute to opaqueness in the accompanying adjudication processes. Continuing executive oversight would increase uniformity in these types of adjudications over time, in part by aggregating information about these multi-agency processes that the agencies themselves may not be tracking. This collection of information would also improve the transparency of agency adjudication for individual claimants, which is often undermined by the relative inaccessibility of rules created by adjudication[280] and exacerbated in those adjudications involving simultaneous multi-agency coordination. In addition, regardless of model, any agency or leader undertaking executive oversight should prioritize high-profile and high-load areas of coordinated administrative adjudication, as this would maximize the benefit to agencies and the public given limited resources and political will.

Executive oversight could be beneficial in cases of coordinated administrative adjudication. However, there are also potential barriers to the establishment of effective oversight that should be considered during implementation — some of which are similar to the barriers found in other agency coordination contexts. The next section discusses these obstacles on a limited basis in the next section. In addition, in keeping with the jurisdictional and rule-of-law motivations underlying this project, it also identifies the extent to which oversight implicates the decisional independence doctrine, a potentially substantial obstacle to the establishment of oversight of administrative adjudication in particular.

C. Potential Obstacles

As noted earlier, executive oversight of coordinated interagency adjudication could be furthered by the President, Attorney General, or entities like the OMB or OIRA. In addition, the GAO has been particularly concerned with oversight of agency coordination and could be similarly employed in the adjudication context. This section will engage with some of the potential obstacles that executive oversight may pose in the adjudication context by drawing from oversight concerns

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[279] *See supra* pp. 847–48.

[280] *See* Eyer, *supra* note 198, at 665.

relevant to nonadjudicative administrative activities.[281] These obstacles include concerns surrounding transparency and accountability, the need for technical expertise, the potential for delay, interest group capture, and a lack of defined oversight authority. This section will also contend with the obstacles posed by the decisional independence doctrine. While there are no complete solutions to these concerns, keeping them in mind while establishing a coordinated adjudication oversight entity could allow for the incorporation of policies that reduce their impact.

1. Overarching Issues. — One concern to arm any new overseeing entity against, perhaps, is a lack of accountability or transparency in the oversight mechanism. At base, White House involvement in the oversight process may not measurably enhance accountability — rather, it may shield the process from public view more so than would a publicly driven oversight measure (such as the notice-and-comment process in rulemaking).[282] However, this concern is perhaps overstated, given that there may not be a public-driven response mechanism that is better suited to oversight of coordinated adjudication. Indeed, the court of appeals process — the best version of a public accountability check available in agency adjudication — does not help serve this oversight function in coordinated interagency adjudication processes because of either the lack of court access to information that has crossed institutional boundaries or the lack of court review altogether, as noted earlier in this Article.[283] Class action lawsuits are similarly ineffective at providing for efficient oversight. Such lawsuits rely on the existence of numerous violations in order to be launched, and the implementation of executive oversight would hopefully curb violations before they got to the stage where class actions become viable.

In contrast, White House oversight through bodies such as OIRA and the OMB has a number of advantages. Arguably, OIRA represents national interests as opposed to the more parochial focus of par-

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[281] Note that this section will focus only on those critiques of executive oversight that could also apply to the adjudication context. For instance, there are many critiques of the OMB, but some of them are specific enough to the values of rulemaking that they are not the focus of my conversation. *See, e.g.*, Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1749–50 (2008) (arguing that the OMB hinders rulemaking by "reducing the stringency of proposed regulations," *id.* at 1750).

[282] *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 82 (2006) (finding White House involvement in the EPA less transparent than the actions of the EPA itself); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1356 (2013) (suggesting that OIRA has been slow to adopt measures that open OIRA review up to public scrutiny).

[283] *See supra* p. 851.

ticular agencies;[284] as such, its potential for selectivity in adjudication oversight — for instance, by focusing on adjudication schemes with a high public impact, like immigration, employment/EEOC, and Social Security benefits administration — could lead to judgments rightly made.[285] Further, because the OMB is not subject to the individual pressures that private groups impose on agencies,[286] this more central oversight may reduce factionalism.[287] Such oversight need not be overbearing on individual agencies. The key to temperate oversight may be consistency.[288] In addition, at the very least, commentators have noted the tradition that OIRA administrator nominees tend to be relatively independent, technocratic figures (rather than individuals with close ties to interest groups).[289] To some extent, the involvement of upper-level (presidential) leadership may even enhance transparency by "enabling the public to comprehend more accurately the sources and nature of bureaucratic power."[290] However, added excessive transparency could subject officials to political considerations at the expense of constructive debates.[291]

Another concern is that overseeing personnel may lack the technical background to make necessary substantive judgments,[292] or that the overseer might politicize the application of technical and legal expertise.[293] Indeed, in contexts with "massive problems" when multiple components of government are in play and/or significant scientific or technical expertise is embedded in the decision(s),[294] executive over-

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284 *See* Sally Katzen, Correspondence, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State,"* 105 MICH. L. REV. 1497, 1505 (2007).

285 *See id.* at 1509 (discussing this virtue of OIRA in the context of rulemaking).

286 *See* Livermore & Revesz, *supra* note 282, at 1362–63.

287 In addition, while centralized executive branch review facilitates presidential control over agencies, there is little evidence that the President is less subject to capture than agencies themselves. It is not clear that OIRA is more representative of the President than agencies in administrative processes, which leads to the possibility that an overseeing entity in administrative adjudications could serve as somewhat of an "agency advocate," if this would benefit agency adjudications. *See id.* at 1356–61.

288 Ad hoc/one-shot interventions pose the greatest risk that the OMB might displace, rather than oversee, agency authority. Sunstein, *supra* note 257, at 461–62.

289 Vermeule argues that the convention of appointing relatively independent, nonideological, and technocratic OIRA administrators has developed such that departure from this convention would have serious political consequences. *See* Vermeule, *supra* note 51, at 1206 ("Although OIRA is, nominally speaking, an office within an office within the Executive Office of the President, and thus firmly under presidential control, commentators discern a 'tradition,' or convention, by now firmly established, that the OIRA Administrator must be a highly credentialed and largely nonpartisan technocrat, who enjoys a substantial measure of de facto autonomy.").

290 Kagan, *supra* note 239, at 2331–32.

291 *See* Livermore & Revesz, *supra* note 282, at 1356.

292 *See* Morrison, *supra* note 255, at 1066; Pildes & Sunstein, *supra* note 245.

293 Sunstein, *supra* note 257, at 457.

294 *See generally* J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59 (2010) (de-

sight has not been deemed the best response.[295] But for purposes of more formal adjudications, a White House entity working primarily as a *coordinator* (as opposed to a substantive stopgap) could avoid this potential pitfall.

One more potential issue is that the introduction of executive oversight could lead to (further) delays in the administrative adjudication process.[296] Oversight could theoretically exacerbate the already slow and burdensome nature of administrative adjudication. However, oversight need not be linked to the timelines of adjudications themselves. For instance, an overseeing agency that emphasizes continually improving the communication between the DHS and the DOJ on immigration adjudication matters need not connect those recommendations to a specific adjudication timeline. Regular oversight and "tuning up" of this interaction might serve as a prophylactic measure, ensuring that interagency coordination is well oiled and thus more responsive when crises appear. Further, the threat of delay can prove a "powerful tool,"[297] for instance to motivate agencies to pay greater attention to their processes and to implement recommendations more precisely (so as to avoid future micromanagement and attendant delay). In any case, delay may be a reasonable trade-off to ensure that processes are of high quality; the amount of delay may also vary depending on the extent of change to the existing coordination structure suggested by the overseeing entity.

Additionally, potential politicization and the fear of interest-group capture are other obstacles to executive oversight worth considering.[298] One specific area of interest is, for instance, the selection of agency roles,[299] which may be of concern even though (as I argue in the next section) there is reduced adjudicatory independence in the context of interagency coordination and therefore perhaps less concern that White House oversight may have an outsized influence on adjudicators. In any case, there is a fear that an OMB-type overseer might unduly politically influence agencies' own analyses.[300] However, at least one study supports a view of White House review as at least partially

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scribing three examples of such "massive problems" that require that agencies have significant scientific or technical expertise in order to regulate effectively).

[295] *See* J.B. Ruhl & James Salzman, *In Defense of Regulatory Peer Review*, 84 WASH. U. L. REV. 1, 5–6 (2006) (arguing for peer review among agencies when issues of scientific and technical expertise are involved in agency decisionmaking).

[296] *See* Pildes & Sunstein, *supra* note 245, at 5.

[297] Bruff, *supra* note 253, at 560.

[298] Livermore & Revesz, *supra* note 282, at 1356–61.

[299] I would like to thank Professor Jason Marisam for this insight.

[300] *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1169 (2014); Lisa Heinzerling, *Who Will Run the EPA?*, 30 YALE J. ON REG. ONLINE 39, 39 (2013). Perhaps this problem can be deterred by focusing oversight, as I note earlier, on only ex ante review of coordination.

technocratic, substantive, and unbiased.[301] More specifically, OIRA review does not appear to favor particular groups, seems to concentrate on areas of White House expertise, avoids deferring to agency prejudgments, and increases specialization by reviewers (thus having the added benefit of reducing costs).[302] The amount of institutional resources dedicated to presidential review also arguably supports an inference of substantive, meaningful review.[303] In addition, for a generalist overseeing body, capture will be more difficult because incentives are diffuse and diluted.[304] Coordination between agencies may also blunt the bias of any one, captured agency.[305]

A final potential problem is a lack of authority. While presidential and court oversight may result in directives that agencies may not sidestep, OMB/OIRA and GAO oversight may not be as closely heeded by agencies.[306] On the other hand, one benefit of less authoritative oversight is the possibility of a more balanced assessment.[307]

Overall, there are various suggestions from the rulemaking context that might improve the oversight of adjudication, if implemented within an overseeing entity. Perhaps, to be more effective, "[any] institution charged with oversight should understand its mission to include not simply the reduction or veto of [agency action], but also its initiation and sponsorship."[308] At the very least, a new overseeing entity should focus on the harmonization of agencies[309] and subsequent improvement of administrative due process, as well as implement standardized guidelines and consider the distributional consequences of all regulations.[310] To combat agency capture, the entity could police agency inaction (to ensure high-quality processes) as well as agency action.[311] Indeed, as has been suggested elsewhere, the creation of an institution within the OMB to coordinate with agency officials early rather than focus only on back-end "review" and discussion would be

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301 *See* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 873–74 (2003).

302 *See id.* at 873–76.

303 *See id.* at 873.

304 Livermore & Revesz, *supra* note 282, at 1362.

305 *Id.* at 1367.

306 *See, e.g.*, Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 491–92 (2011). *See generally GAO's Role in Supporting Congressional Oversight: An Overview of Past Work and Future Challenges and Opportunities: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 110th Cong. (2007), http://www.gpo.gov/fdsys/pkg/CHRG-110shrg36307/html/CHRG-110shrg36307.htm [http://perma.cc/DS4H-9YDH].

307 *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2371 (2006).

308 Sunstein, *supra* note 257, at 459; *see also id.* at 488–89 (discussing the rulemaking context).

309 *See* Bagley & Revesz, *supra* note 239, at 1312.

310 *See id.* at 1313–14.

311 Livermore & Revesz, *supra* note 282, at 1382–83.

beneficial, perhaps, to both the rulemaking and adjudication contexts[312] — especially if focused on politically important adjudicatory regimes and exercised in a sensitive manner.[313]

2. Reconciling Decisional Independence Doctrine. — Even though all administrative agency actions (including adjudication) are by definition executive,[314] "[d]ebates over judicial independence [in administrative tribunals] have been with us for centuries and are not likely to go away soon."[315] The idea that administrative law judges and other administrative adjudicators should retain decisional independence[316] similarly to Article III judges[317] has long allowed agency adjudicators[318] to function more independently than other mid- and lower-level

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[312] *See* Pildes & Sunstein, *supra* note 245, at 9.

[313] *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1449 (1992).

[314] *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1873 n.4 (2013) ("But the dissent overstates when it claims that agencies exercise . . . 'judicial power.' . . . Agencies . . . conduct adjudications . . . and have done so since the beginning of the Republic. These activities take [a] . . . 'judicial' form[], but they are exercises of — indeed, under our constitutional structure they *must be* exercises of — the 'executive Power.'" (citations omitted)); INS v. Chadha, 462 U.S. 919, 953 n.16 (1983).

[315] Legomsky, *supra* note 227, at 369.

[316] *See* Magill & Vermeule, *supra* note 15, at 1075; Vermeule, *supra* note 51, at 1211–12; *see also* Butz v. Economou, 438 U.S. 478, 513 (1978) ("[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency."); Sant'Ambrogio & Zimmerman, *supra* note 231, at 2031 & n.205.

[317] *See* William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 404 (2000).

[318] The term "agency adjudicator" refers to the body of bureaucrats that adjudicate the full breadth of benefit-oriented, punitive, and other types of administrative decisions, including, but not limited to, the processes brought to light in this Article. Agency adjudication structures may be comprised of a hierarchy of adjudicators — such as that which characterizes immigration judges and members of the BIA — or may consist of a fairly horizontal network of decisionmakers. Further, there are three relatedly powerful characteristics of agency adjudicators: decisional independence, discretionary decisionmaking, and the ability to set nationwide standards. Both ground-level adjudicators (like immigration judges) and those with greater authority (such as Board members) can and do exercise decisional independence and discretion, although the degree and effect of such independence vary from context to context. *See, e.g.*, Stephen H. Legomsky, Response, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 472 (2007) (discussing options for "protecting the independence of both immigration judges and BIA members"); Scott Rempell, *Judging the Judges: Appellate Review of Immigration Decisions*, 53 S. TEX. L. REV. 477, 482 (2012) (implying that immigration judges have less decisional independence than agency adjudicators not housed in an agency). Lasting standards are set not necessarily by individual adjudicators, but by networks of adjudicators as a whole, which then lead to the final determination of policy. For instance, a Board member may affirm an immigration judge's decision, thus setting precedent and shaping forthcoming policy, including those standards that an immigration judge may choose to apply in the future. Again, the relative power of any adjudicator or system of adjudicators to set a standard is likely dependent on the substantive area in which she works and her decisionmaking context.

bureaucrats.[319] For this reason, the decisional independence doctrine affects the interactions between administrative adjudicators and agency leadership, whose oversight powers are watered down or nullified because administrative adjudicators are functionally exempted from agency hierarchy and oversight.[320] In other words, the result of this doctrine is that the administrative adjudicator is king of his own domain, and is able to sidestep executive oversight[321] regardless of how insular or politicized his adjudication practices may be. On the flip side, executive leadership may wish to further policy that extends beyond the purview of adjudicative functions or outcomes, which means that agency policy and adjudicative approaches may fundamentally (or paradoxically) diverge.[322] Thus, decisional independence doctrine is an obstacle to executive oversight not encountered in other administrative coordination contexts.

As Vermeule notes, the grounds for limiting executive oversight "of the adjudicative activities of executive agencies are at best dubious. The real source of the limitation is a network of tacit unwritten conventions that protect the independence of even executive agencies when engaged in adjudication."[323] Further, the results of the decisional independence doctrine are problematic. However, even if this were not the case, there has long been confusion "about both the meaning of 'decisional independence,' and the extent to which such independence limits the otherwise appropriate authority of the Agency to manage the performance of the ALJ corps."[324] This confusion reveals that a wholesale, inflexible application of the decisional independence doctrine to the administrative context is likely not justified, regardless of the outcome of its application. As Professor Bill Araiza notes, "the differences between agency and judicial adjudicators are . . . fundamental."[325] He argues that administrative law judges are

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[319] *See* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1472–73 (2012).

[320] *See* Magill & Vermeule, *supra* note 15, at 1075.

[321] *See* Yackee & Yackee, *supra* note 319, at 1473 ("[A]dministrative law judges tasked with pronouncing agency law through adjudications enjoy some measure of decisional independence from other agency staff, including from senior policymakers.").

[322] It is worth noting that a potential benefit of decisional independence is adjudicators' abilities to limit the politicized influence or expectations of agency leaders, to the extent adjudicators are motivated to do so. In any case, however, decisional independence doctrine limits the opportunity to check and improve adjudicator discretion that is distorted by the biases of either adjudicators themselves or bureaucrats seeking to sway adjudicators.

[323] Vermeule, *supra* note 51, at 1211.

[324] Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment in Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203, 206 (2002) (quoting Memorandum from Shirley S. Chater, Comm'r, Soc. Sec. Admin., to the Soc. Sec. Admin. Exec. Staff (Jan. 31, 1997)).

[325] Araiza, *supra* note 317, at 404. Araiza also notes that "there has always been an aversion to equating agency action completely with the action of its constitutionally-recognized cousin be-

not analogous to Article III judges because they "lack the institutional independence and tenure" that define federal judges.[326] Decisional independence is thus a feature of Article III judicial review that has been imported into the administrative adjudication context[327] despite the fact that agency adjudicators, unlike judges, are part of the branch of government that is specifically tasked with being responsive to larger public policy issues and the polity at large.

First, the supposition that administrative adjudicators should possess decisional independence assumes that the adjudicator is able to retain actual, institutional independence. This is another domain in which the parallels drawn between Article III judges and administrative adjudicators falter. Unlike a judge, an administrative adjudicator is associated with a particular executive agency that often opposes the results sought by individuals seeking impartial decisions from that very administrative adjudicator, who may be fundamentally influenced by the fact that his or her own institution seeks a particular outcome.

Second, administrative adjudicators do not "purport only to apply existing law" as Article III judges do;[328] instead, administrative adjudicators "have the power to make law in the course of deciding cases."[329] This power, combined with their sustained decisional independence, allows administrative adjudicators to "enjoy more or less free rein to adopt what they consider to be the best rule,"[330] notwithstanding the highly deferential "arbitrary and capricious" standard typically used in judicial review of agency adjudications.[331] Indeed, administrative adjudicators often have a wide berth not only to make individual case determinations with a great deal of discretionary flexibility, but also to determine the parameters of that discretionary power in general and to follow broader agency policies and guidance as much or as little as they like.[332] This model could lead to instances in which one or a handful of administrative adjudicators shirk broader agency

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cause of crucial differences between the two." *Id.* at 352; *cf.* Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 558 (2013) (describing the relationship between congressional and agency action in the immigration context).

326 Araiza, *supra* note 317, at 352.

327 *See id.* ("Because agency action can be roughly analogized to adjudication, legislation, and enforcement, the tendency has been to force into agency procedures the features found by the 'real' adjudicators, legislators, and prosecutors, namely, courts, legislatures, and prosecutors.").

328 *Id.* at 353.

329 *Id.*

330 *Id.*

331 *See, e.g.*, Fox v. Clinton, 684 F.3d 67, 75 (D.C. Cir. 2012) (describing arbitrary and capricious review in the adjudication context as "fundamentally deferential").

332 *See* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 154 (2006) (discussing "[j]udicial deference to agency adjudicators" and noting that courts "give agency adjudicators broad discretion to fashion procedures and remedies appropriate to their particular context").

goals without much deterrence or pushback. Ironically, another problematic outcome is one in which agency policies and goals have an inordinate bearing on adjudicatory outcomes, because of the extent to which the adjudicator is influenced by but not, subsequently, disabused of the notions of institutional forces. This is the case, for instance, in the asylum/immigration context, where the DHS's national security goals often take precedence over more individualized case determinations.[333] Both the potential shirking of agency goals and overincorporation of those goals into adjudicator outcomes call into question and are problematic side effects of the application of decisional independence to the administrative context.

Arguably, decisional independence and interagency adjudication intersect — in particular, those parts of coordinated adjudication that escape judicial review and that may benefit from focused oversight even if no similar oversight is implemented for intra-agency processes. More specifically, coordination may itself reduce decisional independence in fact, which indicates that the decisional independence doctrine is more porous than it might appear at first glance, especially in the interagency context. If so, this further justifies a proposal for executive oversight of coordinated interagency adjudication. More specifically, there is theoretically a reduction of functional decisional independence by the presence of coordination itself, given the naturally diminished decisional control experienced by administrative adjudicators who are required to work with and account for other agency actors involved in the adjudication process at hand.

Coordination increases agency adjudicators' institutional dependence by intensifying the impact of institutional values on adjudication outcomes.[334] And yet, coordination can also signal agency decentralization, which has often been found to decrease hierarchical control and thus increase bureaucrats' functional freedom.[335] However, the relationship between decentralization and independence appears to be different in the coordinated interagency adjudication context.

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[333] *See* Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 48 (2012) ("Within the DOJ . . . resources for nearly all functions — including immigration adjudication — have been squeezed by the redirection of resources toward national security functions and prison operations.").

[334] *See* Araiza, *supra* note 317, at 354; *see also* Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1520–21 (2013).

[335] *See, e.g.*, Nou, *supra* note 219, at 1782–803 (discussing means through which bureaucrats attempt to avoid centralized review). *See generally* Bagley & Revesz, *supra* note 239 (arguing in favor of administrative centralization). Outside of the administrative law context, scholars have made parallel points about the effects of decentralization. *See, e.g.*, Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1628–29 (1988) (discussing the dynamics of decentralization in Congress); Sally Holewa, *Court Reform: The North Dakota Experience*, 30 JUST. SYS. J. 91, 104 (2009) (discussing decentralization in the context of courts).

The usual instance in which decentralization increases an agency's independence is one in which increased decentralization means the agency is no longer controlled by an agency network or hierarchy and thus retains greater control over the agency process and subsequent outcome in question. In this paradigmatic case, once an agency is decentralized from the interagency hierarchy, the process itself conversely becomes *centralized* within the single agency granted (or restored) the power to control the associated agency process. Thus, it is agency *de*centralization and process *centralization* that together increase adjudicator independence in the classic model.

In the coordinated interagency adjudication context, there is both agency *de*centralization *and* process *de*centralization — in other words, the transformation of a traditionally single-agency process such as adjudication into a multi-authority coordinated interagency process. Thus, an adjudication process involving multiple agencies is *de*centralized, in that it is no longer housed in a single agency. This framework subsequently reduces the ability of each agency involved in this single process to act of its own accord. Put another way, when multiple agencies are added to a single adjudication process, the external demands on any given actor are in fact increased, because each participating agency influences the process and thus demands incorporation of its interests into the process to some degree. As a result, each agency actor (including adjudicators) involved in the process is beholden to players not only within her agency, but also to those actors with various interests, expectations, and demands outside of it. Thus, in these processes, people or entities outside the adjudicating agency often participate — albeit indirectly — in resolving any given administrative claim.

For this reason, decentralization of a process that becomes the responsibility of multiple agencies may increase each agency's adherence to the desires of the other agencies involved. The result is decreasing institutional independence from other agencies (and from the impact of interest groups and other political concerns on the agencies in the procedural chain), despite the decentralization of the process. Under a coordination regime, each agency must rely on each other agency involved to uphold its responsibility. Further, no agency can make decisions of its own accord in an institutional vacuum. As a result, agency *de*centralization and process *de*centralization together decrease independence in the coordinated adjudication.

One example of this dynamic is when an agency is dependent on another agency's factfinding or expert contribution to fulfill its own adjudicatory responsibility. Another example of this institutional dependence dynamic can be found in the conflicting asylum policies is-

sued by the DHS and the DOJ with respect to domestic violence victims.[336] While DHS has long granted asylum to noncitizen victims of relationship or spousal abuse in a manner that conflicts with DOJ policy, the mere fact that the DOJ is part of the adjudicative process with the DHS has led to informal constraint on the DHS's domestic violence-related asylum grant policy.[337] This result is despite the fact that the DOJ's input is not technically required for the initial DHS asylum adjudication in which these grants to domestic violence victims have long occurred.

Although coordinated interagency adjudication features less robust decisional independence — which, perhaps, reduces the requirement that a high level of decisional independence be preserved, to the extent this independence is no longer possible — the introduction of executive oversight might introduce other political pressures (outside of interagency influence) that weaken the likelihood that an adjudicator bases his decision solely on the record. The concern that executive review may unduly influence an otherwise highly independent adjudicator is thus not fully mitigated by the reduction in adjudicator independence caused by coordination.[338] While this concern is significant, as noted earlier in this Article, it may be somewhat reduced if the concerted focus of executive oversight is solely on the quality of the coordination between agencies, and not on substantive outcomes or necessarily even the structure of interagency adjudication processes.

Coordination also decreases agencies' sense of responsibility.[339] Thus, one agency can blame another agency if the coordinated adjudication is incomplete or completed defectively. However, this is a tack an agency cannot take if it is fully responsible for the task, or at least an option that it can draw on less if it is the agency in which the task is centralized or primarily located.[340] In addition, agencies are fundamentally influenced by other agencies' approaches to any process in which multiple agencies are involved. In this way, perhaps, the more an administrative adjudicator lacks institutional independence, the less well-situated she is to make measured judgments free of political or personal biases, and the more important it is that her practices be reviewed by executive leadership or an agency outside of the component that directly employs the adjudicator.

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336 *See* Shah, *supra* note 203, at 189.

337 *See id.* at 188–89.

338 I would like to thank Professors Bill Araiza, Rachel Barkow, and Jennifer Nou for this insight. *Cf.* Andrias, *supra* note 14, at 1071–72 (noting the risk of partisan politics in executive oversight and advocating for a formal coordination system rather than review of individual enforcement actions).

339 *See* Shah, *supra* note 8, at 19–20.

340 *See id.*

Overall, the decrease in agency decisional independence in instances such as these fundamentally shifts administrative tribunals toward categorization as "executive," and away from their construction as "judicial" bodies with "judicial power." This shift, in turn, dilutes both the ideal and the subsequent practical requirements of administrative decisional independence. Thus, the presence of coordination in interagency adjudication opens the door to at least a minimal level of executive oversight. As such, the construction of a system of executive oversight must be responsive to the reduced, but not eliminated, application of decisional independence doctrine.

CONCLUSION

This Article argues that coordinated interagency adjudication is a significant, widespread administrative structure that has thus far been overlooked by scholars, courts, and even agencies themselves. An examination of the broad phenomenon reveals that it exists in important areas of administrative law, hugely affects the public, and bears on important rule-of-law and jurisdictional questions. Because many public interest spaces where interagency adjudication exists escape courts' gaze, there is a need for executive oversight of these functions.[341]

Scholars' recent suggestions favoring executive oversight of coordination in the regulatory and enforcement contexts[342] are not easily imported into the adjudication context, where oversight may run afoul of the longstanding decisional independence doctrine. However, while the suggestion of executive review is a departure from the current mantra that agency adjudication should develop without central oversight and on a case-by-case basis,[343] higher-level executive control could remain consistent with an updated understanding of the decisional independence doctrine that recognizes the extent to which administrative tribunals are, in fact, "executive powers" and not "judicial bodies,"[344] Especially within coordinated interagency adjudication frameworks. This consistency would be accomplished, in part, by ensuring that the primary focus of executive oversight is on the structure of agency coordination,[345] and not on the substance of administrative decisions.

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[341] For a discussion of this topic, see generally *id.* (discussing the limits of the judicial review of interagency adjudication processes).

[342] *See, e.g.*, Freeman & Rossi, *supra* note 2, at 1151 (suggesting that "carefully targeted and managed interagency coordination can help to ameliorate . . . dysfunction").

[343] *See, e.g.*, Magill & Vermeule, *supra* note 15, at 1075.

[344] *See* sources cited *supra* note 314.

[345] *See* Andrias, *supra* note 14, at 1101 (stating that "presidential attention to enforcement should be focused on facilitating interagency coordination").

Besides the matters explored in this Article, a number of open questions remain. In particular, the effects of coordination on the quality of specific administrative adjudications comprise an interesting and useful question requiring additional study. In addition, a discussion about the normative impact of the complex, often inconsistent, and flexible processes by which multiple agencies adjudicate individual claims in areas where there are broader executive branch goals, would benefit both individual constituents and the agencies tasked with adjudicating their claims. Another important issue concerns the question of both the nature and function of judicial review in coordinated administrative adjudication and other multi-authority agency processes, and the extent to which interagency adjudication destabilizes assumptions made by scholars of administrative deference; this is a challenge I have taken up in another work that both supports this Article and stands as a substantively separate inquiry.[346] A final inquiry concerns the relative merits and impact of oversight conducted by independent, as opposed to executive, agencies.

This Article sheds light on essential questions about whether "coordination tools" indeed "merit a place" next to "the choice between rulemaking and adjudication as the key modal decision an agency makes,"[347] whether they might more realistically be seen as simply tools for the ends of adjudication or rulemaking instead of ends in and of themselves, or whether they merely legitimize the increasingly and complexly self-interested relationships that agencies develop with one another. I suspect that, in the end, coordination could easily be characterized by each of these descriptions in turn. Moving forward, the most accurate description will likely be determined by the precision and care with which agencies implement coordination in administrative adjudication and other multi-authority interagency processes as a whole, notwithstanding their authority to do so and the impact these processes have on the balance of executive branch power.

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346 *See* Shah, *supra* note 8, at 12–17.

347 Freeman & Rossi, *supra* note 2, at 1211.