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How Much Procedure Is Needed for Agencies to Change “Novel” Regulatory Policies?

MING HSU CHEN[†]

The use of guidance documents in administrative law has long been controversial and considered to be one of the most challenging aspects of administrative law. When an agency uses a guidance document to change or make policy, it need not provide notice to the public or allow comment on the new rule; this makes changes easier, faster, and less subject to judicial review. Under the Obama Administration, guidance documents were used to implement policy shifts in many areas of administrative law, including civil rights issues such as transgender inclusion and campus sexual harassment, and immigration law issues such as deferred action. The current administration has rolled back many of these policies and advanced its own positions. This Essay will focus on recent developments in the use of guidance documents with an eye toward analyzing the implications of the Trump Administration’s executive order on guidance. It begins by summarizing the issue of policymaking through guidance, highlighting the impact of recent issuances that stiffen procedural requirements for “novel legal and policy issues.” It illustrates the stakes of these changes using recent controversies in immigration law and civil rights and reflects on their significance for the administrative law of guidance.

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INTRODUCTION

With volatile politics, novel legal and policy changes are to be expected. The manner in which these policy changes occur, and the bounds that can be placed on them, is a key question of administrative law. The use of guidance documents in administrative law has long been controversial and considered one of the most challenging aspects of administrative law. When an agency uses a guidance document to change or make policy, it need not provide notice to the public or allow comment on the new rule; this makes changes easier and faster.

This Essay will focus on recent developments in the use of guidance to illustrate its usage in substantive policy arenas related to equality. Under the Obama Administration, guidance documents were used to implement policy shifts in many areas of administrative law, including civil rights issues such as transgender inclusion and campus sexual harassment, and immigration law issues such as deferred action. The Trump Administration has rolled back many of these policies and advanced its own positions. This Essay will focus on recent developments in the use of guidance documents with an eye toward analyzing the implications of the Trump Administration's October 2019 executive order on guidance. Key questions include: (1) the classification of guidance and new procedures to formalize "significant guidance," (2) whether the core concept of bindingness used to delineate the scope of guidance impedes change (and to what extent), and (3) the implications of this form of policymaking for administrative law.

The Essay begins by summarizing the issue of policymaking through guidance, highlighting the impact of recent issuances that stiffen procedural requirements. It will then illustrate the stakes of these changes using recent controversies in immigration law and civil rights law, including DACA and Title IX sexual harassment on campus.

I. GUIDANCE

Federal agency guidance is prevalent in the administrative state, even though it is considered the "exception" rather than the rule in the text of the Administrative Procedure Act (APA).¹ Not only is guidance numerous, it is varied. Agencies issue policy statements and interpretive rules; they post memos on their websites; they send letters to their grant recipients; and they provide operating manuals to their staff. Whatever their form, the consequence of issuing guidance outside the notice and comment procedures is that guidance is not (supposed to be) legally binding.

Most agencies argue that guidance is essential to their daily operations and provides important direction to those they regulate about the laws they enforce and the benefits they dispense, while preserving needed flexibility to adapt to the circumstances of regulation or development of law. This tension between

1. Policy statements and interpretive rules fall within an exemption to notice and comment rulemaking under the APA. 5 U.S.C. § 553(b)(3)(A) (2018).

stability and flexibility is a core dilemma in administrative law.² Under administrative law doctrines, guidance runs afoul of APA requirements when they are overly “binding” on regulated parties.³ This bindingness is primarily shown through the legal effect on persons external to the agency, but the practical effects of guidance may be considered as well. Failure to satisfy requirements precludes the agency from using the document in a way that adversely affects private parties; satisfaction of the requirements makes their use permissible, even if it merits less deference from courts on review.

In order to ameliorate the tension between clarity and flexibility, the Administrative Conference of the United States (ACUS) commissioned a study on guidance and adopted best practices for how agencies should use nonbinding statements of policy. The study, titled “Federal Agency Guidance and the Power to Bind,” was carried out by Nicholas Parrillo and based on interviews with 135 individuals, including current and former agency officials and regulated beneficiaries across eight regulatory areas.⁴ Parrillo found that the public often has a strong incentive to follow federal agency guidance, even though it is not binding law.⁵ The reasons flow from structural and organizational factors—not the agency’s intentions to take short cuts or unfairly coerce the public.⁶ A follow-on study by Ron Levin and Blake Emerson concluded that similar principles should apply to interpretive rules, while acknowledging some differences between these two forms of guidance. The ACUS reports encourage notice and consultation, even if the agency does not seek out mandatory notice and comment procedures.⁷ For example, they suggest the agency provide written explanation for individual departures from guidance that is accessible to other agency officials and the public.⁸ ACUS adopted recommendations based on the Parrillo and Levin-Emerson reports in 2019.⁹

The Trump executive orders on guidance require more from agencies for less binding effect, similar to a Department of Justice (DOJ) Attorney General

2. See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1359–63 (1992).

3. For a summary of the administrative law doctrine on legal effect, see Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 273–74 (2018). Modern cases illustrate practical consequences. See, e.g., *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974); *Molycorp, Inc. v. EPA*, 197 F.3d 543, 544 (D.C. Cir. 1999); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).

4. NICHOLAS R. PARRILLO, FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 4–6 (Oct. 12, 2017), <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf>. Descriptions of the study appear in Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 173–74 (2019).

5. PARRILLO, *supra* note 4, at 177.

6. *Id.* at 174–76.

7. BLAKE EMERSON & RONALD M. LEVIN, AGENCY GUIDANCE THROUGH INTERPRETIVE RULES: RESEARCH AND ANALYSIS 33–36 (2019), <https://www.acus.gov/sites/default/files/documents/ACUS%20IR%20final%20report.5.28.2019.pdf>; PARRILLO, *supra* note 4, at 5.

8. See Adoption of Recommendations, 82 Fed. Reg. 61,728, 61,742 (Dec. 29, 2017).

9. Adoption of Recommendations, 84 Fed. Reg. 38,927, 38,928 (Aug. 8, 2019).

memorandum in 2017.¹⁰ The Trump executive order on guidance requires that guidance documents be labeled and treated as nonbinding in law and practice.¹¹ It also requires agencies to make guidance “readily available” to the public (through publication or indexing on an agency website), to take public input during the initial issuance of their guidance, and to give a “public response” to major concerns raised in comments.¹² The executive order applies to “[s]ignificant guidance document[s],” defined by their economic significance and their raising of “novel legal or policy issues arising out of legal mandates, [or] the President’s priorities” among other factors.¹³

The economic definition of significance is well-established and widely used.¹⁴ U.S. Office of Management and Budget (OMB) Best Practices and other executive orders pertaining to guidance use the economic definition. The ACUS studies focus on regulatory areas governed by cost-benefit analysis—such as financial regulation, health and safety regulation, and consumer protection—and specify a threshold of economic significance. Marking policies for heightened procedure due to their novel legal and policy interpretations is new.¹⁵ In theory, the use of guidance in other policy arenas may serve non-instrumental, non-economic values, such as elaborating how laws apply to novel situations in order to realize aspirational statutory mandates and communicating norms. The inattention to novelty in guidance interpretations leaves open questions about the appropriateness of using novelty as grounds for more procedure, the special import of requiring more procedure for novel interpretations of value-laden policies pertaining to contested norms of equality, and whether the rules calling for increased procedure strike the proper balance between notice and comment rulemaking and informal uses of guidance. This Essay undertakes a consideration of how novel policy and legal interpretations operate in equality-based regulation under the Trump Administration’s guidance rules.

10. Memorandum from the Attorney Gen. to the Dep’t of Justice, Prohibition on Improper Guidance Documents (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>.

11. Exec. Order No. 13,891, 84 Fed. Reg. 55,235, 55,235, 55,237 (Oct. 15, 2019).

12. *Id.* at 55,237 (referencing § 4(a)(ii)(A)).

13. *Id.* at 55,236 (referencing § 2(c)(i)–(iv)). Some exceptions to the heightened procedures are noted in the executive order as well. *Id.* at 55,237 (referencing § 4(b)).

14. See TODD GARVEY, CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 12 (2017); CLYDE WAYNE CREWS, JR., COMPETITIVE ENTER. INST., WHAT’S THE DIFFERENCE BETWEEN “MAJOR,” “SIGNIFICANT,” AND ALL THOSE OTHER FEDERAL RULE CATEGORIES? A CASE FOR STREAMLINING REGULATORY IMPACT CLASSIFICATION 14 (2017) (surveying nomenclature in laws and executive orders governing reporting of regulatory policy).

15. See Exec. Order No. 13,422, 3 C.F.R. § 3(h)(1)(D) (2007) (defining “significant regulatory action” as including “novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order”). While this definition precedes the President Trump executive order issued in October 2019, agency applications and commentary focus on primary definition “[l]eading to an annual economic effect of \$100 million or more.” *Id.* at § 3(h)(1)(A).

II. CASE STUDY ONE: CIVIL RIGHTS

Civil rights retractions provide illustrations of how novel policy interpretations contained in guidance may become vulnerable to change. Two examples, both concerning the U.S. Department of Education, Office for Civil Rights (OCR)'s interpretations of Title IX, illustrate the divergent paths of rescission: the Trump Administration's rescission of guidance extending gender nondiscrimination to transgender equality, and the Trump Administration's rescission and replacement of sexual harassment guidance to allow more lenient campus grievance procedures.

A. TRANSGENDER INCLUSION

The prototypical risk of advancing policy through guidance is that it can be rescinded in a subsequent administration. This is precisely what happened with OCR's attempts to regulate transgender inclusion. Title IX of the Educational Amendments of 1972 provides that "[n]o person in the United States shall, 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"¹⁶ A 2016 Dear Colleague letter advanced an agency interpretation extending Title IX protections on gender to transgender students.¹⁷ The implementing regulations state that "[a] recipient [of federal financial assistance] may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."¹⁸ The Obama Administration used this interpretation to remedy student complaints that single-gender bathrooms excluded transgender students.¹⁹ The remedy became universal access to bathrooms or single-stall bathrooms.²⁰ OCR communicated its substantive policy interpretations without following notice and comment or other heightened procedures.

The novelty of the interpretation can be seen in the legal and political reaction. Conservatives struck back against these interpretations based on substantive disagreements to transgender rights and procedural objections to announcing rights without rulemaking or legislation. Their opposition led to legal challenges to the federal interpretation and state laws, leading to a circuit split. The U.S. District Court for the Northern District of Texas enjoined the letter because it was a binding rule in disguise and therefore procedurally

16. 20 U.S.C. § 1681(a) (2018).

17. CATHERINE E. LHAMON, U.S. DEP'T OF EDUC., & VANITA GUPTA, U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

18. 34 C.F.R. § 106.33 (2018).

19. LHAMON & GUPTA, *supra* note 17, at 3.

20. *Id.*

invalid.²¹ The U.S. Court of Appeals for the Fourth Circuit in *G.G. ex rel. Grimm v. Gloucester County School Board* adopted the OCR interpretations articulated in the very same guidance out of deference to the agency.²² In the face of these interpretive disagreements, the Trump Administration OCR rescinded the Obama OCR guidance. The Supreme Court then vacated and remanded the judgment in *G.G.* “in light of the guidance document issued by the Department of Education and Department of Justice.”²³

B. SEXUAL HARASSMENT ON CAMPUSES

Title IX has also been interpreted to require schools and universities to guard against gender discrimination by instituting grievance procedures to rectify hostile environments on campus. The statute, previously described, provides that “[n]o person in the United States shall, 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”²⁴ A 1975 regulation implementing this provision requires educational recipients of federal funds to “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints”²⁵ Over time, OCR incorporated case law developments on hostile environment in its 1997 OCR Guidance on sexual harassment that requires schools’ “nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment,”²⁶ its 2001 Guidance laying out OCR enforcement procedures,²⁷ and a 2011 Dear Colleague letter giving rise to specific standards of proof for school grievance procedures.²⁸ The Dear Colleague form of these interpretations did not undergo rulemaking procedures.

During the Obama Administration, campuses sought to comply with OCR guidance by adopting a “preponderance of the evidence” standard derived from

21. *Texas v. United States*, 201 F. Supp. 3d 810, 830 (N.D. Tex. 2016) (“The Guidelines are, in practice, legislative rules—not just interpretations or policy statements because they set clear legal standards.”).

22. *G. G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 722 (4th Cir. 2016), *vacated and remanded*, *Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (mem.).

23. 137 S. Ct. at 1239; *see* SANDRA BATTLE, U.S. DEP’T OF EDUC., & T.E. WHEELER, II, U.S. DEP’T OF JUSTICE, DEAR COLLEAGUE LETTER (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> (rescinding the May 2016 transgender guidance).

24. 20 U.S.C. § 1681(a) (2018).

25. 45 C.F.R. § 86.8(b) (1975).

26. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,044 (Mar. 13, 1997).

27. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at iii–iv (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

28. RUSSLYNN ALI, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER 10–11 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

the framework of civil lawsuits.²⁹ In practice, this meant that consent between individuals was harder to show, such that accused students were more likely to be disciplined for violating sexual harassment policies. The Trump Administration changed this standard to allow campuses to adopt either a preponderance of the evidence or the stricter clear and convincing evidence standard, which emulates the criminal context and affords higher levels of protection to the accused.³⁰ This is leading to fewer disciplinary actions against accused students. The state of play in this area is still developing. As this Essay went to press, the Trump Administration finalized its reversal of the Obama Administration's guidance using notice and comment regulation.³¹ After a considerable wait while pending OIRA review, their rules were approved with an effective date for implementation in August 2020.³² They were challenged within a week.³³ Though the ACLU litigation is pending, the case initially illustrates the triumph of procedure over the use of guidance to advance novel policy interpretations since the hurdles to reinstating the Obama Administration guidance are high. The extent of the substantive difference between the Obama interpretation versus the Trump Administration's interpretation is a matter of dispute.³⁴ Equality advocates indicate the implication of more procedure is a bias in the statutory interpretations that favor defendants over plaintiffs in civil rights cases, whereas supporters of the Trump interpretation claim that it is a modest change to the statute that will have little effect on gender equality on campuses.³⁵ Whomever is right, the episode shows that the use of guidance in policy arenas with contested values generates policy flux not undone with more procedure.

The historical context of these recent civil rights policies shows increasing resistance to a longstanding practice of using guidance to advance novel policy

29. See Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 902 (2016) ("In a scramble to be considered compliant and stave off or resolve OCR investigations, schools rushed to rewrite their policies and procedures to satisfy the [2011 Dear Colleague Letter's] commands, including, most prominently, the 'preponderance of the evidence' standard." (footnote omitted)).

30. U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT 5 n.19 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

31. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Funding, 85 Fed. Reg. 30,026, 30,059 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

32. *Id.*

33. Complaint for Declaratory and Injunctive Relief, *Know Your IX v. DeVos*, No. 1:20-cv-01224-RDB (D. Md. May 14, 2020).

34. See Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1854–78 (2017) (providing a historical account of stickiness of Title IX); Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2173–78 (2019) (elaborating on the doctrine behind this stickiness).

35. This point was made forcefully by Nancy Chi Cantalupo, Professor at Barry University School of Law and a consultant on sexual harassment policies for the Obama White House, federal and state legislatures, and the U.S. Department of Education, with her co-authors in Tiffany Buffkin et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call*, 9 CALIF. L. REV. ONLINE 71, 102 (2018).

interpretations that fill in the gaps in a vague civil rights statute.³⁶ Against this backdrop, the efforts of the Obama Administration to advance a novel interpretation were not atypical. However, pressure for heightened regulatory procedure functioned as a shield against expanding rights (transgender inclusion) and as a sword to institute less protective interpretations of equality law (sexual harassment grievance procedures). The episodes illustrate the limits of using guidance to bind an agency's interpretation of the law, particularly at times when the overarching values in the interpretations are contested. Although the case studies arose before the Trump executive order on guidance, one can imagine that more procedure would not have saved transgender rights and that it would not have sufficed to supplant heightened evidentiary standards for reporting sexual harassment.

III. CASE STUDY TWO: IMMIGRATION

Guidance documents play an enduring and distinct role in immigration law. As Jill Family explained in her Association of American Law Schools (AALS) presentation and elsewhere, historically, guidance documents are often the key source of immigration law.³⁷ They are the vehicle for important policies concerning deportation and benefits adjudication.³⁸ Many of the rules that help determine who may be deported and who is eligible for legal status or other forms of relief are contained in guidance documents and nowhere else.³⁹ Major statutory concepts are interpreted only in guidance documents, and the consequence of one interpretation versus another can be the ability to remain in the country or be deported.⁴⁰ Despite their importance, immigration agencies make little effort to provide notice or opportunities for comment on these rules.⁴¹ Consequently, immigrants often did not know of the existence of guidance, let alone the meaning and intended use of guidance.⁴² The problems were exacerbated by the lack of attorney representation such that attorneys could not effectively advise their immigrant clients or represent them in court.

36. See, e.g., BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* (2019); Ming Hsu Chen, *Regulatory Rights: Civil Rights Agencies, Courts, and the Entrenchment of Language Rights*, in *THE RIGHTS REVOLUTION REVISITED: INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE U.S.* (Lynda G. Dodd ed., 2018); Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 *HARV. C.R.-C.L. L. REV.* 291, 292–96 (2014).

37. Jill E. Family, *Immigration Law and a Second Look at the Practically Binding Effect*, *YALE J. ON REG.: NOTICE & COMMENT* (May 6, 2019), <https://www.yalejreg.com/nc/immigration-law-and-a-second-look-at-the-practically-binding-effect-by-jill-e-family/>; Jill E. Family, Panel Discussion at 2020 AALS Annual Meeting: AALS Hot Topic Program, Recent Development: How Easily Can Agencies Change Regulatory Policy in Immigration & Civil Rights? (Jan. 5, 2020).

38. Family, *Immigration Law and a Second Look*, *supra* note 37.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

Three examples illustrate both these typical uses, and new atypical ones, of guidance.

A. DEFERRED ACTION

If there is a pattern to the myriad of guidances, it is that, traditionally, the interpretations contained in guidance were favorable to immigrants, either to ameliorate a severe immigration statute or to diminish political attention to policy outcomes that were substantively fair but politically costly to legislators. The Obama Administration's Deferred Action for Childhood Arrivals (DACA) program is consistent with this trend. President Obama used guidance to issue the DACA memo in 2012 and Deferred Action for Parents of Americans (DAPA) memo in 2014.⁴³ Both of the resulting programs used deferred action to temporarily forbear deportation of undocumented immigrants who satisfy pre-specified criteria—for DACA, individuals who arrived in the U.S. as children without status within a certain time period, and for DAPA, the parents of U.S. citizen children.⁴⁴ Both built on a long line of exercises of prosecutorial discretion in immigration law.⁴⁵ Though they did not use notice and comment, both programs formalized a series of prior enforcement memos by John Morton advising prioritization and developed systems and procedures to ensure more consistent implementation for those who qualified.⁴⁶ Obama's versions of the program required an affirmative application rather than a *post hoc* grant of equity.⁴⁷

The vulnerability of the deferred action programs as a product of *guidance* is most easily seen in DAPA. DAPA proposed using guidance, but did not make it into policy because of the twenty-seven-state challenge that lasered in on the insufficient procedure used for its enactment.⁴⁸

A Fifth Circuit decision suggested the United States Citizenship and Immigration Services (USCIS) guidance was procedurally defective and was left in place when the Supreme Court stalemated 4–4.⁴⁹

A similar legal suit was threatened against DACA and would have been filed had the Trump Administration not rescinded DACA.⁵⁰ The lesson is part politics and part law: Obama's use of guidance was only briefly successful (lasting five years), and was always susceptible to rescission through political means once a conservative president came into office. Had Trump not rescinded

43. Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 384 (2017).

44. *Id.*

45. See generally SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015) (describing the history of prosecutorial discretion in American immigration law).

46. Chen, *supra* note 43, at 381–82.

47. *Id.* at 384–86.

48. *Texas v. United States*, 945 F.3d 355, 383 (5th Cir. 2019), as revised (Jan. 9, 2020).

49. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam).

50. Letter from Ken Paxton, Attorney General of Texas, to Jeff Sessions, U.S. Attorney General (June 29, 2017), https://www.texasattorneygeneral.gov/sites/default/files/files/epress/DACA_letter_6_29_2017.pdf.

DACA, it probably would have been a repeat of the legal lesson from *Texas v. United States*, with the DOJ's assertion of the program's illegality partly turning on whether it had been procedurally sound.

While the Supreme Court has not yet issued its ruling on DACA, the lessons for administrative law are emerging: guidance is a risky endeavor when novel policy positions are contested and a costly one when beneficiaries begin to rely on the legal protections in a situation where they are withdrawn.

B. INVISIBLE WALL POLICIES

In contrast with longstanding immigration practice and with DACA, the trajectory of the Trump Administration is to use guidance to the disfavor of immigrants. USCIS, the immigration benefit-granting agency within the U.S. Department of Homeland Security, has used guidance to curtail legal migration. It has revised and reversed interpretations to restrict admissions, prevent transitions to permanent status, and in some cases to deport. In other words, it has used the APA offensively rather than defensively against procedural challenge.

A series of policies constricting legal immigration—collectively characterized as “invisible wall” policies⁵¹ by advocates—illustrates these tendencies. USCIS grants H-1B visas for temporary high-skilled workers. Defined by statute, the policies addressing when an applicant is eligible for H-1B status have changed since the “Buy American, Hire American” executive order. The result is to throw into question whether computer programmers qualify as high-skilled and what evidentiary burdens must be met for an employer to sponsor such as worker.⁵² In response, approvals of H-1B petitions dropped 8% after many years of relative stability (95.7% in 2015, 93.9% in 2016, 92.6% in 2017, and then 84.5% in 2018).⁵³ Another example is the guidance-based definition of “unlawful presence,” which is now easier to accrue for international students, such that they may find themselves needing to leave the United States and barred from reentry due to a technical violation of their visa—for example, falling below the number of credits required for full-time students.⁵⁴

The Trump Administration's USCIS is also using the procedures of the immigration bureaucracy to slow down the grant of immigration benefits. Increased requests for evidence and decreased deference to prior determinations

51. AM. IMMIGRATION LAWYER ASS'N, DECONSTRUCTING THE INVISIBLE WALL (2018), <https://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall>. For example, USCIS issued policies restricting the Economist classification under the TN visa, terminating work authorization for H-4 spouses, requiring “bridge” applications for F-1 students, and increasing its issuance of Requests for Further Evidence (RFEs), to name a few. *Id.* at 10–11, 18.

52. *Id.* at 9–10.

53. Ming H. Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in Military*, 97 DENVER UNIV. L. REV. (forthcoming 2020).

54. Ming H. Chen & Zachary New, *Silence and the Second Wall*, 27 SO. CAL. I. L.J. 549, 560–61 (2019).

have resulted in backlogs of immigration benefit cases in nearly every category of benefit.⁵⁵ Naturalization wait times have doubled, and the size of the backlog has increased by 30% or more.⁵⁶ Applications from the military are being denied (or held up in background checks preceding the filing of the N-400).⁵⁷ Many of these efforts to slow down and deny immigration benefits stem from executive orders that require agency officials to implement “extreme vetting” for national security or protection of American workers.⁵⁸

C. PUBLIC CHARGE

A related policy goal of the Trump Administration’s efforts to alter the quality of immigrants admitted to the United States is their effort to exclude poor immigrants. They pursued this policy along two regulatory avenues: (1) a U.S. Department of State guidance and (2) a USCIS rule.

The Immigration and Nationality Act (INA) says “[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.”⁵⁹ Although the INA does not define “public charge,” the adjudicating officer must at a minimum consider: the applicant’s age; health; family status; assets, resources, and financial status; and education and skills.⁶⁰ The officer also may consider, or may require, an affidavit of support.⁶¹ The officially codified immigration policy of the United States includes a statement that noncitizens should “not depend on public resources to meet their needs”⁶² Those provisions originated in the Immigration Act of 1882 and

55. Letter from Bipartisan Senators, U.S. Senate, to L. Francis Cissna, Director, USCIS (May 13, 2019), <https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/bipartisan-letter-senators-uscis-backlog>; AM. IMMIGRATION LAWYER ASS’N, *supra* note 51, at 17–18.

56. COLO. STATE ADVISORY COMM’N, CITIZENSHIP DELAYED: CIVIL RIGHTS AND VOTING RIGHTS IMPLICATIONS OF THE BACKLOG IN CITIZENSHIP AND NATURALIZATION APPLICATIONS 9 (2019) (“Since 2016, processing time for citizenship applications has almost doubled, increasing from 5.6 months to 10.1 months as of March 31st, 2019.”).

57. Chen, *supra* note 53.

58. See AM. IMMIGRATION LAWYER ASS’N, *supra* note 51, at 4–8.

59. 8 U.S.C. § 1182(a)(4)(A) (2018).

60. *Id.* § (a)(4)(B).

61. *Id.* The INA of 1952 excluded many classes of noncitizens from admission to the United States, including any noncitizens deemed likely to be a public charge. *Id.* § (a)(4)(A). The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 modified eligibility for federal benefits such that “‘qualified aliens’ are eligible for federal means-tested benefits after 5 years and are not eligible for ‘specified federal programs,’ and states are allowed to determine whether the qualified alien is eligible for ‘designated federal programs.’” Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,126 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248) (discussing the impact of the 1996 welfare reform law on noncitizen receipt of federal public benefits). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) codified the minimum factors referenced above and placed an emphasis on the affidavit of support system. *Id.* at 51,132.

62. 8 U.S.C. § 1601(2)(A) (2018).

have been maintained in modern immigration law with few, if any, changes.⁶³ In 1999, the Immigration and Nationality Service (INS), predecessor to the Department of Homeland Security, published a proposed rule and Interim Field Guidance that defined “public charge” to mean an immigrant who either has, or is likely to become, “primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”⁶⁴ A similar proposal was put forward by the Department of State and incorporated into the Foreign Affairs Manual, which serves as a guide to Department of State adjudicators.⁶⁵ However, these proposals were never finalized and INS adjudicators continued to follow the 1999 Interim Field Guidance and the State Department continued to follow the Foreign Affairs Manual until the Trump Administration intervened.⁶⁶

In January 2018, the State Department used guidance to enlarge the definition of public charge.⁶⁷ More specifically, the State Department published revised sections of its Foreign Affairs Manual in conjunction with an interim final rule that concern whether a person seeking to enter the U.S. is likely to become primarily dependent on cash assistance on long-term care in the future. Longstanding factors are considered: age, health, income, education, and family situation.⁶⁸ The new instructions add that using noncash benefits by a visa applicant or his family is considered as part of the totality of circumstances for the purpose of predicting whether a person will be a charge in the future.⁶⁹ Advocates raised concerns that the benefits exclusions would bar poor immigrants from entry to the United States. Like many of the “invisible wall” policies, these changes went into effect quietly and without notice or comment.⁷⁰

Compare these to USCIS’s more prominent attempts to push a restrictive definition of public charge for those seeking a visa or green card. The proposed rule sought to modify the definition of public charge to bar any noncitizen who receives one or more of the designated public benefits.⁷¹ Their rulemaking process was lengthy but hardly democratic. After months of advocacy, 266,000 comments were filed, with most opposing enlargement of the definition of public charge. Many raised the concern that the tests disadvantaged poor immigrants

63. *Id.*

64. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (proposed Mar. 26, 1999) (proposed rule and notice of INS public charge rule).

65. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. at 28,689.

66. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,133–34 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248) (describing the history of the public charge rule in the context of the INS 1999 Field Guidance).

67. Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54,996, 54,996 (Oct. 11, 2019) (to be codified at 22 C.F.R. pt. 40).

68. *Id.*

69. *Id.* at 54,997.

70. *Id.* at 55,011.

71. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248).

and that they were unfair to those who had relied on them without notice of their future consequences; this was especially true for the consequences of family members using benefits.⁷² USCIS nevertheless adopted a “simplified duration standard,” under which a noncitizen “who receives one or more public benefit for more than 12 months in the aggregate within any 36-month period”⁷³ This metric is incorporated into the “totality of the circumstances” weighed by an adjudicator.⁷⁴ As a matter of process, the notice and comment procedure led to scarce changes in the final rule, suggesting that granting notice through a more formal procedure failed to create a meaningful opportunity to participate and little agency response. Though the rule was temporarily enjoined in multiple courts, the public charge rule is now being implemented nationwide.⁷⁵

The lesson from the immigration policies seems to be that a strong executive can advance novel interpretations of law through either guidance or rulemaking. Whether the interpretation survives is dependent on both political and legal forces. Sub-regulatory guidance is more susceptible to the whims of politics, as seen in the challenge to DAPA and the initiation of “invisible wall” policies. Heightened procedure insulates novel interpretations from eventual legal challenge, as seen in the public charge rule. Agencies choose the level of procedure that is expedient for their goals: they opt for less procedure when they favor preexisting interpretations or when traditions of deference do not require it—for example, if nonimmigrant visa denials are nonreviewable or a statute has long been enforced in a manner consistent with administrative priorities, even without guidance. They opt for more procedure when they want to slow down policies counter to their preferences or when legal challenges to their novel interpretations are contemplated—for example, if DACA recipients come to rely on an immigration benefit or if green card holders found inadmissible due to their likelihood of becoming a public charge raise due process concerns that courts will review.

Whether these strategic calculations about the trade-offs of advancing novel positions without policy, with guidance, and with rulemaking would change under the Trump executive order on guidance is unclear. The Trump executive order on guidance carves out an exception for immigration agencies in enforcement related matters.⁷⁶ The examples discussed in this essay show that asymmetric calls for heightened procedure—where procedure is demanded of immigrants and not of the agencies themselves—can turn guidance into a sword

72. Preliminary studies show that the introduction of the rule interpretations has produced a chilling effect on the collection of benefits, even before the rule’s implementation. Jeanne Batalova et al., *Millions Will Feel Chilling Effects of U.S. Public-Charge Rule that Is Also Likely to Reshape Legal Immigration*, MIGRATION POLICY INST. (Aug. 2019), <https://www.migrationpolicy.org/news/chilling-effects-us-public-charge-rule-commentary>.

73. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,297.

74. *Id.*

75. In January 2020, the Supreme Court voted 5–4 to lift a nationwide injunction on the public charge rule and allow the Trump Administration to implement the rules beginning February 24, 2020. *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020).

76. Exec. Order No. 13,891, 84 Fed. Reg. 55,235, 55,238 (Oct. 15, 2019).

to advance aggressive immigration enforcement policies more often than a shield for immigrants' rights.

CLOSING REFLECTIONS ON THE LESSONS FROM EQUALITY-BASED POLICIES
AND FUTURE DIRECTIONS

The contemporary case studies of agencies issuing equality-related policies demonstrate that the age-old question of whether agencies should advance novel policy through guidance is brought into sharper relief as we experience novel policy change. If novelty is enough to trigger heightened procedural requirements, how is novelty to be measured? Is the baseline the underlying statute or is it the policy interpretation that immediately preceded the change? Does it need to be the first time an interpretation has been adopted? Does the scale of change matter—that is—how different the new policy may be from prior precedents? Does the direction of the policy position matter?

The threat is all the larger in a polarized political environment with intense disagreement over norms and values of equality. Whether agency guidance interpretations should be stable or flexible in the area that implicates civil rights and fundamental liberties depends on the nature of the substantive issues at stake, as well as the underlying procedural issues and structural issues that are the core subject of trans-substantive administrative law debates. However, substance and policy are inextricably linked to equality because regulated parties' adjustments to change are not as simple as shifting money or changing practice. Equality norms can be advanced through legal and policy interpretations articulating or elaborating on statutory rights contained in vaguely worded legislation. The durability of those rights can be weakened by openness to policy change. To the extent that bindingness is considered undesirable under doctrinal tests of legal and practical effect, civil rights can be weakened to the detriment of those who relied on them and remedial statutory ambitions can be blunted. Whether guidance that expands or contracts civil rights and immigrants' rights merits special consideration is pertinent to administrative law's core concerns of legal effect and emerging doctrines about the scope and terms of policy changes expressed in guidance documents. To what extent, and in what manner, do we consider the reliance of the regulatory beneficiaries or the investment of the regulatory challengers and change advocates? Does it matter if these affected individuals have a lesser ability to adapt to changes than institutions navigating primarily economic effects?

Raising the pitch of these questions: does it matter if partisanship stands in for real contestation over reasonable disagreements over substantive values? These persistent questions show that the debate over regulatory guidance in the context of equality is infused with politics. The Trump Administration's regulatory policies have been unabashedly pro-industry, anti-civil rights, and anti-immigrants' rights. They have not been solicitous of equality values. These policy interpretations strive to use procedural formality as a sword to strike down old interpretive positions and a shield to guard against social progress. How much procedure is needed to promote a novel policy depends in part on whether

the underlying policies are viewed as legitimate policy differences or raw assertions of power in politics.

Returning to the problem posed in the title: how much procedure is needed when agencies seek to change novel policies relating to equality? The experiences of the Obama and Trump administrations suggest that we do not want too much procedure,⁷⁷ and yet we do not want too little procedure either.⁷⁸

77. A rich literature in administrative law concerns the extent and desirability of ossification in notice and comment rulemaking. *See, e.g.*, Jason W. Yackee & Susan W. Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making "Ossified"?*, 20 J. PUB. ADMIN. RES. & THEORY 261, 269 (2010).

78. A similarly rich literature exists on the hazards of using guidance as a procedural shortcut. *See, e.g.*, David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 324 (2010). Chris Walker in his contribution to this Symposium Issue uses the term "regulation by compliance" to describe the phenomenon of regulated entities complying with officially nonbinding guidance because of the institutional incentives to do so—for example, meeting an agency's preapproval requirements, maintaining a good relationship with the agency overseers, and shaping the development of compliance officer interpretations for enforcement. Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 71, 1227 (2020). Aaron Nielson, a contributor to this Symposium, provides first impressions on "Promoting the Rule of Law Through Improved Agency Guidance" in Aaron Nielson, *Breaking News: Two Major Executive Orders*, YALE J. ON REG.: NOTICE & COMMENT (Oct. 9, 2019), <https://www.yalejreg.com/nc/breaking-news-two-major-executive-orders/>.