

Congressional Control Over Agencies: The Problem of Coercive Guidance
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Introduction

A central goal of administrative law is balancing executive discretion with legislative control. It is of course a commonplace that day-to-day administrative policy is made largely by the executive branch, without direct legislative involvement and with only vague legislative instructions. But even if that legislative control operates only in the background and at the margins, admin-

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istrative law aims to preserve it. Indeed, it is the *possibility* of such control that makes possible many proposed reforms of the administrative state, such as the REINS Act,¹ or alternative framework statutes,² or more specific revisions of specific agency powers.³

Today, the legislative bounds of the administrative state are reflected both in substantive constraints on rulemaking and in transubstantive procedural constraints. The substantive constraints can be found in the statutes that set out each agency's powers and the directives it is to implement. (We might call these the “*Chevron* Step One” constraints, to reflect the boundaries of the zone of indeterminacy in which agencies are free to act.)⁴ The procedural constraints can be found in other parts of administrative law such as the Ad-

¹ See generally David Schoenbrod, *How REINS Would Improve Environmental Protection*, 21 Duke Environmental L. & Pol. Forum 347 (2011); Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 Legis. & Pub. Pol. 131 (2013); Jonathan H. Adler, *Placing “REINS” on Regulations: Assessing the Proposed REINS Act*, 16 Legis. & Pub. Pol. 1 (2013). See also Stephen Breyer, *The Legislative Veto after Chadha*, 72 Geo. L. Rev. 785 (1984) (first proposing similar idea).

² See, e.g., Conor Raso, *Will Congress Make Rulemaking A Practically Impossible Task?*, Notice & Comment, (Jan. 26, 2016), <http://www.yalejreg.com/blog/will-congress-make-rulemaking-a-practically-impossible-task-by-connor-raso>.

³ See, e.g., Naomi Jagoda & Cristina Marcos, *House Passes Bills to Enhance IRS Oversight*, The Hill (Apr. 21, 2016), <http://thehill.com/blogs/floor-action/house/277125-house-passes-bills-to-enhance-irs-oversight> (describing bills that would revise IRS's powers); Barbara van Schewick & Morgan N. Weiland, *New Republican Bill Is Network Neutrality in Name Only*, 67 Stan. L. Rev. Online 85 (2015) (describing bill that would constrain FCC powers).

⁴ *Chevron v. NRDC*, 467 U.S. 837, 842-845 (1984). I use the “step one” terminology without meaning to take a position on how many steps *Chevron* really does or should have. Compare Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 Va. L. Rev. 597 (2009) with Richard M. Re, *Should Chevron Have Two Steps?*, 89 Ind. L.J. 605 (2014).

ministrative Procedure Act.⁵ (We might call these the “APA” constraints.) These limits might be relatively modest, but they still play an important role in administrative law. Indeed, these limits have been said to be part of the bargain justifying broad executive delegations in the first place.⁶

One challenge for those limits is the use of executive branch “guidance.” This term includes a range of informal but serious agency statements that describe how the agency plans to use its powers. In principle such guidance makes no new law, and so should raise no serious concerns about congressional control. Consider this benign description from the Final Bulletin for Agency Good Guidance Practices:

[G]iven their legally nonbinding nature, significant guidance documents should not include mandatory language such as “shall,” “must,” “required” or “requirement,” unless the agency is using these words to describe a statutory or regulatory requirement, or the language is addressed to agency staff and will not foreclose consideration by the agency of positions advanced by affected private parties. For example, a guidance document may explain how the agency believes a statute or regulation applies to certain regulated activities. Before a significant guidance document is issued or revised, it should be reviewed to ensure that improper mandatory language has not been used. As some commenters noted, while a guidance document cannot legally bind, agencies can appropriately bind their employees to abide by agency policy as a matter of their supervisory powers over such employees without undertaking pre-adoption notice and comment rulemaking. As a practical matter, agencies also may describe laws of nature, scientific principles, and technical requirements in mandatory terms

⁵ 5 U.S.C. § 551 et seq.

⁶ Adrian Vermeule, *No*, 93 *Tex. L. Rev.* 1547, 1558–1560 (2015) (reviewing Philip Hamburger, *Is Administrative Law Unlawful?* (2014)).

so long as it is clear that the guidance document itself does not impose legally enforceable rights or obligations.⁷

Yet even if the guidance does not directly “impose legally enforceable rights or obligations” it can nonetheless have important consequences on policy. Moreover, policy made through guidance can too easily evade both substantive and procedural constraints on agency rulemaking.

This is one of the considerations that motivates the round of recent scholarship attempting to define the legal limits of executive branch guidance. Those proposals include: the creation of a modified form of review for arbitrariness and capriciousness;⁸ the argument that courts should avoid imposing any *direct limits* on the issuance of guidance but encourage the use of notice-and-comment procedures by giving more deference to rules that use them;⁹ the possibility that judges should require agencies to explain and justify their use of guidance rather than rules;¹⁰ the possibility of “limited” public comment on

⁷ Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Register 3,432, 3,437 (Jan. 25, 2007).

⁸ Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 Tex. L. Rev. 331, 385-394 (2011).

⁹ Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. Chi. L. Rev. 1705 (2007); but see David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276, 302-319 (2010).

¹⁰ M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383, 1414, 1446-1447 (2004); see also Seidenfeld, *supra* note 8, at 364 n.174 (2011) (noting that this proposal “although not explicit, is implicit in [Magill’s] arguments”).

guidances before they are officially issued;¹¹ and the direct imposition of de novo review.¹²

Such proposals are valuable, but incomplete. They alter the kind of authority given to the guidance during judicial review. But the issuance of guidance – even if the guidance may ultimately be found to lack legal effect – can also act to deter judicial review in the first place. As I will argue below, when guidance acts to threaten harsh agency enforcement, regulated entities may quite rationally avoid challenging it, and hence acquiesce to it even if there is a substantial probability that the guidance conflicts with the law – i.e., Congress’s instructions. Hence, even a tweak to the substantive standards used to review executive branch guidance may be evaded by the agency when issuing this kind of guidance.¹³

¹¹ Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 Admin. L. Rev. 343, 398-405 (2009).

¹² Accord Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for De Novo Review*, J. of L. Analysis (forthcoming 2016) (manuscript at 23), available at

<http://jla.oxfordjournals.org/content/early/2015/11/18/jla.lav012.full>

¹³ To deal with this problem, Seidenfeld proposes “carefully massaging” the “doctrines of finality and ripeness” to enable guidance to be reviewed before it is enforced, Seidenfeld, *supra* note 8, at 375, and Epstein proposes a more dramatic and direct revision of those doctrines, Epstein, *supra* note 12, at 36-44. My proposal avoids the need to tinker with those doctrines or to confront the constitutional questions that would be raised by doing so. See generally Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153 (1987) (noting, and criticizing, the constitutionalization of ripeness doctrine); see also *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2340-41 (2014) (“The doctrines of standing and ripeness ‘originate’ from the same Article III limitation.”).

The goal of this paper is therefore to suggest a modest, and practically achievable, solution to the problem of coercive executive guidance. The solution is the use of the established doctrine of qualified immunity – a solution that, I will argue, could be imposed by legislative reform but also plausibly imposed by judicial interpretation of the APA. In making this modest proposal, I take much of the existing regime of administrative law as given. No doubt some would prefer to decimate the administrative state through a radical constriction of the non-delegation doctrine and of non-judicial adjudication; others might love to see the separation of powers eliminated entirely and given to the executive branch. This paper, however, deals only with the limited question of whether it is possible to preserve the existing system of legislative constraints and prevent executive creativity from systematically evading them.

The Problem of Coercive Guidance

The proposal I pursue here is limited to what we might call “coercive” guidance.¹⁴ This is guidance that informs regulated entities how the agency interprets the law regulating their primary conduct, and (implicitly or explicitly) threatens enforcement against those who disregard the guidance. Because of doctrines of finality and ripeness, the target of the guidance is often unable to proceed immediately to court to have the guidance’s legality tested. And the target is often *unwilling* to simply ignore it and call the agency’s bluff – when

¹⁴ Thanks to Zach Price for emphasizing this distinction and suggesting the term.

the penalties are high the substantial *possibility* that the agency’s claims could be right can make it too risky to fight them. This absence of judicial review is what lets guidance evade congressional mandates. It can succeed at its goal – exacting compliance from regulated entities – regardless of whether it would survive judicial scrutiny.

Examples of Coercive Guidance

Some important uses of guidance fall in this category. For example, the Food and Drug Administration has been said to have “largely forsworn regulation through notice-and-comment rulemaking,” regulating instead “through never-finalized ‘draft’ guidance documents.”¹⁵ Examples include guidances laying out the FDA’s disapprobation of off-label marketing,¹⁶ and pharmacy compounding.¹⁷ It also uses the threat of enforcement to regulate advertising and training otherwise outside of its statutory mandate.¹⁸ Although the guid-

¹⁵ Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 Geo. Mason L. Rev. 501, 533 (2015).

¹⁶ *Id.*

¹⁷ FDA, Compliance Policy Guide 7132.16 (later renumbered as 460.200) (1992) discussed by Epstein, *supra* note 12, at 26. This policy guide has since been overtaken by various events, see Examining Drug Compounding: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce, 113th Cong. 8–22 (2013) (statement of Janet Woodcock, Director, Center for Drug Evaluation and Research, FDA).

¹⁸ Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873, 892-893 (1997).

ances are not formally binding they are said to be “nothing short of an open threat to prosecute.”¹⁹

A more recent example might be the guidances issued by the Department of Education’s Office for Civil Rights. These have included a 2001 “policy guidance”²⁰ on sexual harassment and a 2006 “Dear Colleague” letter elaborating those standards.²¹ They have also included, more controversially, a 2011 “Dear Colleague” letter, this time on campus rape,²² and a 2014 document consisting of 50 pages of “Questions and Answers.”²³ These documents, for instance, took the position that “in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard” and not the higher “‘clear and convincing’ standard ... currently used by some schools.”²⁴ They also “strongly discourage[d] a school from allowing the parties to personally question or cross-examine each other during a hearing” and instead allow a third party to “screen the questions submitted

¹⁹ Epstein, *supra* note 12, at 26; Greve & Parrish, *supra* note 15, at 533.

²⁰ Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties: Title IX, U.S. Department of Education (January 19, 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

²¹ Stephanie Monroe, Dear Colleague Letter, U.S. Department of Education, (January 25, 2006), <http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>.

²² Russlynn Ali, Dear Colleague Letter, U.S. Department of Education (April 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

²³ U.S. Department of Education, Questions and Answers on Title IX and Sexual Violence (April 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

²⁴ Ali, *supra* note 22, at 11.

by the parties and only ask those it deems appropriate and relevant to the case.”²⁵

Overall, the guidance documents present a concrete precisification²⁶ of the statutory prohibition that nobody may, “on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,”²⁷ which has been held by the Supreme Court to forbid funding recipients from “deliberate indifference to known acts of peer sexual harassment.”²⁸ Again, the loss of federal funds is a powerful threat.

An even more recent example from the Department of Education is the department’s “Dear Colleague Letter on Transgender Students.”²⁹ This letter instructs schools to treat Title IX’s prohibition of discrimination “on the basis of sex”³⁰ as “encompassing discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.”³¹ It further instructs schools categorically to “allow transgender students access” to re-

²⁵ Questions and Answers, *supra* note 23, at 38.

²⁶ On “precisification,” see Lawrence B. Solum, *The Positive Foundations of Formalism*, 127 Harv. L. Rev. 2464, 2494-95 (2014) (book review).

²⁷ 20 U.S.C. § 1681.

²⁸ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

²⁹ U.S. Department of Education, Dear Colleague Letter on Transgender Students (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

³⁰ 20 U.S.C. § 1681.

³¹ Dear Colleague Letter on Transgender Students, *supra* note 29, at 1.

strooms and locker rooms that are “consistent with their gender identity.”³² Athletic teams may treat cisgender students and transgender students of the same gender identity differently only if they impose “age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport,” and may not “rely on overly broad generalizations or stereotypes.”³³ Again, it remains to be seen whether courts agree that this guidance takes the correct view of Title IX,³⁴ but unusual political mobilization may be necessary for a direct challenge to be brought to court.³⁵

“*In Terrorem*” and the Plea Bargaining Problem

Many scholars have noted that entities can find it easier to comply with coercive guidance than to challenge it³⁶—a point acknowledged by the Office of

³² *Id.* at 3.

³³ *Id.*

³⁴ One recent appellate decision deferred to this interpretation because the underlying statute and regulation were ambiguous, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, ___ F.3d ___, No. 15-2056, 2016 WL 1567467, at *5-*8 (4th Cir. Apr. 19, 2016), over a dissent, *id.* at *21-*24 (Niemeyer, J., dissenting).

³⁵ Complaint, *Texas v. Perez*, 16-cv-00054 (N.D. Tex., May 25, 2016); see also Mark Berman & Moriah Balingit, *Eleven States Sue Obama Administration Over Bathroom Guidance for Transgender Students*, Wash. Post (May 25, 2016) available at <https://www.washingtonpost.com/news/post-nation/wp/2016/05/25/texas-governor-says-state-will-sue-obama-administration-over-bathroom-directive/>.

³⁶ Seidenfeld, *supra* note 8, at 343; Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 Mo. L. Rev. 695, 703 (2007); Mantel, *supra* note 11, at 344.

Management and Budget’s bulletin as well.³⁷ Some scholars have pointedly challenged this effect as creating “exactly the *in terrorem* effect that should not be allowed in administrative law.”³⁸ And even scholars who champion the ability of agencies to influence conduct through coercive guidance agree that “using threats to avoid explicit congressional limits on power” is “presumptively abusive and ought to be avoided.”³⁹

Unfortunately, the structure of enforcement renders that “*in terrorem* effect”⁴⁰—and the consequent ability to “avoid explicit congressional limits on power”⁴¹—an almost inevitable consequence of the executive powers to enforce and decline to enforce most laws. Obviously if there were no FDA or no Office of Civil Rights imposing coercive sanctions in the first place then guidance would not have any *in terrorem* effect. Similarly, if enforcement were automatic rather than discretionary, then there would be fewer incentives for regulated entities to follow the agency’s views. The case would end up in court either way, so the best course would be to estimate the legally correct position, whether that was the agency’s position or not.

³⁷ Good Guidance Practices, *supra* note 7, at 3432 (“Guidance can have coercive effects or lead parties to alter their conduct.”).

³⁸ Epstein, *supra* note 12, at 26; see also *id.* at 23 (“[T]he guidance cases that raise the greatest anxiety are those where agencies strategically issue guidances when they want to short-circuit the formal processes in order to gain some tactical advantage to implement some policy scheme.”).

³⁹ Tim Wu, *Agency Threats*, 60 Duke L.J. 1841, 1843 (2011).

⁴⁰ Epstein, *supra* note 12, at 26.

⁴¹ Wu, *supra* note 39, at 1843.

Indeed, the near intractability of the problem is confirmed by considering the criminal law problem of plea bargaining. Many have lamented the disappearance of the criminal trial, which gives us some ability to test whether a defendant is legally innocent or guilty. The trial has disappeared because both prosecution and defense prefer to plea bargain. Executive guidance makes judicial review of agency action disappear in a similar way.

As in the agency context, prosecutors have the power to enforce laws with severe penalties – usually many years in prison – that most people would like to avoid. And as in the agency context, prosecutors also have the power to decline to bring some of the charges in most cases. This creates obvious room for bargaining, because if the defense can give the prosecution something it wants (for instance, avoiding the risk and cost of trial) then the prosecution might decline some of the charges in exchange.

And as in the agency context, it does little good to impose an external legal constraint if neither side is willing and able to enforce the constraint. For instance, the Federal Rules of Criminal Procedure require a judge to satisfy himself that there is a factual basis for the plea and that the plea is not coerced.⁴² But if both parties want the plea to go through, they will usually tell the judge that the plea is based in fact and the deal is voluntary.⁴³

⁴² Fed. R. Crim. P. 11(b)(2)–(3).

⁴³ See Julian A. Cook, III, *Crumbs from The Master's Table: The Supreme Court, Pro Se Defendants and The Federal Guilty Plea Process*, 81 Notre Dame L. Rev. 1895, 1900–01 (2006).

Similarly, even attempts to ensure that sentences do not depend on the exercise of one's trial rights don't solve this problem. For instance, the once-mandatory Federal Sentencing Guidelines made a defendant's sentence turn on all of his or her "relevant conduct," rather than only the crime of conviction, in an effort to reduce prosecutorial control over sentences.⁴⁴ But prosecutors still controlled whether to charge statutory mandatory minima and what inculpatory facts to bring before the court, and defendants still had strong incentive to accede to prosecutorial demands.⁴⁵ Again, so long as the prosecutor has the power to seek harsh sanctions and the related power not to do so, some form of plea bargaining seems inevitable.⁴⁶

To be sure, the situation of executive guidance is not exactly analogous in two major respects. For one thing, in the criminal context the main bargain is simply over the severity of the sentence,⁴⁷ whereas in the administrative context an agency often wants to change the primary conduct of the regulated entity. But if anything this makes bargaining even more inevitable in the guidance context, because there are more gains from trade between both sides.

⁴⁴ U.S. Sentencing Guidelines Manual § 1B1.3 (2015).

⁴⁵ Accord Frank H. Easterbrook, *Plea Bargaining As Compromise*, 101 Yale L.J. 1969, 1975 (1992).

⁴⁶ Accord Noah, *supra* note 18, at 908.

⁴⁷ There are exceptions, to be sure, such as corporate "deferred prosecution agreements," see Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (2014), or creative proposals to bargain over "unbundled" trial rights, see John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. Chi. L. Rev. 181 (2015). But the exotic nature of the exceptions demonstrates the ordinary rule.

For another thing, it is not clear that agencies face the same resource constraints as prosecutors; they may seek to avoid judicial proceedings less because of time and expense and more because of the possible outcomes of those proceedings. But again, that seems to make the executive guidance situation slightly harder to solve.

So one can see how both the agency and the regulated entities end up choosing to govern and be governed through executive branch guidance. (Even if, as with plea bargaining, some might describe the regulated entities' choice as somewhat coerced.) But from the systemic perspective, the deals have serious costs because they allow the evasion of Congress's choices on matters of both substance and procedure. What can be done to return executive guidance to congressional control?

The Qualified Immunity Solution

My suggestion is that we learn a lesson here from the tort doctrine of qualified immunity. Qualified immunity is usually invoked by government officials as a defense to constitutional tort claims. It provides that the official cannot be held personally liable for money damages unless their violation was one of "clearly established law."⁴⁸

In practice, this means that officials are not liable for violating a legal provision written at a high level of abstraction, but usually only once a court

⁴⁸ Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

has made it reasonably clear that the official's conduct was unlawful. Indeed, in many cases a court will simultaneously rule that an official's conduct was unlawful and yet also grant immunity;⁴⁹ this lets it regulate the official's conduct without punishing the official for litigating the question.

An avowed purpose of this doctrine is to give officials some freedom to act without "unwarranted timidity" due to overly crippling sanctions.⁵⁰ It could serve a similar purpose if afforded to regulated entities.

Consider how qualified immunity would change the dynamics of executive guidance. If presented with executive guidance that takes an aggressive or questionable interpretation of the underling statute, the regulated entity would now be able to more confidently go on about its business, ignoring the agency's position. It is still equally possible for the agency to impose sanctions and take the regulated entity to court, but the entity has been insured to some degree against the risk of losing a novel question of law. This makes it far more likely that debatable executive interpretations will end up subject to judicial review, and hence far more likely that they will ultimately be subject to congressional constraints.

While qualified immunity makes it easier for regulatory targets to avail themselves of judicial review, it nonetheless leaves agencies substantial en-

⁴⁹ This procedure is permitted by *Pearson v. Callahan*, 555 U.S. 223, 236-242 (2009). The extent to which courts actually avail themselves of this option is catalogued in Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 34-42 (2015).

⁵⁰ *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012).

forcement authority. *After* an adjudication in favor of the agency’s position, the regulated entity won’t have immunity in the future. Moreover, qualified immunity applies only to suits for *damages*. Attempts at injunctive or declaratory relief can continue unhindered, even if the law is still unclear and has not been adjudicated.⁵¹

So immunity changes the immediate adjudication of agency power, but not its absolute level going forward. Indeed, some scholars have argued that qualified immunity actually makes courts slightly *less reluctant* to agree with the plaintiffs’ claims because they can do so without unfairly imposing quasi-retroactive liability.⁵²

To be sure, qualified immunity doctrine is currently framed in terms of *public officials* or else private actors who are nonetheless undertaking public duties,⁵³ but the basic insight remains available for the dynamics of administrative guidance as well. What’s good for public officials might well be at least as good for everybody else.⁵⁴

⁵¹ Wood v. Strickland, 420 U.S. 308, 314, n. 6 (1975).

⁵² John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87, 98–100 (1999); Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1803 (1991).

⁵³ Filarsky, 132 S. Ct. at 1665. See also Wyatt v. Cole, 504 U.S. 158, 168 (1992).

⁵⁴ Elsewhere, I’ve provided some criticism of current qualified immunity doctrine. William Baude, *Qualified Immunity and the Supreme Court* (unpublished manuscript) (on file with author). This discussion of course takes the current doctrine as given; but it is also inspired by my view that one problem with qualified immunity is the great asymmetry between the treatment of public officials and of other parties that face legal uncertainty. *Id.* at 25-28.

The Details

Translating the doctrine of qualified immunity from the context of Section 1983 suits to administrative action does raise several questions of procedural detail.

What counts as “clearly established?”

Under current qualified immunity doctrine, the source of “clearly established” law is judicial decisions. To be sure, the ultimate source of law in constitutional cases is of course the Constitution, but under qualified immunity doctrine “the broad history and purposes of the Fourth Amendment,” for example, are at an overly “high level of generality” to create clearly established law.⁵⁵

Rather, the plaintiff must point to judicial decisions that more clearly establish the law. “Its contours ‘must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.’”⁵⁶ The Court

⁵⁵ *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (citing *Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004); *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001)).

⁵⁶ *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson*, 483 U.S. at 640) (internal citations omitted).

has recently added that “[t]he relevant inquiry is whether existing precedent placed the [outcome of the case] in these circumstances beyond debate.”⁵⁷

In the administrative context, it might make sense to instead focus on whether the rule had been clearly established by the agency through statutory notice-and-comment rulemaking.⁵⁸ In other words, given the goal of ensuring that agencies don’t circumvent the procedural requirements of the APA, one might allow sufficiently-official agency action to count as “clearly established law.”

This would still leave the possibility that the rules themselves might be inconsistent with the underlying statute, so it would seem to address only the *procedural* kind of evasion of congressional control, not the *substantive* kind. Yet by channeling agency action toward notice-and-comment rulemaking, this would also make it easier to review agency action for *substantive* deviations.⁵⁹

There is also a slightly more aggressive alternative (one that is also more analogous to qualified immunity). This would be to continue to use substantive law and judicial decisions as the source of clearly established law.

⁵⁷ *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (internal quotation marks omitted).

⁵⁸ APA § 553, 5 U.S.C. § 553.

⁵⁹ It has been observed that proposed reforms that try to channel agencies away from informal guidance and toward notice-and-comment rulemaking might instead have the effect of channeling agencies away from rulemaking altogether, and instead making law through agency adjudication. See generally John F. Manning, *Nonlegislative Rules*, 72 *Geo. Wash. L. Rev.* 893, 895-897 (2004). It would therefore make sense to extend an analogous rule to adjudications – a given adjudication could impose a sanction on the regulated entity only if it was clearly established by prior adjudications that were entitled to substitute for notice-and-comment rulemaking.

Hence, it would not be enough for an agency to show that the target clearly violated agency regulations. It would instead have to show both (1) that the target clearly violated agency regulations and (2) that those regulations were clearly consistent with the underlying statutory authority.

By adding the second step, this slightly more aggressive alternative would give every regulated entity additional freedom to challenge agency regulations, so it might be seen as unduly anti-regulatory. But its practical effect might also be somewhat modest. Since most rules will be presumptively valid under *Mead*⁶⁰ and *Chevron*,⁶¹ the qualified immunity inquiry and *Chevron* deference might effectively cancel out in most cases. Plus in cases where the validity of the rule is indeed uncertain, early litigation about the rule is more likely, and its validity (or invalidity) is more likely to be clearly established by case law.

What counts as damages?

Plaintiffs in civil rights suits usually choose between two main sanctions – retrospective money damages or prospective injunctive relief – and qualified immunity applies to the former but not the latter. So the most modest possibility would be to apply qualified immunity only to agency enforcement that takes the form of money damages or fines. Such fines are regularly imposed

⁶⁰ *United States v. Mead*, 533 U.S. 218 (2001).

⁶¹ *Chevron v. NRDC*, 467 U.S. 837 (1984).

by, for instance, the Securities and Exchange Commission,⁶² or by the Environmental Protection Agency.⁶³

Other agencies that use coercive guidance, however, sometimes have a different array of sanctions available to them. The Department of Education, for instance, can enforce Title IX by revoking the federal funding of a recalcitrant institution.⁶⁴ This is not technically money damages, but rather the discretionary exercise of Congress's spending power. Nonetheless, it operates somewhat similarly to damages and so one might wish to similarly extend qualified immunity to it.

There are more sanctions. The Food and Drug Administration, for instance, sometimes enforces its edicts through fines,⁶⁵ but it also uses other sanctions such as seizures or debarment orders.⁶⁶ The latter aren't really monetary at all, but they nonetheless can provide a stiff sanction for those who

⁶² SEC, SEC's FY 2014 Enforcement Actions Span Securities Industry and Include First-Ever Cases, (Oct. 16, 2014),

<https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543184660>.

⁶³ EPA, Enforcement Annual Results for Fiscal Year (FY) 2015,

<http://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-fy-2015>.

⁶⁴ 20 U.S.C. § 1682. In practice, the government uses this power as a threat to induce a settlement. Katie Jo Baumgardner, *Resisting Rulemaking: Challenging the Montana Settlement's Title IX Sexual Harassment Blueprint*, 89 Notre Dame L. Rev. 1813, 1839 (2014).

⁶⁵ Lena Groeger, *Big Pharma's Big Fines*, ProPublica, (Feb. 24, 2014), <http://projects.propublica.org/graphics/bigpharma>.

⁶⁶ FDA Enforcement Statistics Summary: Fiscal Year 2015,

<http://www.fda.gov/downloads/ICECI/EnforcementActions/UCM484400.pdf>.

See also Marie A. Urban, *The FDA's Policy on Seizures, Injunctions, Civil Fines, and Recalls*, 47 Food and Drug L.J. 411 (1992).

take their chances violating FDA guidance. They, too, can produce the *in terrorem* effect.

So, again, a less modest and more promising possibility would be to apply administrative qualified immunity to *all* retrospective relief or punishments, regardless of whether it takes the form of monetary damages. The point of the immunity is to avoid penalizing regulated entities for taking reasonable litigating positions, while allowing the agency to enforce the law if its position is ultimately correct. The line that best accomplishes both goals is one that gives immunity from punishment, but not from forward-looking relief.

“From Here to There”

All practical institutional reforms also face the question of how they will be adopted – what Heather Gerken has aptly called the “here to there” problem.⁶⁷ On one hand, it is tempting to dismiss such problems. As Adrian Vermeule has put it, “A plausible division of labor is that the reformer should deliberately ignore political feasibility; she should simply propose first-best plans and programs and then let politics itself filter the feasible from the infeasible.”⁶⁸ On the other hand, there is also the risk (again observed by Vermeule)

⁶⁷ Heather K. Gerken, *Shortcuts to Reform*, 93 Minn. L. Rev. 1582, 1583 (2009).

⁶⁸ Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 Minn. L. Rev. 1154, 1172 (2006).

that the premise of one's institutional diagnoses contradict the premise of one's institutional cure.⁶⁹

In particular, the problem of congressional control arises in part because Congress finds itself systematically unwilling or unable to control agencies through tighter statutory delegations. Does that defeat the relevance of administrative qualified immunity?

Congressional imposition?

Not necessarily. It is possible to imagine, for instance, that revisions to statutory *structure* and statutory *procedure* face a different set of political constraints than the ones faced by substantive organic statutes. The Administrative Procedure Act itself represents that possibility: it responds to the reality of broad delegation of authority by providing an off-the-rack set of procedures that constrain that authority. So my qualified immunity proposal could most directly be adopted as an amendment or elaboration to the APA.

As a matter of political reality, it's also easy to imagine a particular Congress recognizing a crisis in administrative government and amassing the necessary political will to make such a change. If 2018 or 2022 finds us with the political will to make some transsubstantive change to the treatment of executive agencies, my qualified immunity proposal offers a possible tool.

⁶⁹ Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. Chi. L. Rev. 1743, 1744 (2013). See also Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 Fordham L. Rev. 631, 636–49 (2006).

Possibility of judicial recognition

All of that said, an unappreciated strength of the qualified immunity proposal is that maybe it *need not* be adopted by Congress. Maybe it could be imposed as a matter of judicial interpretation *now*.

In the civil rights context, qualified immunity operates as a defense to both common-law *Bivens* suits and suits under Section 1983. The latter is a federal statute that makes no mention of qualified immunity, just as the text of the APA and agency organic statutes do not. But despite that textual lacuna, courts have found immunity to be implicit in the statute as a matter of judicial interpretation and common law.

And of course this wouldn't be the first time that courts have found common law principles to be implicit in administrative law. Just think of *Chevron* and other forms of administrative deference.⁷⁰

To be sure, some of the rationales for qualified immunity in the context of constitutional suits might seem not to translate to the APA context. In *Wyatt v. Cole*, for instance, the Supreme Court considered and rejected the argument that private parties could claim qualified immunity to Section 1983 claims when they “rely unsuspecting on state laws they did not create and may have no reason to believe are invalid.”⁷¹ It explained:

⁷⁰ *Chevron v. NRDC*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 79 (1997).

⁷¹ *Wyatt v. Cole*, 504 U.S. 158, 168 (1992).

Unlike school board members, or police officers, or Presidential aides, private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly, extending Harlow qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions, *the public interest will not be unduly impaired* if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.⁷²

On its own terms, one could argue that this analysis does not apply in the context of executive guidance. In particular, in the guidance context the lack of immunity *does* “impair” the “public interest” because it facilitates agency evasion of congressional control. Moreover, it does so by reducing the number of cases that “proceed to trial to resolve their legal disputes,” contrary to the situation in *Wyatt*. So courts might not reject administrative qualified immunity out of hand.

But more fundamentally, *Wyatt*’s account of acting “forcefully and decisively” is not the only source of qualified immunity in the Section 1983 context. In a different set of Section 1983 cases, the Court has recognized that qualified immunity also derives from principles of due process and fair notice.⁷³

For instance, in both criminal *and civil* cases against officers, the Court has said that “Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the

⁷² *Id.*

⁷³ See Baude, *supra* note 54, at 20-27.

criminal offense defined in 18 U.S.C. § 242,”⁷⁴ and that “in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials ... the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.”⁷⁵

The first cases to recognize these due process concerns in civil rights enforcement were criminal cases,⁷⁶ but the rationale has been extended to civil cases under Section 1983 as well. And if indeed the fair notice principle ultimately stems from the Due Process Clause, the Clause applies to all deprivations of life, liberty, or property, not only to those imposed through the criminal process.

Moreover, the Supreme Court’s very recent decision in *FCC v. Fox*⁷⁷ might begin to recognize similar due process concerns in the administrative context. In *Fox* the FCC sanctioned broadcasters for three alleged instances of on-air indecency: two of Cher and Nicole Richie swearing at the 2002 and 2003 Billboard Music Awards, and some mild nudity during an episode of *NYPD Blue*.⁷⁸ The Court invalidated the sanctions as conflicting with the “fundamental principle in our legal system ... that laws which regulate persons or entities

⁷⁴ *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

⁷⁵ *United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

⁷⁶ See *Screws v. United States*, 325 U.S. 91 (1945); *Williams v. United States*, 341 U.S. 97 (1951). See also Baude, *supra* note 54, at 21-22.

⁷⁷ 132 S. Ct. 2307 (2012).

⁷⁸ *Id.* at 2314.

must give fair notice of conduct that is forbidden or required.”⁷⁹ While the FCC’s position might well be lawful going forward (an issue the Court did not decide) it concluded that “the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent.”⁸⁰

To be sure, the due process analysis in *Fox* is not the same as the immunity I propose here – it was more generous to the broadcasters in one respect and more stingy in another. For instance it applied even though the FCC did not impose any monetary fine or other deprivation of liberty or property on Fox; the sanction was purely declaratory.⁸¹ On the other hand, the Court was concerned with *the lack of executive branch guidance*; it was not concerned with the possibility of guidance that deviated from the agency’s lawful authority. But by recognizing the core point that administrative sanctions are subject to *some* due process principles of fair notice, the Court invites the question of whether *other* recognized due process principles of fair notice apply as well.

Conclusion

Executive guidance may be an inevitable part of the administrative state. If so, the use of that guidance to influence the conduct of regulated enti-

⁷⁹ *Id.* at 2317. The Court appeared not to rely on special First Amendment principles. *Id.* at 2320. (“[B]ecause the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission’s indecency policy.”).

⁸⁰ *Id.* at 2318.

⁸¹ *Id.* at 2318. The other defendant, ABC, was fined \$1.24 million.

ties may be inevitable as well. Rather than try to suppress such guidance entirely, we might instead think about how to keep it from evading other techniques of congressional control. The procedural tools to do so have been lying in plain sight, in a different doctrinal area. If qualified immunity is a good way to protect government agents' interest in fair notice and due process, it might do some good for the rest of us too.