

University of Chicago Law School

## Chicago Unbound

---

Journal Articles

Faculty Scholarship

---

2015

### Agency Coordinators Outside of the Executive Branch

Jennifer Nou

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

#### Recommended Citation

Jennifer Nou, Response, "Agency Coordinators Outside of the Executive Branch", 128 Harvard Law Review Forum 64 (2015).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

---

---

## AGENCY COORDINATORS OUTSIDE OF THE EXECUTIVE BRANCH

*Jennifer Nou\**

Adjudication is the policymaking vehicle of choice for some agencies,<sup>1</sup> and yet the procedure is often “forgotten” in debates over regulatory reform.<sup>2</sup> To a large extent, the literature on coordinated agency action has been no exception. In *Uncovering Coordinated Interagency Adjudication*,<sup>3</sup> however, Professor Bijal Shah offers an eye-opening account of how multiple agencies can interact with one another during informal and formal adjudications. During the course of a single claim resolution, for example, an agency can ask other agencies to help find facts, lend expertise and advice, or even hear evidence and draft orders.<sup>4</sup> One of Shah’s most striking observations is the extent to which such relationships are often governed, if at all, by mere interagency memoranda of understanding, rather than by statute or even regulation.<sup>5</sup> These memoranda are rarely legally enforceable and often difficult for the public to locate.<sup>6</sup> As a result, agencies can essentially outsource aspects of their adjudicatory activities to other agencies with little congressional or public oversight.

Identifying and cataloguing this phenomenon would have been significant contributions on their own. But Shah also provides a careful normative account of the benefits and drawbacks of centralizing the coordination of these interactions. Her rich analysis ultimately leads her to the conclusion that the executive branch should provide greater ex ante oversight.<sup>7</sup> Looking to the President to coordinate interagency

---

\* Neubauer Family Assistant Professor, University of Chicago Law School. For helpful comments and conversations, thanks to Jeff Lubbers, Richard Posner, and Bijal Shah.

<sup>1</sup> See, e.g., M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1399 (2004) (noting that the “[National Labor Relations Board] and the [Federal Trade Commission] are known for their heavy reliance on adjudication as a way of making policy”).

<sup>2</sup> See Jeffrey S. Lubbers, *Management of Federal Agency Adjudication*, 12 J. NAT’L ASS’N ADMIN. L. JUDICIARY 112, 112 (1992) (referring to adjudication as the “seemingly forgotten half of the [A]dministrative Procedure Act’s procedural framework”).

<sup>3</sup> Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015).

<sup>4</sup> *Id.* at 820–21.

<sup>5</sup> *Id.* at 826.

<sup>6</sup> See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1161 (2012) (observing that memoranda of understanding “resemble contracts, yet they are generally unenforceable and unreviewable by courts”).

<sup>7</sup> Shah, *supra* note 3, at 814 (proposing “ex ante review of coordinated adjudication . . . by an executive body that is not governed by any of the agencies involved in the coordinated adjudication”).

adjudication is sensible for many reasons — thus, others’ similar recommendations regarding multiple-agency rulemaking,<sup>8</sup> enforcement,<sup>9</sup> inaction,<sup>10</sup> and risk analysis.<sup>11</sup> The executive branch, for example, has a singular figurehead who can be held accountable and represents the national interest; it possesses a wide range of expertise; it is relatively expedient and wields a number of formal and informal sticks that can help to encourage compliance.<sup>12</sup> As a result, calls for the establishment of executive branch institutions either modeled on or expanding the role of the Office of Information and Regulatory Affairs (OIRA) to address one coordination ailment or another are increasingly common<sup>13</sup> — and justly so.

At the same time, however, the experience thus far with presidential oversight also offers some lessons that should temper the case for centralized executive control at least in arenas as fraught as agency adjudication. This Response accordingly considers some of the less-recognized costs and limited benefits of coordination that may help to explain why the President often refrains from exercising such oversight in practice. In light of these dynamics, the discussion then turns to consider other candidate coordinators outside of the executive branch, such as the Judicial Conference, the Administrative Office of the Courts, and the Administrative Conference of the United States. These entities, of course, have their own institutional limitations and drawbacks, which may mitigate their effectiveness. The more general effort here is simply to broaden the lens of agency coordinators beyond that of OIRA and other executive branch bodies.

---

<sup>8</sup> See Freeman & Rossi, *supra* note 6, at 1197–98.

<sup>9</sup> See Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1103–04 (2013) (discussing potential enforcement-coordinating role for a “reimagined OIRA,” *id.* at 1103).

<sup>10</sup> See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1337 (2013) (proposing “a specific mechanism for OIRA to engage in review of agency inaction by examining petitions for rulemakings filed with agencies”).

<sup>11</sup> See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1313 (2006) (arguing that “a centralized agency” like OIRA “should provide standardized scientific guidelines to the regulatory agencies to aid them in undertaking risk assessments”).

<sup>12</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001) (examining the “[c]ase for [p]residential [a]dministration,” *id.* at 2331); Cass R. Sunstein, Commentaries, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1874–75 (2013) (“Federal officials, most of them nonpolitical, know a great deal, and the OIRA process helps to ensure that what they know is incorporated in agency rulemakings.”).

<sup>13</sup> See, e.g., Eric A. Posner & E. Glen Weyl, *Benefit-Cost Paradigms in Financial Regulation*, 43 J. LEGAL STUD. 51, 530 (suggesting that “the president . . . create a department within OIRA and give it the specific mission of coordinating [benefit-cost analysis] among the financial agencies”).

## I. WHEN PRINCIPALS AND AGENTS ALIGN

Separation of powers and due process concerns have long driven worries about the presidential oversight of administrative adjudication. Courts, for instance, have repeatedly cited an agency's adjudicatory functions as reason to allow some congressional restrictions on the President's removal power.<sup>14</sup> Congress itself has expressly fostered the relative independence of administrative law judges (ALJs) through various measures in the Administrative Procedure Act (APA) and related statutes.<sup>15</sup> The Executive Office of the President (EOP), for its part, has historically exercised self-restraint, publicly expressing its hesitance to oversee adjudications and formal rulemakings involving trial-type hearings.<sup>16</sup> Part of the reason for this cautiousness likely lies in the EOP's bona fide legal concerns as well as the development of what Professor Adrian Vermeule calls the "conventions" governing the perceived independence of adjudicatory actors.<sup>17</sup> In other words, many executive branch norms effectively restrain the President from interfering with interagency adjudicatory activities.

Beyond these norms, the President's self-interest in coordinating agency adjudication is curbed for other reasons as well. First, coordination is costly. It requires the EOP to spend its limited resources and political capital, which could be deployed to other competing priorities.<sup>18</sup> As it stands, OIRA-coordinated review of agency rulemaking

---

<sup>14</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3173–74 (2010) (Breyer, J., dissenting) (noting that the Supreme "Court has long recognized the appropriateness of using 'for cause' provisions to protect the personal independence of those who even only sometimes engage in adjudicatory functions," *id.* at 3173); *Wiener v. United States*, 357 U.S. 348, 356 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52, 135 (1926).

<sup>15</sup> See, e.g., 5 U.S.C. § 554(d) (2012) (isolating ALJs from agency prosecutorial staff); *id.* § 3105 (providing for appointment process); *id.* § 5372 (providing structure of pay and promotion for ALJs independent of agency head discretion); *id.* §§ 4301(2)(D), 4302 (excluding ALJs from the definition of employees subject to performance appraisals).

<sup>16</sup> See, e.g., Memorandum from David Stockman, Dir., Office of Mgmt. & Budget, to Heads of Exec. Depts. & Agencies (June 11, 1981), reprinted in *Role of OMB in Regulation: Hearing Before Subcomm. on Oversight & Investigations of H. Comm. on Energy & Commerce*, 97th Cong. 17 (1981) (noting that Executive Order 12,291 "appl[ies] only to informal rulemaking proceedings and [is] not in any sense intended to affect the more stringent ex parte rules applicable to agency adjudications and formal rulemakings. . . . Such proceedings are expressly intended by Congress to be more in the nature of formal judicial proceedings and involve bars against various forms of ex parte communication").

<sup>17</sup> See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211–14 (2013); see also Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 242 ("Adjudications are insulated from influences outside the hearing process by constitutional and statutory norms of due process that bind the President no less than the ordinary citizen."); Shah, *supra* note 3, at 876.

<sup>18</sup> OIRA, for example, has only about fifty staff members, who are involved not only with the review of regulations, but also with the administration of the Paperwork Reduction Act and implementation of the Information Quality Act. See *Frequently Asked Questions*, OFFICE INFO. &

already requires substantial high-level attention given the various interests implicated by particular regulations. By contrast, individual adjudications draw less political interest given the nature of case-by-case resolutions; even in the aggregate, they often concern less well-represented groups.<sup>19</sup> As a result, the EOP is unlikely to spend much time and energy attending to interagency adjudication relative to rulemaking. Moreover, as a practical matter, efforts to draft an executive order or other high-level guidance documents require time-consuming meetings and negotiations between otherwise busy officials. Such efforts also demand various EOP clearance procedures necessitating the review of and sign-off from multiple political and legal entities within the executive branch. Such “institutional inertia” may help to explain, for instance, why disparities in agencies’ use of discount rates and other inconsistencies among agency rulemaking activities continue to persist.<sup>20</sup>

The President also gains limited benefits from some coordination efforts. Consider an illustrative analogy between Shah’s proposed interventions and the President’s current oversight of independent agencies. By executive order, such agencies are required to submit and publish annual regulatory plans and agendas, but are otherwise exempt from the review of individual regulations.<sup>21</sup> Shah suggests a similar approach to interagency adjudication, perhaps in the form of required submissions from agencies regarding their anticipated adjudicatory practices.<sup>22</sup> Alternatively, executive oversight might also take the form of an executive order for agencies to disclose their general and specific interagency arrangements, either on the agency’s

---

REG. AFF., <http://www.reginfo.gov/public/jsp/Utilities/faq.jsp> [<http://perma.cc/87AC-CQCT>] (last visited Jan. 8, 2015) (“In addition to reviewing government collections of information from the public under the Paperwork Reduction Act, OIRA reviews draft proposed and final regulations under Executive Order 12866 and . . . also oversees agency implementation of the Information Quality Act, including the peer review practices of agencies.”); *id.* (reporting that OIRA has only about “50 full-time professionals who work with agency professionals on specific issues and regulations”).

<sup>19</sup> *But see* Shah, *supra* note 3, at 862 (noting that there may nevertheless be “areas with particularly influential political meaning” implicating “larger coordinated adjudication regimes”).

<sup>20</sup> *See* Cass R. Sunstein, *On Not Revisiting Official Discount Rates: Institutional Inertia and the Social Cost Of Carbon*, 104 AM. ECON. REV. PAPERS & PROC. 547, 548 (2014) (noting that “[t]o decide whether to” initiate a process to revisit government discount rates, the executive branch “would have to consider the costs and benefits of initiating that very process”).

<sup>21</sup> *See* Exec. Order No. 12,866 § 4(c), 3 C.F.R. 638, 642 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2012); Vermeule, *supra* note 17, at 1215 (noting that presidential oversight of independent agencies consists of “ex ante coordination and regulatory planning, but no mandatory review of major rules”).

<sup>22</sup> *See* Shah, *supra* note 3, at 866 (noting more generally that adjudicatory oversight could “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”).

website or in the *Federal Register*.<sup>23</sup> Such innovations would, at the very least, allow for greater public scrutiny by interest groups, Congress, and perhaps even the courts.

By many accounts, however, the regulatory agenda and planning process governing rulemaking by independent agencies has not yielded meaningful oversight. In fact, according to some observers, it has “become more of a paper exercise than an analytical tool.”<sup>24</sup> Similarly, there is evidence that despite current executive orders requiring agencies to reveal the changes made as a result of OIRA-coordinated rulemaking review,<sup>25</sup> such disclosures are not regularly made.<sup>26</sup> Accounts even suggest that OIRA itself sometimes prevents such attempts at transparency.<sup>27</sup> In this manner, formal requirements imposed by the executive branch to promote interagency coordination and disclosure are often unenforced and disregarded in practice — at times, even with the encouragement of executive branch overseers themselves.

In many ways, these observations are perhaps unsurprising. The executive branch gains many benefits from declining to exercise control as well as from limiting the amount of agency transparency.<sup>28</sup> These benefits include the President’s ability to preserve his flexibility, engage in unfettered deliberation, hide poor management practices

---

<sup>23</sup> See *id.* at 855 (“Formal oversight could . . . improve transparency in coordinated adjudicative processes . . .”); cf. Andrias, *supra* note 9, at 1107 (noting that executive overseers could “be responsible for ensuring that significant shifts in enforcement policy are made public and easily accessible for examination”).

<sup>24</sup> Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 111 (2011); see also William F. West, *Presidential Leadership and Administrative Coordination: Examining the Theory of a Unified Executive*, 36 PRESIDENTIAL STUD. Q. 433, 445–46 (2006).

<sup>25</sup> Under current executive orders, after a regulatory action has been published in the *Federal Register* or otherwise issued to the public, agencies are directed to “[m]ake available to the public” information such as the text of the draft regulatory action and the cost-benefit analysis; to “[i]dentify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced”; and to “[i]dentify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.” Exec. Order No. 12,866, § 6(a)(3)(E), 3 C.F.R. 638, 646 (1994). The orders also direct OIRA, among other things, to forward all written communications between OIRA and external sources to the agency, to disclose these communications publicly, and eventually to “make available to the public all documents exchanged between OIRA and the agency during the review.” *Id.* § 6(b)(4), 3 C.F.R. at 648.

<sup>26</sup> See Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1148–54, 1164 (2010).

<sup>27</sup> See Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 362 (2014) (recalling instance when “OIRA told [the author, who was then serving “as the head of the EPA office responsible for acting as the primary EPA liaison to OIRA,” *id.* at 326] in no uncertain terms that the memo must not be made public”); Shah, *supra* note 3, at 871 (recognizing that “White House involvement in the oversight process . . . may shield the process from public view”).

<sup>28</sup> See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 601 (2010) (noting that “the President does not always have a political interest in seeking maximum control of regulatory policy”).

from public scrutiny, and selectively shift blame to different entities within the executive branch. Indeed, centralized oversight is only meaningful when the agency and President's interests in transparency and interagency consistency are not aligned, that is, when the principal's preferences depart from those of its agents. Otherwise, the costs of exercising such control are likely to outweigh their benefits. Under many circumstances, however, both agencies and the President are likely to be allies in resisting sustained coordination. Thus, there are many reasons to be skeptical that executive branch self-policing will be successful on its own.

## II. COORDINATORS OUTSIDE OF THE EXECUTIVE BRANCH

If these lapses in presidential oversight reflect the complicated internal dynamics of the EOP, they also call into question the potential for effective executive branch oversight in the adjudicatory context. If interagency coordination is valuable to the President, why hasn't the President already engaged in such efforts? There are many potential explanations, of course, but the President's conflicting incentives suggest that it would also be prudent to legislate such coordination efforts as well as to empower entities external to the executive branch to help facilitate ongoing oversight. These outside coordinators could either work independently or in conjunction with OIRA or other executive branch actors. While Shah gestures to the Government Accountability Office as one possibility,<sup>29</sup> this section will briefly consider other candidates such as the Judicial Conference and the Administrative Office of the Courts, as well as the Administrative Conference of the United States — with the hope of inviting future work to identify other possibilities outside of the executive branch.

A. *Judicial Conference and Administrative Office of the United States Courts.* — Administrative adjudicators have often been analogized to Article III judges, and for good reason. Like Article III judges, ALJs and other agency adjudicators are called upon to resolve individualized disputes through factfinding and the application of law to fact. While formally part of the executive branch, many of their adjudicative tasks are functionally similar to those of traditional judicial actors. Agency adjudicators and those who design adjudicatory procedures, for example, must often grapple with how to give hearing participants effective notice, how to ensure an unbiased tribunal, whether to allow for in-person or in-writing submissions, effective record requirements, how to draft orders, and so on.<sup>30</sup> Of course, as Shah

---

<sup>29</sup> Shah, *supra* note 3, at 870.

<sup>30</sup> See generally Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

and others point out,<sup>31</sup> administrative adjudicators are also unlike Article III judges in many ways: the latter possess life tenure and salary protections, and are governed by different rules of discovery, procedure, and evidence.<sup>32</sup> In these and other respects, the analogy between agency and Article III adjudicators is imperfect, to be sure, but the two are often faced with similar issues that nevertheless render the analogy a powerful one.

Most relevantly, Shah demonstrates that agency adjudicators are like federal judges in that they both assign some of their discrete tasks to other actors such as, for the latter, magistrate judges for factfinding. In other words, Article III judges are like their Article I counterparts in unbundling aspects of their judicial tasks and outsourcing them to others, whether for reasons of expediency or efficiency. As a result, administrative adjudicators could learn much from Article III judges' own efforts to manage these efforts amongst themselves as well as with other actors who aid in their work.

The federal judiciary, in turn, has a number of coordinating bodies, most prominently the Judicial Conference and the Administrative Office of the Courts (AO), that help to coordinate and share expertise. The modern Judicial Conference was created in 1948,<sup>33</sup> and is currently comprised of the Chief Justice of the U.S. Supreme Court, the chief judge of each judicial circuit, and the Chief Judge of the Court of International Trade, as well as a district judge from each regional judicial circuit.<sup>34</sup> The Conference is generally "responsible for comprehensively surveying business conditions in the federal courts," proposing measures "for the coordination of judicial assignments," and "submit[ting] suggestions to the various courts in the interest of uniformity and expedition of business."<sup>35</sup> In other words, one purpose of the Judicial Conference is to coordinate judicial practices by drawing from the collective experience of judges at various levels of the federal judiciary.

To help administer and promote consistent policy, Congress also created the AO in 1939.<sup>36</sup> The AO assumed many administrative du-

---

<sup>31</sup> See Shah, *supra* note 3, at 875–78 and sources cited therein.

<sup>32</sup> See 5 U.S.C. §§ 556, 557 (2012) (governing formal adjudications). Various agencies also adhere to a diverse array of procedures for informal adjudications.

<sup>33</sup> Harlington Wood, Jr., *Judiciary Reform: Recent Improvements in Federal Judicial Administration*, 44 AM. U. L. REV. 1557, 1561 (1995) (citing Judicial Code of 1948, Pub. L. No. 80-772, 62 Stat. 683 (codified as amended at 28 U.S.C. § 331 (2012))).

<sup>34</sup> *Judicial Conference of the United States: Membership*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/JudicialConference/Membership.aspx> [<http://perma.cc/QYJ5-YQP5>] (last visited Jan. 8, 2015).

<sup>35</sup> Wood, *supra* note 33, at 1561.

<sup>36</sup> Administrative Office Act of 1939, Pub. L. No. 76-299, 53 Stat. 1223 (codified as amended at 28 U.S.C. §§ 601–610).



ties that had previously been performed by the Department of Justice, such as collecting statistics, issuing reports, and dealing with various procurement and personnel issues.<sup>37</sup> While supervised by the Judicial Conference, the Chief Justice of the Supreme Court is authorized to appoint and remove the AO's Director and Deputy Director.<sup>38</sup> Amongst its many duties, one of the AO's primary tasks is to facilitate "communications within the Judiciary and with Congress, the Executive Branch, and the public on behalf of the Judiciary."<sup>39</sup> As such, the office is uniquely positioned to serve as an interface between the executive branch and the courts.

The executive branch would thus do well to solicit the assistance of the Judicial Conference and the AO in developing guidance regarding interagency adjudication. Circuit court judges, for example, may have insights that are useful to agency appeals councils and boards, while district court judges likely face issues similar to that of line ALJs. There is also historical antecedent for the Judicial Conference itself to initiate a conference or otherwise invite a more ongoing relationship with agency officials on the issue. In 1953, the Chief Justice asked the President to convene a gathering to address the "unnecessary delay, expense and volume of records" in agency adjudicatory and rulemaking activities, a gathering which some view as a precursor to the more permanent Administrative Conference.<sup>40</sup> The meeting produced an influential report and included representatives from almost sixty departments and agencies, members of the federal judiciary, and the bar.<sup>41</sup>

Because such gatherings can be ad hoc, Congress should also consider legislating an ongoing relationship between ALJs and Article III judges, perhaps in the form of periodic joint reports or gatherings.<sup>42</sup> Indeed, the Judicial Conference and the AO have experience providing the kind of ex ante oversight that Shah contemplates. For example,

---

<sup>37</sup> See Wood, *supra* note 33, at 1562.

<sup>38</sup> See 28 U.S.C. § 601.

<sup>39</sup> *Administrative Office of the United States, United States Courts*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx> [<http://perma.cc/B9CY-JG3A>] (last visited Jan. 8, 2015).

<sup>40</sup> See E. BARRETT PRETTYMAN ET AL., REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE CALLED BY THE PRESIDENT OF THE UNITED STATES ON APRIL 29, 1953, 19 F.R.D. 45 (1957); Jeffrey S. Lubbers, *ACUS 2.0 and Its Historical Antecedents*, ADMIN. & REG. L. NEWS, Spring 2011, at 9, 9 (noting that the conference was chaired by Judge Prettyman and "has been called the 'first temporary Administrative Conference'").

<sup>41</sup> See PRETTYMAN ET AL., *supra* note 40.

<sup>42</sup> See Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1019 (2000) ("To shift administrative law judges away from alignment with the invisible bureaucracy and toward affiliation with the symbolism of personalized judgments made in courts, the spaces currently occupied by such judges would have to be reorganized.").

given that district court judges currently possess substantial discretion regarding how and when to use magistrate judges,<sup>43</sup> both the Judicial Conference and the AO have been involved in efforts to promote a more national approach — by making such delegations more transparent as well as by providing more uniform guidance.<sup>44</sup> Such insights, in turn, may readily translate into lessons for how ALJs delegate certain tasks to factfinding actors in other executive branch entities. Moreover, both the AO and the Judicial Conference may be particularly influential on administrative adjudicators, since most agency orders will be eventually subject to judicial review. In other words, because many ALJs know that they will be eventually subject to Article III oversight, they may be more inclined to follow the best practices that Article III actors have helped to generate. Thus, encouraging more interaction between the executive and judicial branches would not only reap the benefits of the Judicial Conference and the AO's adjudicatory expertise, but also could help to ensure an external check on the executive branch's incentives to shirk oversight.

*B. Administrative Conference of the United States (ACUS).* — The recently reauthorized<sup>45</sup> ACUS could also play an important coordinating role, not only by further cataloguing interagency adjudicatory practices, but also by generating ideas for best practices within particular contexts. Indeed, ACUS was first established by Congress in 1964<sup>46</sup> to address the “real need for an independent, nonpartisan body

---

<sup>43</sup> See PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM 23, <http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System.aspx?FT=.pdf> [<http://perma.cc/6ZXJ-4JHT>] (“A particular genius of the Federal Magistrates Act is that it does not mandate the assignment of particular duties to Magistrate Judges, but instead, it lets each District Court determine what duties are most needed in light of local conditions and changing caseloads.”).

<sup>44</sup> In 1995, for example, the Judicial Conference's *Long Range Plan for the Federal Judiciary* cited the importance of local flexibility, but concluded that “[a]lthough each District Court exercises discretion to its use of Magistrate Judges, the effort to encourage effective utilization of Magistrate Judges must be national in approach and effect.” *Id.* at 24 (alteration in original) (quoting JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 102 (1995)) (internal quotation marks omitted). As a result, the AO updates and compiles information on magistrate duties across courts, while the Magistrate Judges Committee of the Judicial Conference has published best practices for the effective and efficient use of and delegation to magistrate judges. *Id.* at 24–25.

<sup>45</sup> Regulatory Improvement Act of 2007, Pub. L. No. 110-290, 122 Stat. 2914 (2008) (codified at 5 U.S.C. § 596 (2012)) (reauthorizing ACUS with appropriations); Federal Regulatory Improvement Act of 2004, Pub. L. No. 108-401, 118 Stat. 2255 (2004) (reauthorizing ACUS but without sufficient appropriations); see Jeffrey S. Lubbers, *Paul Verkuil's Projects for the Administrative Conference of the U.S. 1974–1992*, 32 CARDOZO L. REV. 2421, 2421 n.2 (2011).

<sup>46</sup> Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964) (codified at 5 U.S.C. §§ 591–596); Marshall J. Breger, *The Administrative Conference of the United States: A Quarter Century Perspective*, 53 U. PITT. L. REV. 813, 819 (1992).

to advise and coordinate activities among federal agencies.”<sup>47</sup> Decades of experience under the APA had revealed that many issues of agency procedure remained unresolved, and that some existing procedures were unduly costly — especially as the administrative state grew in size and scope. Thus, the growing perception among members of Congress, the executive branch, and even the judiciary (mainly through the Judicial Conference) was that a more permanent institution was necessary to identify inefficiencies, disseminate information, and develop best practices among administrative agencies.<sup>48</sup>

Accordingly, Congress designed ACUS as a partnership between agency officials and outside experts. In many ways, ACUS was modeled on the Judicial Conference in terms of representativeness and scope.<sup>49</sup> Specifically, a small professional staff helps to support a presidentially appointed Chairman, a ten-member Council, and up to over a hundred total members drawn from every major federal agency as well as private individuals who serve without compensation.<sup>50</sup> One of ACUS’s main tasks, in turn, is to sponsor, guide, and support research projects on timely topics, which then often become the basis for formal recommendations drafted with participation by committee members.<sup>51</sup> These recommendations are then considered by the full membership during semiannual plenary sessions. While the recommendations are usually published in the *Federal Register* and actively promoted by ACUS staff members, many of them are also implemented voluntarily by agencies whose members were often part of the drafting process itself.<sup>52</sup>

While it is currently pursuing a project on federal administrative adjudication,<sup>53</sup> ACUS could play a more robust role with regard to the coordination of interagency adjudication specifically as well. It might, for example, embark on a follow-up project to its previous work, helmed by Professors Jody Freeman and Jim Rossi, on improving the

---

<sup>47</sup> See Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19, 28 (1998).

<sup>48</sup> See Breger, *supra* note 46, at 814.

<sup>49</sup> See Fine, *supra* note 47, at 70 (noting that “the Administrative Conference acts as an ongoing mini-national performance review in its area of expertise, just as the . . . Judicial Conference does in overseeing the operations of the judiciary” (quoting 139 Cong. Rec. H6575–76 (daily ed. Sept. 29, 1993) (statement of Rep. Jack Brooks) (omission in original))).

<sup>50</sup> See Jeffrey Lubbers, “*If It Didn’t Exist, It Would Have to Be Invented*” — *Reviving the Administrative Conference*, 30 ARIZ. ST. L.J. 147, 148 (1998).

<sup>51</sup> *Id.* at 149.

<sup>52</sup> *Id.*

<sup>53</sup> See Shah, *supra* note 3, at 812; *Federal Administrative Adjudication*, ADMIN. CONFERENCE OF THE U.S., <http://www.acus.gov/research-projects/federal-administrative-adjudication> [<http://perma.cc/F8A4-RTZS>] (last visited Jan. 8, 2015).

coordination of related agency responsibilities more broadly.<sup>54</sup> The project might focus in particular on agency memoranda of understanding regarding adjudication — how accessible they are, how long they are in effect, and whether they are treated as internally binding in some sense by agency officials.<sup>55</sup> While many of the recommendations provided in the prior interagency coordination report remain germane, much of ACUS's credibility and influence comes from its unique ability to convene and engage with agency officials themselves. One of the most valuable aspects of the institution, in other words, is its ability to convene experts from within agencies — actors who not only bring experience, but also are more vested in the resulting process and implementation of any recommendations that may follow.<sup>56</sup> Simply fostering those discussions across agencies and then reporting on the findings would go a long way toward improving the transparency of interagency adjudication.

\* \* \*

As novel regulatory problems increasingly require the cooperation of multiple agencies, the study of interagency coordination remains critical. Shah's study is an important contribution to this growing body of research. By identifying and analyzing the phenomenon of how agencies coordinate their adjudicatory activities, Shah raises a novel set of issues distinct from those that arise in the rulemaking and enforcement contexts. Future work might fruitfully build upon her efforts by identifying further institutions outside of the executive branch that could provide a bird's-eye view of such adjudicatory activities without the same incentives to shirk or otherwise shield such efforts from external oversight. This task will also be important since there is still more work to be done in understanding the adjudicatory activities of traditionally independent, as opposed to executive, agencies — particularly given that the EOP's influence is even more constrained in that arena. Regardless, such research will surely be aided by Shah's nuanced theoretical insights and her successful efforts to bring much-needed attention to the ways in which multiple agencies influence the individuals that appear before them every day.

---

<sup>54</sup> *Improving Coordination of Related Agency Responsibilities*, ADMIN. CONFERENCE OF THE U.S., <http://www.acus.gov/research-projects/improving-coordination-related-agency-responsibilities> [<http://perma.cc/QYL4-L7DY>] (last visited Jan. 8, 2015).

<sup>55</sup> Many thanks to Jeff Lubbers for this suggestion.

<sup>56</sup> See Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. (forthcoming 2015) (manuscript at 16–19) (discussing ACUS's “[b]ridging [f]unction,” *id.* at 16), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2501422](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501422).