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This Article establishes the subject of federal administrative investigations as a new area of study in administrative law. While the literature has addressed investigations by specific agencies and congressional investigations, there is no general account for the trans-substantive constitutional value of administrative investigations. This Article provides such an account by exploring the positive law, agency behaviors, and constraints pertaining to this unresearched field. It concludes with some urgency that the Administrative Procedure Act of 1946—the statute that stands as a bill of rights for the Administrative State—does not serve to regulate administrative investigations and that Article III courts have held that such agency behavior is essentially unreviewable since the mid-twentieth century. It identifies the historical guideposts of administrative investigations and analyzes the substantial power agencies wield when they investigate. It surveys and analyzes the limiting principles in law that operate as nominal constraints to unlawful administrative investigative behavior. This Article concludes by considering procedural and substantive constraints that could be implemented to align agency investigations with constitutional and statutory norms without sacrificing their ability to fulfill their critical missions for the American public.

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INTRODUCTION

Almost uniformly, federal agencies investigate. Armed with broad or vague mandates, agencies investigate matters within their purview that they might be able to enforce or regulate. This domain is shrouded in considerable mystery. The final agency action following an investigation does not always disclose the full extent of the agency's inquiry. If agencies decline to act on the results of an investigation, the public will likely never know that it took place, aside from the targets of the investigation or third parties who receive agency requests for information under the threat of compulsion, such as subpoenas or warrants.

The full extent of an agency investigation can be fearsome. The Federal Trade Commission (FTC) doggedly investigated a company called LabMD, which cost the business millions to defend and ultimately caused its shuttering.[1] Under the strain of a multiyear FTC investigation, LabMD saw its revenue halved over the course of a year and its insurers refuse to renew the company's policies.[2] In January 2014, the CEO shut down the company due to the "psychological warfare the FTC did on the company," which included hammering LabMD with continual demands which relented only upon settlement.[3] Part of the cost to LabMD came from protracted litigation spurred by allegedly falsified information that a cyber-security firm gave

1. Dune Lawrence, *A Leak Wounded This Company. Fighting the Feds Finished It Off*, BLOOMBERG: BLOOMBERG BUSINESSWEEK (Apr. 25, 2016), https://www.bloomberg.com/features/2016-labmd-ftc-tiversa/ [https://perma.cc/ZL68-WCFW].

2. *Id.*

3. *Id.*

the government[4] and allegations that a Big Law firm covered up for that firm.[5] A House Oversight Committee report later concluded that the FTC had sacrificed "good government" in using a conflicted third party's leads to "obtain information validating its regulatory authority" and providing the third party with "actionable information that it exploited for monetary gain."[6]

Whether deployed nobly or not, agency investigative tools are powerful and merit examination. This Article reveals and probes federal agency investigations, their legal foundation and constraints, and how the People can act to improve agency behavior. Our nuanced inquiry into administrative investigations is the first of its kind.[7] Despite the richness, ubiquity, and importance of administrative investigations, they have never been studied in depth. Others have obliquely touched on some of the topics that this Article squarely addresses.[8] The Supreme Court has recently addressed the scope of administrative warrants and subpoenas,[9] but it has not examined the foundation of its modern jurisprudence for evaluating the lawfulness of agency investigations or developed a touchstone for agencies and the public. Instead, the Court catalyzed the flourishment of a highly deferential standard that rarely results in the quashing of agency investigative action or the exercise of agency self-restraint. The Court has also refrained from acknowledging that the foundations of its earlier cases have been eroded by more recent developments in both constitutional law and administrative law.

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4. Joel Schectman, *Exclusive: DOJ Probes Allegations that Tiversa Lied to FTC About Data Breaches*, REUTERS (Mar. 17, 2016, 8:30 PM), https://www.reuters.com/article/us-tiversa-doj-probe-exclusive-idUSKCN0WK027 [https://perma.cc/4R6D-UQ6P].

5. Kathryn Rubino, *Biglaw Firm Accused of Covering Up for Hacker*, ABOVE L. (May 8, 2018, 11:47 AM), https://abovethelaw.com/2018/05/biglaw-firm-accused-of-covering-up-for-hacker/ [https://perma.cc/4JR8-YJBK].

6. Lawrence, *supra* note 1; Alison Frankel, *There's a Big Problem for the FTC Lurking in 11th Circuit's LabMD Data-Security Ruling*, REUTERS (June 7, 2018, 4:39 PM), https://www.reuters.com/article/us-otc-labmd/theres-a-big-problem-for-the-ftc-lurking-in-11th-circuits-labmd-data-security-ruling-idUSKCN1J32S2 [https://perma.cc/C7Q2-3FLZ] (describing how a cybersecurity firm exploited a LabMD technical vulnerability, and then after LabMD refused to hire the firm, the firm reported the breach to the FTC).

7. The last article that appears to have addressed the general topic of agency investigations was written in 1985. John W. Bagby, *Administrative Investigations: Preserving a Reasonable Balance Between Agency Powers and Target Rights*, 23 AM. BUS. L.J. 319 (1985). Professor Philip Hamburger has discussed "Inquisitorial Process" and "Prerogative Orders and Warrants" through a historical lens but has not engaged on this general topic. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 157–90 (2014); *see also* Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017) (on enforcement discretion); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014) (same).

8. *See, e.g.*, MICHAEL ASIMOW, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2019), https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf [https://perma.cc/HE8J-XFRS].

9. *E.g.*, McLane Co. v. EEOC, 137 S. Ct. 1159, 1166–70 (2017) (holding that a district court's decision to enforce or quash an Equal Employment Opportunity Commission administrative subpoena is reviewed for abuse of discretion, not *de novo*, with reference to "longstanding practice of the courts of appeals in reviewing a district court's decision to enforce or quash an administrative subpoena").

Our research has led us to conclude that courts are not using the Fourth Amendment to meaningfully rein in agency investigative excesses, and that courts are not using the Administrative Procedure Act of 1946 (APA) at all to regulate agency investigative behavior. Courts have consistently held that investigative behavior is unreviewable for lack of finality. The following chart summarizes the interplay between the APA and various agency behaviors, as assessed by the text of the APA. The chart displays how administrative investigations are not constrained by positive procedures or judicial review under the APA.

Table 1. Judicially Recognized Positive APA Procedures and Article III Review of Administrative Behaviors (all citations to title 5 of the U.S. Code)

	Investigative Behavior/Action	**Informal Adjudication & Licensure**	**Formal Adjudication & Licensure**	**Subregulatory Rulemaking**	**Informal Legislative Rulemaking**	**Formal Legislative Rulemaking**
Positive procedures?	No[10]	No, save for § 555(e)[11]	§§ 554, 556, 557	§ 553	§ 553	§§ 553, 556, 557
Reviewable under § 704?	Rarely	Yes	Yes	Yes, generally	Yes	Yes

This Article first analyzes the evolution of the Supreme Court's treatment of investigative actions and concludes that the U.S. Constitution provides no meaningful barrier to such exercises of investigative power. This Article identifies and analyzes how the APA has never regulated the civil investigative conduct of agencies. To aid this Article's navigation into these uncharted waters, Part I looks into the history of agency investigations to see whether and how they have been constrained. Here, we fashion a working definition to use as a foundation for our examination. Part II surveys the range of agency investigative techniques and showcases the degree of power agencies wield when they investigate.

Part III analyzes the efficacy of checks on agency investigatory abuses. These checks manifest in hard and soft forms. Hard constraints, like the APA and the Bill of Rights, provide direct avenues for inappropriately investigated individuals to seek judicial redress. Soft constraints, like the separation of powers principle of the Constitution and Congress's powers of oversight and the purse, merit discussion but are less directly able to contain abusive investigations. Likewise, the exercise of executive branch self-restraint is a suboptimal solution due to a durability deficit. Our research leads us to conclude that there are minimal barriers applied throughout the federal government under the innumerable administrative statutory schemes that facilitate investigations and that any enlargement of prosecutorial behavior in light

10. The APA does not provide positive procedures for investigative acts. Unless investigative acts qualify as final agency action in a particular case, they are not reviewable under the APA. *See* 5 U.S.C. § 704.

11. Butte Cty. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010) (concluding that under 5 U.S.C. § 555(e), "the agency must provide an interested party . . . with 'a brief statement of the grounds for denial'" in an informal adjudication).

of new technologies could evolve to an unanticipated and unprecedented total enforcement environment in portions of administrative law.

To assess the desirability of heightened barriers, Part IV examines how administrative investigations further the purpose of agencies in the constitutional order. Proceeding from the conclusion that adequate restraints are lacking, this Part establishes why checks are needed on investigative actions by chronicling abuses and inefficiencies in agency investigations.

Part V identifies and analyzes potential solutions to unlawful investigative acts that could be utilized to calibrate agency investigations into constitutional and statutory norms without foreclosing agencies' ability to lawfully execute their respective missions.

I. TRACING ADMINISTRATIVE INVESTIGATIONS

A. Supreme Court Treatment of Agency Investigations

As long as there has been civilized government, there has been executive investigation.[12] The concept of administrative investigations draws from this legacy.[13] In medieval England, the King's Chancellor, an administrative official, commonly issued writs as royal commands.[14] During the seventeenth century, the powerful Star Chamber issued broad warrants permitting searches of the papers of political suspects.[15] Eighteenth-century England exercised administrative power in the form of writs of assistance, that is, general search warrants (e.g., authorizing customs searches).[16] In colonial America, writs of assistance were a major grievance that spurred the colonies to declare independence.[17]

Some of the first American statutes explicitly authorizing agency investigations were the Act of 1838, which created the Steamboat Inspection Service,[18] and the

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12. *1 Samuel* 14:38 ("Saul said, 'Draw near here, all you chiefs of the people, and investigate and see how this sin has happened today.'").

13. Kenneth Culp Davis, *The Administrative Power of Investigation*, 56 YALE L.J. 1111, 1111–14 (1947) (beginning in biblical times and continuing through World War II and noting that "[t]he story of the development of the administrative power of investigation is rather dramatic").

14. John A. Hamill, Sr., *EPA Administrative Investigative Tools: An Inside Perspectiv*e, 4 J. ENV'T L. & LITIG. 85, 86–87 (1989) (discussing how writs were "an executive, not a judicial, invention" arising after the Norman conquest of 1066 and commonly issued by the King's Chancellor and other administrative officials).

15. Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 362 (1921).

16. Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 MO. L. REV. 939, 952 (2016).

17. Davis, *supra* note 13, at 1111–14.

18. Act of July 7, 1838, Pub. L. No. 25-191, 5 Stat. 304 (providing for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam). This act provided for inspections of hulls, boilers, and the like. *Id.* §§ 3–6; *see* Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568, 1633 (2008).

Interstate Commerce Commission Act of 1887.[19] The courts struggled with what oversight to exercise over agency investigations.[20] The Supreme Court initially viewed agencies' ability to issue subpoenas with skepticism, even upon congressional delegations.[21] The majority opinion in *Harriman v. Interstate Commerce Commission* limited administrative subpoenas to the "cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law."[22] The Court reinforced the notion that agency investigative acts would be scrutinized carefully by denouncing a "general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice."[23] Into the 1920s, the Court reiterated its disapproval of "fishing expeditions into private papers on the possibility that they may disclose evidence of crime."[24]

But the Supreme Court's attitude shifted after the New Deal established new and varied agencies with complex missions.[25] After World War II, and in near-contemporaneity with the enactment of the Administrative Procedure Act of 1946, the Court decided a body of cases that recalibrated the baseline judicial scrutiny of agency investigations to highly deferential. These seminal cases include *Oklahoma Press Publishing Co. v. Walling*[26] and *United States v. Morton Salt Co*.[27]

In *Oklahoma Press Publishing*, the U.S. Department of Labor's Wage and Hour Division issued subpoenas to two newspaper publishers it was investigating for violating the Fair Labor Standards Act.[28] The publishers resisted the subpoenas, arguing that the Division failed to comply with the Fourth Amendment and demonstrate the probable cause necessary to enforce the subpoenas.[29] The Supreme Court rejected that argument and dismissed the publishers' concerns about executive "general fishing expeditions into [their] books, records and papers, in order to secure evidence that they have violated the Act," holding that "the records in these cases present no question of actual search and seizure" but were only "constructive" searches.[30] For such constructive searches, the Fourth Amendment's probable cause

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19. KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.1, at 940 (6th ed. 2019) (citing 24 Stat. 379, 383 (1887) (repealed 1978)).

20. Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1401–08 (2014); Donald R.C. Pongrace, *Requirement of Notice of Third-Party Subpoenas Issued in SEC Investigations: A New Limitation on the Administrative Subpoena Power*, 33 AM. U. L. REV. 701, 709–16 (1984) (discussing how the Supreme Court initially erected a high hurdle for agencies to issue administrative subpoenas); HICKMAN & PIERCE, *supra* note 19 (similar).

21. Pongrace, *supra* note 20, at 709–10.

22. 211 U.S. 407, 419–20 (1908).

23. Jones v. SEC, 298 U.S. 1, 27 (1936) (quoting *In re* Pac. Ry. Comm'n, 32 F. 241, 263 (C.C.N.D. Cal. 1887)).

24. FTC v. Am. Tobacco Co., 264 U.S. 298, 306 (1924).

25. Davis, *supra* note 13, at 1122.

26. 327 U.S. 186, 209 (1946).

27. 338 U.S. 632, 652 (1950).

28. *Okla. Press Publ'g Co.*, 327 U.S. at 189.

29. *Id.* at 189–90.

30. *Id.* at 194–95, 202–05.

requirement was satisfied simply "by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry."[31] *Oklahoma Press Publishing* thus ruled that the Fourth Amendment protects regulated parties only so far as Congress has explicitly limited agencies' subpoena authorities.[32] Because the Fair Labor Standards Act's "language leaves no room to doubt that Congress intended to authorize just what the Administrator did and sought to have the courts do," the publishers' claims failed.[33] The opinion also took particular note of the "corporate character" of the publishers' records, implying that the Fourth Amendment's protections were especially attenuated in that circumstance.[34] Justice Murphy dissented alone, inveighing against all uses of administrative subpoenas and alluding to King George III as he worried that administrative subpoenas were vulnerable to "[e]xcessive use or abuse of authority."[35]

The Supreme Court returned to review the lawfulness of agency warrants four years later in *Morton Salt,* this time in a challenge to an FTC order requiring salt producers and trade associations to file various and comprehensive reports and statements.[36] The salters argued that the Commission's order violated the Fourth and Fifth Amendments.[37] Building off of *Oklahoma Press Publishing*, including its dim view of the robustness of business associations' constitutional rights in this context, the Court held that "neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret."[38] "Of course," the Court recognized, the Constitution imposes some limits on what the Commission could demand.[39] In addition to the limitations found in *Oklahoma Press Publishing*—that the type of agency request must be authorized by statute and the specific agency request must be "reasonably relevant"—the Supreme Court held that "the demand [must be] not too indefinite."[40] The Court summarily found that the Commission's order, on its face, met those standards.[41] Finally, the Court faulted the salters for not complaining directly to the Commission and asking it to modify the order: before quashing agency investigative acts as "arbitrarily excessive," courts "may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions."[42]

These two decisions had the effect of "further legitimizing the routine use of administrative subpoenas."[43] This regime was ushered in by new Justices with a more

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31. *Id.* at 209 (footnote omitted).
32. *Id.* at 197–202.
33. *Id.* at 198 (footnote omitted).
34. *Id.* at 204–08.
35. *Id.* at 218–19 (Murphy, J., dissenting).
36. United States v. Morton Salt Co., 338 U.S. 632, 636–37 (1950) (first citing Hale v. Henkel, 201 U.S. 43 (1906); and then United States v. White, 322 U.S. 694 (1944)).
37. *Id.* at 651.
38. *Id.* at 652.
39. *Id.* at 652–53.
40. *Id.* at 652.
41. *Id.* at 653.
42. *Id.*
43. Cuéllar, *supra* note 20, at 1404 (footnote omitted).

hospitable view of government intervention.[44] The Supreme Court has not in recent years squarely addressed this issue or the standards that should apply to judicial review of agency investigatory techniques.[45] Although the Supreme Court has not in recent years taken up the matter squarely, it has not done so for a lack of petitions for writs of certiorari. Several have been filed in the decades since *Morton Salt*, asking the Court to overrule or diminish parts of that jurisprudence.[46]

B. Defining Agency Investigative Acts

The postwar Supreme Court cases involve perhaps the quintessential agency investigative act: subpoenas. But subpoenas are just one example of an agency investigative act. A proper study of investigations requires us to precisely define agency investigative acts. The academy and courts have not coalesced on a comprehensive definition of an agency investigative act. The Attorney General's 1941 report on administrative procedure remarked, "Much that occurs at a hearing or conference is conditioned by the investigation of the problem which may have preceded it, or of which the hearing may be a part."[47] Once Congress enacted the APA, which carried forward many existing administrative law practices, Professor Kenneth Culp Davis offered, "The Administrative Procedure Act to the contrary notwithstanding, administrative proceedings are not limited to rule-making, adjudication, and licensing. Some administrative proceedings are investigations—proceedings designed to produce information."[48]

The Supreme Court has weighed in by providing a negative definition of an administrative investigation, concluding that an investigation is not a final agency action.[49] An investigation "is not a definitive statement of position . . . [but only] represents a threshold determination that further inquiry is warranted."[50] The APA obliquely references "nonpublic investigatory proceeding[s]" and "investigative act[s],"[51] but "provides no statutory definition or classification of different kinds of investigations."[52]

Nor do dictionaries provide helpful definitions. *Merriam-Webster* defines "investigate" and the word's derivatives—"investigatory," "investigator," and "investigation"—to mean or involve "a systematic examination."[53] Other courts have

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44. HICKMAN & PIERCE, *supra* note 19.

45. *See, e.g.*, *id.* § 8.2.

46. *See, e.g.*, Petition for Writ of Certiorari at 20, Koresko v. Chao, 549 U.S. 942 (2006) (No. 05-1501) 2006 WL 1455400 ("*Morton Salt* and *Powell* are decades old, predating this Court's jurisprudence on privacy rights. Subsequent statutory law has worn away the main thread of the holdings – that government inquiries must be presumed legitimate.").

47. ATT'Y GEN.'S COMM. ON ADMIN. PROC., DEP'T OF JUST., FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 111 (1941).

48. Davis, *supra* note 13, at 1111; *see also* David C. Shonka, *Responding to the Government's Civil Investigations*, 15 SEDONA CONF. J. 1, 1 (2014).

49. FTC v. Standard Oil Co., 449 U.S. 232, 241 (1980).

50. *Id.*

51. 5 U.S.C. §§ 555(c), 554(d).

52. Hamill, *supra* note 14, at 88.

53. *Investigate*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020).

turned to *Black's Law Dictionary*'s definition, which focuses on the objective of the investigation: "[t]he activity of trying to find out the truth about something."[54] The Department of Justice has defined "regulatory investigations" similarly: "'[R]egulatory investigations' . . . generally have as their objective regulatory compliance by private parties."[55] This demonstrates a parallel framework to Justice Stewart's "I know it when I see it" approach.[56]

Although there is no general executive branch definition of administrative investigation, certain organic statutes give agencies binding definitions in some contexts. For example, the Antitrust Civil Process Act defines an "antitrust investigation" as "any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or in any activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation."[57] Similar statutory definitions for civil administrative investigation exist for the Consumer Financial Protection Bureau (CFPB)[58] and the FTC.[59] These definitions, too, are only general.

We thus offer a definition of agency investigative acts: executive branch agency exercises of civil examination or inquiry authority, taken in the absence of positive APA procedures, that carry the perceived, eventual, or actual threat of compulsion.[60] We draw the term from the APA, which uses it, albeit glancingly and without definition.[61]

Deconstructing this definition requires mapping agency behavior that precedes "agency action" as normatively understood in the APA in 5 U.S.C. § 704.[62] The agency must be acting on some kind of formal or informal complaint, tip, internal targeting, or defined trigger point, at which point the agency researches the facts necessary to sustain an agency action and decides whether to initiate such an action.[63]

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54. MusclePharm Corp. v. Liberty Ins. Underwriters, Inc., 712 F. App'x 745, 755 (10th Cir. 2017) (citing BLACK'S LAW DICTIONARY (10th ed. 2014)) (distinguishing "regulatory investigation" from "proceeding").

55. Inspector General Authority to Conduct Regulatory Investigations, 13 Op. O.L.C. 54, 54 n.1 (1989).

56. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (applying such an approach to pornography).

57. 15 U.S.C. § 1311(c).

58. 12 U.S.C. § 5561. The Supreme Court held that it was unconstitutional for the CFPB's director to be removed only for cause. Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020). Although the case focused primarily on the authorities of inferior officers of the United States, it arose in the context of CFPB attempting to enforce its civil investigatory authority against the respondent. *Id.* at 2188.

59. 15 U.S.C. § 57b-1.

60. This definition comports with the only other attempted definition in the literature of which we are aware, Professor Davis's comment that investigations are "designed to produce information." Davis, *supra* note 13, at 1111.

61. 5 U.S.C. § 555(c).

62. ASIMOW, *supra* note 8.

63. *E.g.*, 7 U.S.C. § 193(a) (describing the procedure for the Department of Agriculture to investigate, hear, and fine packers and swine contractors who have violated or may have violated the Packers and Stockyards Act of 1921).

If the type of agency action is an adjudication, then the investigation could enable the decision whether to adjudicate by enforcement against a specific party. Here, investigation targets are not (yet) respondents or defendants in agency or civil actions, but akin to third-party witnesses, including third-party witnesses on notice of their potential status as a party-defendant.[64] The goal is to determine whether agency action that would trigger normative section 704 finality is warranted.

Our definition presumes that the purpose of agency investigation is to see whether some agency action may eventually be warranted, excepting when the investigation is preordained to produce a discrete outcome. This comports with the Supreme Court's 1946 statement that agency investigations aim to "discover and procure evidence" with the ultimate goal being to see if that evidence "should justify" bringing a charge or complaint.[65] It also comports with the Court's later distinction between "determinations of a quasi-judicial nature"—i.e., adjudications—and "nonadjudicative, fact-finding investigations."[66] This definitional prong leaves out agency movement where agency action is remote, impossible, or forsworn. For example, when the government seeks demographic data for the decennial census, the request's purpose is not to make agency action.[67]

A variety of sources can spark an investigation. Some agencies could conduct investigations as an exercise of their own discretion and on their own initiative. For example, the CFPB may issue civil investigative demands to collect information "before the institution of any proceedings."[68] The agency might do so simply upon reading a news story,[69] or "merely on suspicion."[70] The agency might receive a tip or notification, perhaps from an inspector general or another federal agency like the Department of Justice.[71] This may be because a private party files a charge with the agency, which is then required to investigate (often within a time frame) and decide whether to file an administrative complaint.[72] The agency may commence an

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64. FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1310–11 (D.C. Cir. 1980).

65. Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 201 (1946).

66. Hannah v. Larche, 363 U.S. 420, 445–46 (1960).

67. *See* 13 U.S.C. §§ 141, 181 (authorizing the Census Bureau to conduct decennial censuses and interim inquiries).

68. 12 U.S.C. § 5562(c)(1). Each demand must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." *Id.* § 5562(c)(2).

69. Shonka, *supra* note 48, at 2.

70. United States v. Powell, 379 U.S. 48, 57 (1964).

71. *E.g.*, FED. ELECTION COMM'N, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS 8–9 (2012), https://transition.fec.gov/em/respondent_guide.pdf [https://perma.cc/DGT4-JK65].

72. 8 U.S.C. § 1324b(d)(2) (the U.S. Department of Justice's Civil Rights Division's Immigrant and Employee Rights Section, which receives and investigates complaints of unfair immigration-related employment practices); *see also id.* § 1324b(d)(1) (also permitting that Section to unilaterally investigate and file charges); 14 C.F.R. § 13.5(g)–(i) (similar, for Federal Aviation Administration complaints); 52 U.S.C. § 30109(a)(1) (similar, for FEC complaints); 11 C.F.R. § 111.4 (same); 29 U.S.C. § 160(b) (similar, for National Labor Relations Board complaints).

investigation upon direction from the President.[73] Congress may also issue a directive to investigate,[74] for example, through a statute directing an agency to adopt rules within a certain number of days on a particular subject, which requires the agency to investigate what the rule should be.[75]

Some agencies, like the Internal Revenue Service[76] and the Federal Election Commission,[77] exercise express discretion under their organic statute, commonly in the form of compliance checks or audits. Such an investigation may arise out of a telephone call received on a tip line, a whistleblower complaint, or some other reason for the agency to suspect a violation. But even if the agency does not have a discrete reason to audit a party, it may employ a random audit[78] to decrease the probability that violators can strategically evade enforcement.[79] The audit might not be completely random. An agency might pay attention to particular industries or fields within its regulatory purview.[80]

Once the agency elects to investigate, there are a number of possible outcomes, all of which (under our definition) carry the perceived threat or actual consequence of compulsion. The agency may decide to commence an adjudication or rulemaking, although the adjudication may be the agency finding a liability yet declining to seek an immediate remedy.[81] Conversely, the agency might decline to commence an adjudication or rulemaking for the time being. An outcome from an agency investigation that yields an agency action could be a compliance action. For example, a grant-distributing agency must comply with its organic statute and the Office of Management and Budget's various circulars via audits for compliance purposes. Sometimes, there is the authority to engage in an audit outside the periodic time requirement in response to allegations or suspicion of fraud or bad action.

An adjudication or rulemaking does not necessarily need to be the goal, however. An agency could investigate for the purpose of discovering and logging "informal enforcement actions." For example, the EPA maintains Enforcement and Compliance History Online, which is a searchable, publicly accessible database that

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73. *E.g.*, Zeke Miller, *President Trump Is Escalating Efforts to Investigate Intelligence Agencies*, TIME (May 24, 2019), https://web.archive.org/web/20190524024835/http:/time.com/5595248/donald-trump-intelligence-russia/ [https://perma.cc/GUN3-3AXW]; Kaveh Waddell, *Obama Orders Investigation into Election-Related Hacking*, ATLANTIC (Dec. 9, 2016), https://www.theatlantic.com/technology/archive/2016/12/obama-orders-full-review-of-election-related-hacking/510149/ [https://perma.cc/NH6R-QKDX].

74. Shonka, *supra* note 48, at 2.

75. *E.g.*, 15 U.S.C. § 2056c(a); 22 U.S.C. § 5504(a); 25 U.S.C. § 1406(b), (c).

76. *Audit Techniques Guides (ATGs)*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/audit-techniques-guides-atgs [https://perma.cc/UV9A-R5KE] (industry-specific audit guidances).

77. 26 U.S.C. §§ 9007(a), 9008(g), 9038(a).

78. *See* Chaves Cnty. Home Health Serv., Inc. v. Sullivan, 931 F.2d 914, 916 (D.C. Cir. 1991).

79. *See* United States v. Biswell, 406 U.S. 311, 316 (1972); Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 299 (2006).

80. *See Audit Techniques Guides*, *supra* note 76.

81. *See, e.g.*, Rhea Lana, Inc. v. Dep't of Lab., 824 F.3d 1023 (D.C. Cir. 2016).

lists corporate violations and provides data on "informal enforcement actions."[82] An agency investigation might also result in management audits, where agencies work with regulated parties to ensure that regulated parties are prepared to follow the law. Of course, to fall within our definition of "agency investigation," the interaction between the agency and the regulated parties must at some point carry, at minimum, the perceived threat of coercion.

So, what is *not* an agency civil investigation? Negative definitions are helpful because the APA does not precisely or exhaustively define all forms of agency conduct or behavior. Indeed, the APA is replete with negative definitions.[83] The APA also hints at investigative functions without defining, positively or negatively, that term.[84] Some courts have implied—appropriately so, in our view—that investigative acts are categorically distinct from other types of "agency action," including adjudications or rulemaking.[85]

Proceedings with positive APA procedures like rulemaking or adjudications are not agency investigations; our definition does not include everything leading up to, or just short of, the completion of rulemakings or adjudications. For instance, we define agency investigations to exclude predecisional adjudicational and rulemaking processes where the decision to charge a party has been formally made and an impartial decisionmaker now has jurisdiction over the case.[86] Although a neutral agency decisionmaker conducting hearings as part of the formal adjudication process is literally "investigating" a claim and assessing whether the complaint has merit, we exclude these types of proceedings because the agency is acting in a quasi-judicial role. Such proceedings feature fewer problems, as we discuss below in Part V, and objections to agency abuses committed during the adjudicatory or rulemaking process can often be raised to an impartial decisionmaker. Our definition thus requires that there be a lack of APA positive procedures, and therefore the *processes* of rulemaking and adjudication are not "investigations."[87]

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82. *Enforcement and Compliance History Online*, U.S. ENV'T PROT. AGENCY, https://echo.epa.gov/ [https://perma.cc/42Q5-53MT]. For an example page, see *Detailed Facility Report*, U.S. ENV'T PROT. AGENCY, https://echo.epa.gov/detailed-facility-report?fid=110070032218 [https://perma.cc/LF6D-F4C4].

83. The APA has a negative definition of informal adjudication as adjudication that is not formal. *See* 5 U.S.C. § 554(a); *see also* SecurityPoint Holdings, Inc. v. Transp. Sec. Admin., 769 F.3d 1184, 1187–88 (D.C. Cir. 2014) (applying § 555(e) to informal adjudications). Similarly, "agency" is a general definition with a number of negative carveouts. *See* 5 U.S.C. § 551(1).

84. *See, e.g.*, § 554(d).

85. United States v. W.H. Hodges & Co., 533 F.2d 276, 278 (5th Cir. 1976) (per curiam); *see* Sierra Club v. Peterson, 185 F.3d 349, 366 n.25 (5th Cir. 1999), *on reh'g*, 228 F.3d 559 (5th Cir. 2000) (dicta).

86. We have also structured our definition to exclude "enforcement actions." For example, in the SEC context, enforcement actions mean all the legal proceedings that the commission brings that would normatively be considered "final agency action" under the APA. Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 903–04 (2016).

87. This is because the APA provides the general contours of process for rulemaking and adjudication. *See* 5 U.S.C. §§ 553, 556, 557.

An agency investigation could result in collateral issues during and following agency action. Instead of the agency deciding whom to pursue or whether to pursue someone, the agency could be deciding the size of a penalty. For example, the Office of Thrift Supervision may assess civil fines against a party that violates banking laws or regulations or breaches a fiduciary duty. In assessing fines, the agency, by statute, must consider mitigating factors like the size of the subpoenaed party's financial resources.[88]

Further, our affirmative definition covers only civil agency investigations. Criminal investigations by agencies are a separate inquiry beyond the scope of this Article.[89] Additional constitutional safeguards apply if the investigation is for a criminal offense, including if a civil investigation shifts into a criminal investigation.[90] That said, criminal investigations are often intertwined with civil investigations and are frequently the outgrowth of an investigation that may have begun with a purely civil aim.

Our definition excludes noncoercive action.[91] While an agency investigation can be noncoercive or nonintrusive, this Article concerns only coercive or intrusive actions—or actions carrying the threat of possible future coercion or the *perception* of coercion—such that the respondent would want to challenge them. Purely voluntary requests, such as civil extradition mutual legal assistance treaty information requests from foreign countries or Hague Convention requests for evidence, implicate fewer of the concerns we identify later on and also permit a brighter line by their exclusion. We do recognize that at some point, a significant investment in noncoercive factfinding can morph into an investigation. The line can be subtle and can vary among and within agencies.

Finally, our definition of "investigative act" excludes investigations by entities that are not "agencies." To make that determination, we look to the familiar APA definition of an "agency," which carves out Congress, the courts, state and territorial governmental entities, and so forth.[92] Thus, this Article does not examine

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88. *See* 12 U.S.C. § 1818(i)(2); *In re* Sealed Case (Admin. Subpoena), 42 F.3d 1412, 1416 (D.C. Cir. 1994).

89. Criminal investigations merit a separate investigation but are typically associated with federal employees classified under the U.S. Office of Personnel Management's Series GS-1811. *See* U.S. OFF. OF PERS. MGMT., JOB FAMILY POSITION CLASSIFICATION STANDARD FOR ADMINISTRATIVE WORK IN THE INSPECTION, INVESTIGATION, ENFORCEMENT, AND COMPLIANCE GROUP, 1800 12–14 (2011), https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/standards/1800/1800a.pdf [https://perma.cc/PQ2Y-C637]. Employees classified as 1811 investigators "supervise, lead, or perform work involving planning, conducting, or managing investigations related to alleged or suspected criminal violations of Federal laws." U.S. OFF. PERS. MGMT., HANDBOOK OF OCCUPATIONAL GROUPS AND FAMILIES 109 (Dec. 2018), https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/occupationalhandbook.pdf [https://perma.cc/ZYV2-AMGW].

90. *See generally* Risa Berkower, Note, *Sliding Down a Slippery Slope? The Future Use of Administrative Subpoenas in Criminal Investigations*, 73 FORDHAM L. REV. 2251 (2005).

91. *Cf., e.g.*, United States v. Bailey (*In re Subpoena Duces Tecum*), 228 F.3d 341, 348 (4th Cir. 2000) (noting that administrative subpoenas "commence[] an adversary process").

92. 5 U.S.C. § 551(1).

investigations by Article I actors or Article III courts.[93] We also exclude certain entities from the APA definition that courts have construed as non-agencies, such as presidential czars within the Executive Office of the President.

In sum, an investigative act lies early on the spectrum of total agency behavior. Agency activity progresses from a triggering event to an investigation, then to the beginning of an "agency action." If the action is adjudication, then the investigation ends with the allegation of a legal violation. If the action is rulemaking, then the investigation ends with the commencement of a rulemaking process.

II. AGENCY INVESTIGATIVE TECHNIQUES AND METHODS

Before understanding agency investigation norms and the appropriate legal response to agency investigations, it is necessary to understand precisely how agencies accomplish their investigations. First, agencies can often issue subpoenas to inspect documents and other physical materials.[94] Some agencies issue national security letters[95] or "civil investigative demand[s]"[96] on responding parties.[97] Other organic statutes endow agencies with the authority to conduct audits, by which the government gains documents or information.[98] Congress has not given any agency the power to enforce such orders with contempt powers, although some state courts have permitted state agencies to punish disobedience with contempt.[99]

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93. For an example of a judicial investigation, see Matt Zapotosky, *Judiciary Closes Investigation of Sexual Misconduct Allegations Against Retired Judge Alex Kozinski*, WASH. POST (Feb. 5, 2018), https://www.washingtonpost.com/world/national-security/judiciary-closes-investigation-of-sexual-misconduct-allegations-against-retired-judge-alex-kozinski/2018/02/05/e3a94bb8-0ac0-11e8-95a5-c396801049ef_story.html [https://perma.cc/W5TX-TAXE].

94. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.13 n.4 (5th ed. 2012) (listing examples); *see also, e.g.*, 7 U.S.C. § 499m (Department of Agriculture); 15 U.S.C. § 1311 (Department of Justice Antitrust Division); 18 U.S.C. § 923(g)(1)(B), (C) (Attorney General may inspect the records of certain licensed firearm importers, manufacturers, and dealers); 26 U.S.C. §§ 5123(a) (IRS), § 7609 (IRS third-party summonses); 29 U.S.C. § 521(a) (Secretary of Labor); 49 U.S.C. § 32910(a)(1)(A) (Secretary of Transportation and the Administrator of the Environmental Protection Agency); 52 U.S.C. § 20703 (Attorney General may inspect and copy certain records related to federal elections); Belle Fourche Pipeline Co. v. United States, 554 F. Supp. 1350, 1359 (D. Wyo. 1983); U.S. DEP'T JUST. OFF. LEGAL POL'Y, REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES (2002), https://www.justice.gov/archive/olp/rpt_to_congress.htm#4 [https://perma.cc/SR7C-J93W].

95. *See* 18 U.S.C. §§ 2709, 3511; Doe v. Gonzales, 546 U.S. 1301 (2005) (Ginsburg, J., in chambers).

96. Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs., 854 F.3d 683, 685 (D.C. Cir. 2017).

97. *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1379–80 (2015) (tracing a since-rejected view of Justice Field that agencies should conduct investigations without the aid of federal courts, and thus without the aid of the judiciary's subpoena power).

98. Cuéllar, *supra* note 79, at 252–58, 276–82.

99. HICKMAN & PIERCE, *supra* note 19, § 8.2.

Second, many agencies can inspect property or enter premises, sometimes for the purpose of inspecting records.[100] The organic statute does not need to explicitly authorize searches, as courts sometimes infer an agency's ability to search.[101]

Third, agencies may make voluntary requests for interviews or documents.[102] Agencies can issue such requests to third parties, perhaps before the subject of the investigation learns that it is under investigation. In doing so, agencies can liaise with state and local agencies.[103] Of course, if these requests do not carry the perceived, eventual, or actual threat of compulsion for *the party under investigation*, then they lie outside our definition of investigative action.

Finally, an agency may engage in noncoercive monitoring practices. These include checking databases, public or private;[104] maintaining interagency lines of communication;[105] setting up a tip line;[106] conducting laboratory work, as with the Department of Commerce's National Institute of Standards and Technology;[107] and even reading the mail from the public such as an IRS Form 13909 Tax-Exempt Organization Complaint (Referral).[108] Some sources of information at an agency's disposal are tips, inspector general findings, periodic reports from grantees, audits, charges, and complaints that it may receive at little to no cost.[109] Passive practices require something more than merely watching the news or parsing the internet.[110] Such monitoring practices, though facially noncoercive, can carry coercive tendencies if coupled with a subjectively inferred threat of firmer action.

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100. *E.g.*, 15 U.S.C. § 2065(a) (FTC); 26 U.S.C. § 5123(b) (IRS); 30 U.S.C. § 1267(a) (Department of the Interior); 42 U.S.C. § 7542(b)(2) (Environmental Protection Agency); 49 U.S.C. § 60120(a)(2) (Secretary of Transportation may request the Attorney General bring a civil action to allow for on-site inspections to enforce 49 U.S.C. §§ 60101–41, regarding pipeline safety).

101. *E.g.*, Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1221–22 (D.C. Cir. 1981); *see* Dow Chem. Co. v. United States, 476 U.S. 227, 233 (1986).

102. *See, e.g.*, Kerry Flynn, *Why the FBI Is Investigating Media Buying Practices*, DIGIDAY (Oct. 15, 2018), https://digiday.com/marketing/fbi-investigating-media-buying-practices/ [https://perma.cc/G88P-6VTC].

103. *E.g.*, 29 U.S.C. § 211(b) (authorizing the Department of Labor to use the services of state and local labor agencies with consent); *see also* 27 U.S.C. § 202(f) (authorizing the Department of Treasury to work with "any department or other agency of the Government" to enforce the Federal Alcohol Administration Act).

104. *See, e.g.*, Emp. Benefits Sec. Admin., *Case Development and Limited Review Investigations*, U.S. DEP'T LAB., https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/case-development-and-limited-review-investigations [https://perma.cc/X3FJ-4RHR].

105. *See, e.g.*, *id.*

106. *E.g.*, *ICE Tip Form*, U.S. IMMIGR. & CUSTOMS ENF'T (Jan. 25, 2021), https://www.ice.gov/webform/hsi-tip-form [https://perma.cc/GUP4-UA5X].

107. 15 U.S.C. §§ 271–281a; *see* Davis, *supra* note 13, at 1114.

108. *Form 13909*, Internal Revenue Serv. (2016), https://www.irs.gov/pub/irs-pdf/f13909.pdf [https://perma.cc/J9J4-EX58].

109. *E.g.*, 7 U.S.C. § 193(a); 8 U.S.C. § 1324a(b)(1); 29 U.S.C. §§ 151–69.

110. *See* Davis, *supra* note 13, at 1114. For more information on how agencies use internet evidence in their adjudications, see *Independent Research by Agency Adjudicators in the Internet Age*, ADMIN. CONF. OF THE U.S. (Dec. 27, 2019), https://www.acus.gov/research-projects/internet-evidence-agency-adjudication [https://perma.cc/T8T4-QV2K].

Congress must authorize an agency, at least implicitly, to use these tools.[111] The APA contemplates agencies having such power and provides an agency with power to make "[p]rocess, requirement of a report, inspection, or other investigative act or demand," including a subpoena if "authorized by law."[112] However, the APA does not independently empower agencies to issue subpoenas or inspect property.[113]

Rather, the primary source of an agency's investigative authority is its organic statutes.[114] By one count, "Congress has passed more than 300 administrative subpoena statutes 'grant[ing] some form of administrative subpoena authority to most federal agencies.'"[115] But creating some tension with that fundament, the Supreme Court held in *Dow Chemical Co. v. United States* that "[r]egulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted."[116] *Dow Chemical* does not require an agency endowed with investigatory or enforcement authority "to identify explicitly each and every technique that may be used in the course of executing the statutory mission."[117] Courts have used this language—sometimes alongside an organic statute's legislative history[118]—to permit certain modes of investigatory inspection or searches that are not specifically authorized by statute.[119]

Expansive readings of this sort are sometimes necessary, as organic statutes often impose no textual constraints on the investigative techniques agencies may use. For example, Congress has permitted the Department of Labor's Wage and Hour Division Administrator to broadly "investigate such facts, conditions, practices, or

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111. As part of its oversight powers, *see* U.S. CONST. art. I, § 5, Congress can initiate and undertake its own investigations through subpoenas, similar to agency investigative acts. Daniel Epstein, *"Drive-by" Jurisdiction: Congressional Oversight in Court*, 2020 PEPP. L. REV. 37, 41.

112. 5 U.S.C. § 555(c), (d).

113. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 67 (1947) ("It should be emphasized that [this] relates only to existing subpoena powers conferred upon agencies; it does not grant power to issue subpoenas to agencies which are not so empowered by other statutes."); United States v. Sec. State Bank & Tr., 473 F.2d 638, 642 (5th Cir. 1973).

114. Peters v. United States, 853 F.2d 692, 696 (9th Cir. 1988) (citing 3 BASIL J. MEZINES, JACOB A. STEIN & JULES GRUFF, ADMINISTRATIVE LAW § 20.02 (1988)); Univ. of Richmond v. Bell, 543 F. Supp. 321, 332 (E.D. Va. 1982) ("[N]o inherent investigatory authority exists in a government agency but only such authority as is granted by statute."); Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs., 854 F.3d 683, 690 (D.C. Cir. 2017) ("An administrative agency's authority to issue subpoenas 'is created solely by statute.'").

115. Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 117 (2012) (alteration in original) (footnote omitted); *see Subpoena Authority*, ADMIN. CONF. OF THE U.S. & STAN. L. SCH., https://acus.law.stanford.edu/reports/subpoena [https://perma.cc/LFE9-ZMEY].

116. 476 U.S. 227, 233 (1986).

117. *Id.*

118. *See, e.g.*, Boliden Metech, Inc. v. United States, 695 F. Supp. 77, 81 (D.R.I. 1988) (citing Toxic Substances Control Act, S. REP. NO. 94-3149 (1976) (Conf. Rep.)).

119. Nat'l-Standard Co. v. Adamkus, 881 F.2d 352, 362 (7th Cir. 1989) (holding that background sampling, although not specified in statute, was permissible under 42 U.S.C. § 6927(a)).

matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter."[120] Similar expansive authority is held by the Office of Foreign Asset Control,[121] the Drug Enforcement Administration,[122] and the U.S. Postal Service.[123] These textually broad delegations of investigatory authority provide little constraint to agencies' exercise of discretion in utilizing investigatory tools.

III. CONSTRAINTS ON AGENCY INVESTIGATIONS

There are several legal levers that check overzealous exercises of agency investigative authority with varying degrees of success. They include tools under the U.S. Constitution, the APA, and other applicable statutes and regulations. These legal levers tend to sort into a binary hard-versus-soft paradigm. "Hard" checks are constraints on investigative acts that can be applied more directly by parties aggrieved by investigative acts, such as Fourth Amendment challenges to the relevancy of an agency investigative act. "Soft" checks are constraints that include the articles of the U.S. Constitution embodying the doctrine of the separation of powers, congressional oversight, public pressure, executive or agency self-constraint, and agency culture.

A. Constitutional Constraints

1. Constitutional Civil Liberties

The Founders did not contemplate the modern administrative state and the complex civil society that it regulates.[124] The administrative state, which has grown rapidly since the New Deal era, "has seemingly become an irresistible force" that "has collided with what at first were apparently immovable constitutional principles concerning privacy, searches and seizures, self-incrimination, and freedom from bureaucratic snooping."[125] In the wake of that era, courts have held repeatedly that the Constitution permits an agency to exercise investigative functions.[126]

Nevertheless, the Constitution's protections of civil liberties can limit meandering agency investigations. The primary guarantee of personal rights against improper

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120. 29 U.S.C. § 211(a) (Fair Labor Standards Act); *id.* § 2616(a) (same for Family and Medical Leave).

121. 50 U.S.C. § 1702(a)(1)–(2).

122. 21 U.S.C. §§ 880, 965; *see* 21 C.F.R. § 1316.03 (2021).

123. 39 U.S.C. § 404(a)(6); *see* 39 C.F.R. § 233.1 (2021).

124. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233 (1994).

125. Davis, *supra* note 13, at 1111.

126. *See, e.g.*, FTC v. Cinderella Career & Finishing Schs., Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968) (collecting cases); McVane v. Fed. Deposit Ins. Corp. (*In re* McVane), 44 F.3d 1127, 1134 (2d Cir. 1995) ("Courts have imposed few constitutional limitations on agencies' power to issue administrative subpoenas.").

investigations is the Fourth Amendment.[127] The Supreme Court has not interpreted these protections to be robust in the civil setting.[128] Generally, the agency's power of access "is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence, but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."[129]

The Fourth Amendment interacts differently with certain types of agency investigatory tools. Starting with subpoenas, an agency subpoena—including those requiring appearance at a deposition[130]—effectuates a "constructive search" by the agency.[131] The Fourth Amendment erects a number of hurdles on such subpoenas, albeit of varying heights. In the modern Fourth Amendment jurisprudential landscape, as first enunciated in *Morton Salt* and *Oklahoma Press Publishing*,[132] a party may launch a "strictly limited" challenge to an agency's subpoena in enforcement proceedings.[133] The moving party must demonstrate that the agency has failed any of four showings that favor the agency. The following chart summarizes the dimensions of these standards.

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127. U.S. CONST. amend. IV.

128. *See* United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950).

129. *Id.*

130. *E.g.*, 16 C.F.R. § 3.33 (2021) (FTC permits depositions); Amendments to the Commission's Rules of Practice, 80 Fed. Reg. 60,091 (Oct. 5, 2015) (to be codified at 17 C.F.R. pt. 201) (SEC proposing to allow depositions).

131. Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 202 (1946); *cf.* McLane Co. v. Equal Emp. Opportunity Comm'n, 137 S. Ct. 1159, 1169 (2017) (appearing to distance subpoena-quashing jurisprudence from the Fourth Amendment by stating that *Oklahoma Press* "implied that the Fourth Amendment is the source of the requirement that a subpoena not be 'too indefinite'" (quoting United States v. Morton Salt Co., 338 U.S. 632, 652 (1950))).

132. *Morton Salt Co.*, 338 U.S. at 652; *Okla. Press Publ'g Co.*, 327 U.S. at 209; *see also* United States v. Stuart, 489 U.S. 353, 359 (1989) (enforcing this requirement in a more modern case).

133. FTC v. Texaco, Inc., 555 F.2d 862, 871–72 (D.C. Cir. 1977); Univ. of Med. & Dentistry of N.J. v. Corrigan, 347 F.3d 57, 64 (3d Cir. 2003); *accord* Equal Emp. Opportunity Comm'n v. Bay Shipbuilding Corp., 668 F.2d 304, 310–11 (7th Cir. 1981) (calling administrative subpoena enforcement proceedings "of a summary nature not requiring the issuance of process, hearing, findings of fact, and the elaborate process of a civil suit" (quoting Goodyear Tire & Rubber Co. v. Nat'l Lab. Rels. Bd., 122 F.2d 450, 451 (6th Cir. 1941))).

Table 2. Fourth Amendment Showings Necessary to Challenge Pre-Adjudication Civil Investigatory Agency Subpoenas

Standard	Requirements on Agency
Is the subpoena in the agency's authority?	• Must be within authority[134] • Cannot "plainly lack jurisdiction"[135] • Cannot investigate "other wrongdoing, as yet unknown"[136] • Must comply with all procedural requirements in its organic statute and with its own regulations[137] • Cannot be issued for improper purpose[138] • Cannot be issued in bad faith[139]
Is the subpoena "reasonably relevant"?	• Agency's own appraisal of relevancy, which "must be accepted so long as it is not obviously wrong"[140] • May hinge on whether the target of investigation is a person or a business association[141]
Is the subpoena overbroad or improper in scope?	• Cannot be "too indefinite"[142] • Cannot be "unreasonably broad"[143] • Must be "sufficiently limited in scope,"[144] subject to federal privilege law[145]
Is the subpoena unduly burdensome?	• Cannot unduly burden the respondent[146]

134. United States v. Powell, 379 U.S. 48 (1964); *Morton Salt Co.*, 338 U.S. at 652; *Okla. Press Publ'g Co.*, 327 U.S. at 209; *see also Stuart*, 489 U.S. at 359 (enforcing this requirement in a more modern case).

135. *E.g.*, FTC v. Ernstthal, 607 F.2d 488, 490 (D.C. Cir. 1979); NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995 (9th Cir. 2003).

136. *In re* Sealed Case (Admin. Subpoena), 42 F.3d 1412, 1419 (D.C. Cir. 1994).

137. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266–67 (1954).

138. *Powell*, 379 U.S. at 58; Resol. Tr. Corp. v. Frates, 61 F.3d 962, 965 (D.C. Cir. 1995); *see* Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs., 854 F.3d 683, 689 (D.C. Cir. 2017).

139. United States v. LaSalle Nat'l Bank, 437 U.S. 298, 316–18 (1978); SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 125 (3d Cir. 1981) (en banc); United States v. Markwood, 48 F.3d 969, 978 (6th Cir. 1995).

140. Resol. Tr. Corp. v. Walde, 18 F.3d 943, 946 (D.C. Cir. 1994) (quoting FTC v. Invention Submission Corp., 965 F.2d 1086, 1089 (D.C. Cir. 1992)).

141. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

142. *Id.*; *Powell*, 379 U.S. at 48; Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 209 (1946); *see also* United States v. Stuart, 489 U.S. 353, 359 (1989) (enforcing this requirement in a more modern case).

143. *E.g.*, FTC v. Texaco, Inc., 555 F.2d 862, 881–82 (D.C. Cir. 1977); NLRB v. Am. Med. Response, Inc., 438 F.3d 188, 192 (2d Cir. 2006).

144. See v. City of Seattle, 387 U.S. 541, 544 (1967).

145. *See, e.g.*, Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resol. Tr. Corp., 5 F.3d 1508, 1513 (D.C. Cir. 1993) (citing FTC v. TRW, Inc., 628 F.2d 207, 210–11 (D.C. Cir. 1980)) (FTC); Dole v. Milonas, 889 F.2d 885, 889 n.6 (9th Cir. 1989) (ERISA); United States v. Schoenheinz, 548 F.2d 1389, 1390 (9th Cir. 1977) (IRS); Colton v. United States, 306 F.2d 633, 636 (2d Cir. 1962) (IRS).

146. *See*, 387 U.S. at 544; *Texaco*, 555 F.2d at 882, 882 n.51 (D.C. Cir. 1977); FTC v. Church & Dwight Co., 665 F.3d 1312, 1315–16 (D.C. Cir. 2011).

First, an agency subpoena must be within the agency's authority to issue.[147] This requirement is variously articulated as whether the agency "plainly lacks" jurisdiction.[148] That is, an agency cannot simply serve a subpoena seeking information to investigate "other wrongdoing, as yet unknown."[149] Relatedly, an agency must comply with all procedural requirements in its organic statute and with its own regulations.[150] For example, the statute may require the agency to state the nature of its investigation and the law supposedly being violated.[151] An agency's authority must extend not only to the type of investigatory tool used but also to the type of information sought. For example, an agency holding the statutory authority only to subpoena information for the purpose of determining liability cannot enforce a subpoena of personal financial information for the purpose of assessing the individual's net worth (so as to determine the cost-effectiveness of an investigation).[152] This standard is rather lax. One circuit held that "[a]s long as the agency's assertion of authority is not apocryphal, a procedurally sound subpoena must be enforced."[153] The Supreme Court has confirmed that the assertion of authority is jurisdictional in nature and that the familiar *Chevron* deference[154] is due to an agency's determination of its jurisdiction.[155]

Relatedly, the subpoena cannot be used for an improper purpose or in bad faith.[156] "Bad faith" must be institutionalized bad faith—bad faith by individual agency actors is insufficient.[157] One example of bad faith would include "harassment of the recipient of the subpoena, or a conscious attempt by the agency to pressure the recipient to settle a collateral dispute."[158] However, it is worth noting that the purpose

147. *See* cases cited *supra* note 132.

148. *See* cases cited *supra* note 133.

149. *See* cases cited *supra* note 134.

150. *See* cases cited *supra* note 135.

151. *E.g.*, Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs., 854 F.3d 683, 690 (D.C. Cir. 2017).

152. Resol. Tr. Corp. v. Walde, 18 F.3d 943, 947–49 (D.C. Cir. 1994); *see* Katherine Scherb, Comment, *Administrative Subpoenas for Private Financial Records: What Protection for Privacy Does the Fourth Amendment Afford?*, 1996 WIS. L. REV. 1075, 1085–97 (summarizing case law). Note that the D.C. Circuit does not view this *ultra vires* inquiry as being constitutional. *Resol. Tr. Corp.*, 18 F.3d at 949.

153. United States v. Sturm, Ruger & Co., 84 F.3d 1, 5–6 (1st Cir. 1996).

154. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

155. City of Arlington v. FCC, 569 U.S. 290 (2013); ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 113, at 69 (first citing Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943); and then citing Okla. Press Publ'g Co. v. Walling, 327 U.S. 186 (1946)) ("Nothing in the language of section 6(c) suggests any purpose to change this established rule."). The Attorney General's Manual cited the fact that an earlier APA bill specifically entitled courts to "determine all relevant questions of law raised by the parties, including the authority or jurisdiction of the agency." *Id.* (emphasis omitted). However, that language did not make it into the enacted bill. *Id.* Note that the Constitution, if not the APA, allows courts to hear certain challenges to an agency's jurisdiction, per post-1946 case law from the Supreme Court. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 49–51 (1938).

156. *See* case cited *supra* note 139.

157. United States v. LaSalle Nat'l Bank, 437 U.S. 298, 314–18 (1978).

158. United States v. Markwood, 48 F.3d 969, 978 (6th Cir. 1995).

of the subpoena in the seminal case establishing this requirement, *United States v. Powell*, was important because the agency at issue, the IRS, could issue summons only for limited purposes.[159] Thus, the "improper purpose" requirement might not be available to parties challenging every type of investigative act under every type of organic statute.

Second, the subpoena must be "reasonably relevant."[160] This standard appears lax too. Because the "standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one,"[161] the court "defer[s] to the agency's appraisal of relevancy, which 'must be accepted so long as it is not obviously wrong.'"[162] The burden of showing irrelevance lies with the responding party.[163]

The relevance test may hinge on whether the target of investigation is a person or a business association. This distinction derives from the penumbral right to privacy recognized from, inter alia the Fifth and Fourteenth Amendments, as well as from a statement in *Morton Salt* that corporations "can claim no equality with individuals in the enjoyment of a right to privacy."[164] This test is consistent with the APA's House Judiciary Committee Report, which opined that an agency "investigation must be substantially and demonstrably necessary to agency operations."[165] The effect of this distinction may be a lower bar for the responding party to show irrelevance,[166] especially if the responding party is a third party who is not the target of the agency's investigation.[167]

Third, the subpoena must not be "too indefinite"[168] or "unreasonably broad,"[169] and it must be "sufficiently limited in scope."[170] Federal privilege law governs the subpoena's scope.[171]

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159. 379 U.S. 48, 49–51, 57–58 (1964).

160. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 209 (1946); *see also* United States v. Stuart, 489 U.S. 353, 359 (1989) (enforcing this requirement in a more modern case).

161. FTC v. Invention Submission Corp., 965 F.2d 1086, 1090 (D.C. Cir. 1992).

162. Resol. Tr. Corp. v. Walde, 18 F.3d 943, 946 (D.C. Cir. 1994) (quoting FTC v. Invention Submission Corp., 965 F.2d 1086, 1089 (D.C. Cir. 1992)).

163. *Invention Submission Corp.*, 965 F.2d at 1090.

164. *Morton Salt*, 338 U.S. at 652 (citing United States v. White 322 U.S. 694 (1944)).

165. H.R. REP. NO. 79-1980, at 264 (1946).

166. McVane v. Fed. Deposit Ins. Corp. (*In re* McVane), 44 F.3d 1127, 1137 (2d Cir. 1995); United States v. Harrington, 388 F.2d 520, 524 (2d Cir. 1968); *cf.* Doe v. United States, 253 F.3d 256, 269–70 (6th Cir. 2001) (holding that "the same standard of reasonable relevance applied to [certain] corporate records" and "should also be applied to request for the private financial records of corporate officials").

167. *McVane*, 44 F.3d at 1137–38.

168. United States v. Morton Salt Co., 338 U.S. 632, 636–37 (1950).

169. *See* cases cited *supra* note 141.

170. See v. City of Seattle, 387 U.S. 541, 544 (1967).

171. *See* cases cited *supra* note 145.

Fourth, the subpoena cannot be "unduly burdensome."[172] Once challenged, the burden is on the agency to show that the subpoena does not impose undue burdens.[173] There are very few cases in which a court has quashed a subpoena on this basis.[174]

These showings are not needed until the subpoena is challenged in court; a judicial warrant is not a condition precedent to a valid administrative subpoena.[175] To serve a subpoena in the first place, an agency does not need probable cause[176] or reasonable suspicion.[177] The agency need only be "reasonable," which means compliance with the above criteria.[178] Nor must the agency "make a preliminary finding of liability before it can even initiate an investigation."[179] One possible exception is that, in the D.C. Circuit at least, an agency must demonstrate an "articulable suspicion" of liability to enforce a subpoena for personal financial information.[180] The fact that probable cause in the criminal sense is not required provides another incentive for agency investigators to start building their case with civil investigative tools as opposed to criminal investigative tools.

Judicial review of agency subpoenas to determine compliance with the above criteria is "strictly limited" on account of "the important governmental interest in the expeditious investigation of possible unlawful activity."[181] "Courts generally defer to an agency's interpretation of the scope of its own investigation."[182] During proceedings to quash, a court will not hear substantive defenses that the investigated party may have to the underlying investigation *during* its pendency.[183] Arguments

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172. *See* case cited *supra* note 146.

173. Equal Emp. Opportunity Comm'n v. Md. Cup Corp., 785 F.2d 471, 476 (4th Cir. 1986); Equal Emp. Opportunity Comm'n v. Child.'s Hosp. Med. Ctr., 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc); *cf.* FTC v. Jim Walter Corp., 651 F.2d 251, 258 (5th Cir. 1981) (putting the burden on the affected party to show that compliance would impose an unreasonable burden), *abrogated on other grounds by* Republic of Pan. v. BCCI Holdings (Lux.) S.A., 119 F.3d 935 (11th Cir. 1997).

174. Equal Emp. Opportunity Comm'n v. Aon Consulting, Inc., 149 F. Supp. 2d 601, 603–04 (S.D. Ind. 2001) (finding subpoena unduly burdensome, but conditioning enforcement on agency's willingness to enter a confidentially agreement).

175. Donovan v. Lone Steer, Inc., 464 U.S. 408, 415 (1984).

176. Marshall v. Barlow's, Inc., 436 U.S. 307, 320–21 (1978); *see* Camara v. Mun. Ct. of S.F., 387 U.S. 523, 538 (1967); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 209 (1946).

177. De Masters v. Arend, 313 F.2d 79, 88 (9th Cir. 1963); United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950).

178. *See* United States v. Powell, 379 U.S. 48, 51, 57–58 (1964).

179. *In re* Sealed Case (Admin. Subpoena), 42 F.3d 1412, 1416 (D.C. Cir. 1994) (citing FTC v. Texaco, Inc., 555 F.2d 862, 874 (D.C. Cir. 1977)).

180. Resol. Tr. Corp. v. Walde, 18 F.3d 943, 949 (D.C. Cir. 1994). The "articulable suspicion" requirement also applies to determining an individual's ability to pay a civil penalty. *In re* Sealed Case, 42 F.3d at 1417.

181. U.S. Int'l Trade Comm'n v. ASAT, Inc., 411 F.3d 245, 253 (D.C. Cir. 2005) (quoting *Texaco*, 555 F.2d at 872).

182. Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs., 854 F.3d 683, 689 (D.C. Cir. 2017) (citing FTC v. Church & Dwight Co., 665 F.3d 1312, 1315–16 (D.C. Cir. 2011)); Dir., Off. of Thrift Supervision v. Vinson & Elkins, LLP, 124 F.3d 1304, 1307 (D.C. Cir. 1997)).

183. *Texaco, Inc.*, 555 F.2d at 879.

that the respondent is not within the agency's jurisdiction may typically only be made in defense of an administratively exhausted final enforcement action.[184] Another nigh insurmountable challenge is that an investigated party might not know that an administrative subpoena went out to a third party or might not have standing to challenge the demand.[185]

If the movant succeeds in enforcement proceedings, the remedy is unclear. Courts sometimes imply that the agency need only reissue the problematic subpoena within certain parameters[186] and sometimes suggest the subpoena is executable as modified by the court.[187] Regardless of the procedure that the agency must undertake going forward, it is typically not difficult or burdensome for the agency to quickly demand from a party the maximum amount of information that it is allowed. Even when the subpoena is quashed, the remedy is often "limited to a judicial requirement that the agency narrow the scope of the subpoena or identify the materials sought with greater specificity."[188]

Yet courts will, albeit rarely, vindicate the right not to be investigated beyond statutory authority once the investigation and the final agency action has concluded. One circuit court held that an agency's "comprehensive initial investigation . . . pursuant to the Secretary's standard practice exceeded his statutory authority from the outset."[189] In fashioning a remedy, that court simply struck the administrative findings of violations and awards against the investigated party.[190]

The following chart summarizes the domain of administrative subpoenas before and after the Supreme Court's decisions in *Oklahoma Press Publishing* and *Morton Salt*. The chart compares these standards with the standards for grand jury subpoenas—investigative subpoenas used for a criminal investigative purpose.

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184. *See* McLane Co. v. Equal Emp. Opportunity Comm'n, 137 S. Ct. 1159, 1165 (2017); CSG Workforce Partners, LLC v. Watson, 512 F. App'x 830, 836 (10th Cir. 2013); Donovan v. Shaw, 668 F.2d 985, 989 (8th Cir. 1982); FTC v. Ken Roberts Co., 276 F.3d 583, 584 (D.C. Cir. 2001); Fed. Mar. Comm'n v. Port of Seattle, 521 F.2d 431 (9th Cir. 1975); SEC v. Savage, 513 F.2d 188 (7th Cir. 1975).

185. Berkower, *supra* note 90, at 2275–76.

186. Equal Emp. Opportunity Comm'n v. Tricore Reference Lab'ys., 849 F.3d 929, 943 (10th Cir. 2017) ("Our decision [quashing the EEOC's subpoena] should not preclude the EEOC from formulating a request for information to overcome the concerns discussed in this opinion."); *see* McVane v. Fed. Deposit Ins. Corp. (*In re* McVane), 44 F.3d 1127, 1137 (2d Cir. 1995) (implying same).

187. Equal Emp. Opportunity Comm'n v. Aon Consulting, Inc., 149 F. Supp. 2d 601, 603 (S.D. Ind. 2001) (permitting enforcement as modified by the court); Equal Emp. Opportunity Comm'n v. United Air Lines, Inc., 287 F.3d 643, 653 (7th Cir. 2002) (implying such).

188. HICKMAN & PIERCE, *supra* note 19, § 8.2 (citing United States v. Theodore, 479 F.2d 749 (4th Cir. 1973)); *cf. In re* Grand Jury Proc., 601 F.2d 162, 166–67 (5th Cir. 1979) (grand jury).

189. Greater Mo. Med. Pro-Care Providers, Inc. v. Perez, 812 F.3d 1132, 1139 (8th Cir. 2015).

190. *Id.*

Table 3. Comparison of Procedural Protections for Administrative Subpoenas Before and After *Oklahoma Press Publishing* (1946) and *Morton Salt* (1950), with Grand Jury Subpoenas

Issue	Administrative Investigations before 1950	Administrative Investigations after 1950	Grand Jury Subpoena
Preissuance role of Article III judge?	No[191]	No[192]	Yes; convened under auspices of judge[193]
Standard for issuance?	Indeterminate; potentially requiring probable cause[194]	Whether agency "plainly lacks" jurisdiction[195]	Discretionary; "as it considers appropriate"[196]
Relevance?	Limited to cases "where the investigations concern a specific breach of the law"[197]	Must be "reasonably relevant"[198]	Must be a reasonable possibility that category of materials Government seeks will produce information relevant to general subject of investigation[199]
Breadth?	No roving "fishing expeditions;" must specify a reasonable period of time and reasonably particular subjects[200]	Cannot be "too indefinite"[201]	Limited by function toward the possible return of an indictment[202]
Unduly burdensome standard?	Not explicitly[203]	Yes[204]	No; reasonableness and oppressiveness standard[205]

191. *See, e.g.*, Harriman v. Interstate Com. Comm'n, 211 U.S. 407, 415–16 (1908); Cudahy Packing Co. v. Holland, 315 U.S. 357, 363 (1942).

192. *See supra* note 175 and accompanying text.

193. *See* FED. R. CRIM. P. 17(a).

194. *See* Jones v. SEC, 298 U.S. 1, 27 (1936) ("An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact.").

195. *See* cases cited *supra* note 133.

196. United States v. Calandra, 414 U.S. 338, 343 (1974).

197. Harriman v. Interstate Com. Comm'n, 211 U.S. 407, 419–20 (1908).

198. *See* case cited *supra* note 159.

199. United States v. R. Enters., Inc., 498 U.S. 292, 301 (1991).

200. FTC v. Am. Tobacco Co., 264 U.S. 298, 306 (1924).

201. *See* cases cited *supra* note 142.

202. Costello v. United States, 350 U.S. 359, 362 (1956).

203. *See* Harriman v. Interstate Com. Comm'n, 211 U.S. 407 (1908); *Am. Tobacco Co.*, 264 U.S. at 29; Brown v. United States, 276 U.S. 134 (1928); Jones v. SEC, 298 U.S. 1 (1936).

204. *See* cases cited *supra* note 146.

205. FED. R. CRIM. P. 17(c)(2).

Bad faith basis acceptable?	Not explicitly[206]	No[207]	Yes[208]
Timing of challenge	Apparently post-issuance[209]	While a subpoena may be challenged before final agency action, the investigation itself otherwise may typically only be made after final action; no meaningful judicial pre-determination.[210]	Postissuance as to the subpoena;[211] however, grand juries cannot "engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass."[212]

We now shift to administrative search warrants, which are less difficult to challenge than administrative subpoenas. A warrant is generally required *before* an agency may conduct a "search" within the Fourth Amendment.[213] The Supreme Court has recognized exceptions for a motley assortment of certain regulated industries: those involving liquor,[214] firearms,[215] mining,[216] and junkyards[217]—but not hotel operation[218] or commercial activity generally.[219]

To validly execute an administrative warrant, an agency must provide a court with discrete evidence of an existing violation[220] or a "reasonable belief" or "reasonable suspicion."[221] The search must be part of a general, neutral administrative plan.[222] An agency may not conduct an investigation outside the scope of its authority, although probable cause in the criminal sense is not required.[223]

We reiterate that the landscape is different in the criminal context (although that lies beyond the scope of this Article). Also, "evidence implicating diminished privacy interests or for a corporation's own books" might not be protected by the Fourth Amendment.[224]

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206. *See* cases cited *supra* note 203.
207. *See* cases cited *supra* note 139.
208. Trump v. Vance, 140 S. Ct. 2412, 2428 (2020); United States v. R. Enters., Inc., 498 U.S. 292, 299–301 (1991).
209. *See* Harriman v. Interstate Com. Comm'n, 211 U.S. 407, 415–16 (1908).
210. *See* cases cited *supra* note 184.
211. FED. R. CRIM. P. 17(c)(2).
212. *R. Enters., Inc.*, 498 U.S. at 299.
213. Marshall v. Barlow's, Inc., 436 U.S. 307, 325 & n.23 (1978).
214. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).
215. United States v. Biswell, 406 U.S. 311 (1972).
216. Donovan v. Dewey, 452 U.S. 594 (1981).
217. New York v. Burger, 482 U.S. 691 (1987).
218. City of Los Angeles v. Patel, 576 U.S. 409, 424–25 (2015).
219. See v. City of Seattle, 387 U.S. 541 (1967).
220. Marshall v. Barlow's, Inc., 436 U.S. 307, 320–21 (1978).
221. *In re* Midwest Instruments Co., 900 F.2d 1150, 1153 (7th Cir. 1990).
222. *Marshall*, 436 U.S. at 320–21.
223. *Id.* at 320.
224. Carpenter v. United States, 138 S. Ct. 2206, 2221 & n.5 (2018) (footnote omitted) (citing cases including United States v. Morton Salt Co., 338 U.S. 632, 634, 651–53 (1950);

Another amendment in the Bill of Rights that protects subjects of agency investigations is the Fifth Amendment's Self-Incrimination Clause.[225] Regarding revealing document *contents*, this Clause protects the respondent only from *compelled* self-incrimination.[226] This hinges on how the documents were originally prepared; if the responding party prepared business records voluntarily, even before the investigation, then the compulsion is constitutional.[227]

Under the same reasoning, regarding the act of document *production*, the Self-Incrimination Clause may be invoked only when the subpoena or warrant "compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect."[228] Those aspects may be present, for example, if "[c]ompliance with the subpoena tacitly concedes the existence of the papers demanded."[229] But where a respondent is required to comply with a regulatory regime unrelated to criminal law enforcement—as is often the case with regulated industries—there is no Self-Incrimination Clause privilege available.[230]

Moreover, the Self-Incrimination Clause is inapplicable with regard to *third-party* subpoenas.[231] The Self-Incrimination Clause may, however, be invoked in an agency investigation to protect against a disclosure that the respondent reasonably believes could be used against it in a criminal proceeding or could lead to other such evidence.[232]

The Supreme Court interprets the Fifth Amendment's Due Process Clause to provide even less protection against improper agency investigations.[233] Writing for the Court in 1960, Chief Justice Warren acknowledged that due process "is an elusive concept," but that "when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used."[234] The Due Process Clause tolerates an agency using its subpoena power to gather evidence adverse to a person under investigation without notifying him or her, as "an administrative

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Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 189, 204–08 (1946)).

225. U.S. CONST. amend. V.

226. United States v. Doe, 465 U.S. 605, 610 (1984).

227. *Id.*

228. *Id.* at 612–13.

229. *Id.* at 613 (quoting Fisher v. United States, 425 U.S. 391, 410 (1976)); United States v. Hubbell, 530 U.S. 27, 43–45 (2000); *see also In re* Twelve Grand Jury Subpoenas, 908 F.3d 525, 528 (9th Cir. 2018).

230. Shapiro v. United States, 335 U.S. 1, 17–18 (1948) (introducing the required records doctrine that is an exception to the Fifth Amendment); Balt. City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 555–60 (1990).

231. *See* U.S. CONST. amend. V; SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984) ("The rationale of this doctrine is that the Constitution proscribes only compelled self-incrimination, and, whatever may be the pressures exerted upon the person to whom a subpoena is directed, the subpoena surely does not 'compel' anyone else to be a witness against himself." (emphasis omitted) (footnote omitted) (citation omitted)).

232. Kastigar v. United States, 406 U.S. 441, 444–45 (1972).

233. *See* U.S. CONST. amend. V.

234. Hannah v. Larche, 363 U.S. 420, 442 (1960).

investigation adjudicates no legal rights."[235] Similarly, the right of cross-examination generally does not apply in agency investigations.[236]

The Due Process Clause will also permit an agency to work on an initially civil investigation that results only in a criminal prosecution.[237] As the Supreme Court has held, "[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect."[238] There is thus a very low barrier to a law enforcement agency referring a matter to an administrative agency. Parallel investigations do not violate civil liberties so long as the agency is not investigating solely to obtain evidence for a criminal prosecution, it did not fail to advise the defendant that a criminal prosecution has been contemplated, and there are no "other special circumstances."[239] Stated differently, courts have approved administrative proceedings that result from a criminal referral, so long as the criminal investigation did not interfere with the agency's operations and the parallel proceedings are conducted in "good faith."[240] The reason: if "investigators suspected that a particular store might contain evidence of other crimes, the investigators would be precluded from performing any administrative inspection of that store."[241] This nevertheless leaves open an obvious potential for abuse.[242]

There are some boundaries in place to prevent agency officials who cannot meet the higher standard from doing this with the hope or intent of transitioning to criminal liability. An agency cannot conduct an investigation when its true purpose is a criminal investigation,[243] that is, an investigation that is not "for a purely administrative purpose," but rather one that carries the "real threat of criminal sanctions."[244] Courts have been mollified by the fact that "while information obtained by an administrative subpoena could be shared with prosecutors and used in a criminal investigation, grand jury secrecy would prevent information from

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235. *Jerry T. O'Brien, Inc.*, 467 U.S. at 742 (citing *Hannah*, 363 U.S. at 440–43).

236. *Hannah*, 363 U.S. at 445–46.

237. Doe v. United States, 253 F.3d 256, 265 (6th Cir. 2001) ("Both the Supreme Court and this circuit have long applied [the reasonableness] test when reviewing administrative subpoena requests, and we see no convincing basis upon which to distinguish these binding precedents simply because this subpoena was issued pursuant to a criminal, as opposed to civil, investigation."); Becker v. Kroll, 494 F.3d 904, 917 (10th Cir. 2007) (noting that the administrative subpoena was enforceable, even though it had "potential criminal ramifications," because it was "issued in good faith and prior to a recommendation for criminal prosecution").

238. New York v. Burger, 482 U.S. 691, 716 (1987) (citing United States v. Villamonte-Marquez, 462 U.S. 579, 583–84, 584 n.4 (1983)).

239. United States v. Kordel, 397 U.S. 1, 11–12 (1970).

240. Shiv Narayan Persaud, *Parallel Investigations Between Administrative and Law Enforcement Agencies: A Question of Civil Liberties*, 39 U. DAYTON L. REV. 77, 89–90 (2013).

241. United States v. Mansour, 252 F. Supp. 3d 182, 202 (W.D.N.Y. 2017) (citing United States v. Gel Spice Co., 773 F.2d 427, 432 (2d Cir. 1985)).

242. Persaud, *supra* note 240, at 95–99 (citing possible examples).

243. *Id.* at 80 n.27.

244. Jacob v. Twp. of W. Bloomfield, 531 F.3d 385, 390 (6th Cir. 2008); United States v. Theodore, 479 F.2d 749, 753 (4th Cir. 1973).

moving in the other direction."[245] That said, other courts have suggested that an administrative warrant may be taken when the agency's aim is not solely to build a criminal case.[246] Because the Supreme Court—as with most facets of investigative acts—has not addressed this question in decades, a contemporary challenge that raises these issues could result in a different outcome.

As the preceding discussion illustrates, there are many limitations in using the U.S. Constitution to deter an agency from using an improper investigatory tool or to challenge the use of such a tool. Even if a regulated entity could try to make out a *Bivens*[247] claim on the above, damages are the only available remedy, and they are based on a predicate finding of unconstitutional conduct. It would not seem that a court could halt an investigation, but at least one court has commented that it was unaware of case law permitting a *Bivens* remedy in the context of an agency investigation.[248]

Putting aside whether a position is likely to succeed in the long run, the case law generally does not permit a respondent to raise any merits defenses in challenging an agency action. There is also a lack of post-enforcement accountability. A motion to quash an administrative warrant may be moot where the warrant has been fully executed prior to the appeal.[249] The respondent would have to argue, for example, that the issue is evading review yet capable of repetition. Unless the party is frequently investigated by the same agency, this showing may be difficult.

2. Constitutional Separation of Powers

The Constitution can constrain overzealous agency investigations through not just the Bill of Rights, but also through its structure-of-government provisions.[250] As Professor Nicholas Bagley has written, "Congress and the president both remain on the scene, fully capable of reforming or restraining agencies."[251] Through Article I, Congress may exercise control over certain agency investigations—beyond, of course, legislating directly on the matter.[252]

Article I is the font from which the Supreme Court infers the Nondelegation Doctrine.[253] Some scholars hold the view that the administrative agencies have

245. Berkower, *supra* note 90, at 2264; *see* FED. R. CRIM. P. 6(e).

246. *See, e.g.*, United States v. Kordel, 397 U.S. 1, 11–12 (1970).

247. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that a cause of action lay against a federal officer for violating an individual's Fourth Amendment rights. *Id.* at 389.

248. Casella v. United States, 642 F. App'x 54, 56 (2d Cir. 2016).

249. Koppers Indus., Inc. v. EPA, 902 F.2d 756, 758 (9th Cir. 1990) (CERCLA warrant).

250. *See, e.g.*, U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1, cl. 1.

251. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 351 (2019) (footnote omitted).

252. *See, e.g.*, SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 745–46 (1984).

253. *See, e.g.*, HICKMAN & PIERCE, *supra* note 19, § 8.1, at 942 (citing FTC v. Balt. Grain Co., 284 F. 886, 888, 890 (D. Md. 1922) (overbroad delegation would be "beyond any power which Congress can confer"), *aff'd*, 267 U.S. 586 (1924)); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147, 178 (2017); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–53 (2002).

become microcosms of government unto themselves, with Article III judicial review constrained by the APA to final agency action.[254] If challengers can reinvigorate the long dormant Nondelegation Doctrine, then they may be able to challenge agency investigatory methods on the basis that Congress did not intend to delegate such broad authority to the agency—depending, of course, on the exact agency, organic statute, and investigatory method used.[255]

Another way Congress can restrain agency investigative acts is through its oversight power.[256] Naturally, members of Congress disagree over how they want the government and its agencies to run.[257] Nevertheless, "[l]egislators tend to prioritize the investigation and monitoring of executive bureaucracies," because it helps them achieve policy goals and "lets them claim credit for making the government work more efficiently and effectively."[258] Oversight can be "police patrol oversight"—more routinized oversight characterized by constant vigilance of what an agency is doing—versus "fire alarm oversight," in which Congress waits for interest groups, the public, the media, or inspectors general to draw Congress's attention to an agency problem.[259]

Oversight may occur formally by committees holding oversight hearings. For example, the House held a hearing on the Federal Trade Commission's investigation authority: "The Federal Trade Commission and Its Section 5 Authority: Prosecutor, Judge, and Jury."[260] The hearing examined the FTC's broad authority to prohibit unfair or deceptive trade practices and specifically heard testimony concerning the FTC's issuance of subpoenas to forty LabMD employees.[261] Oversight can proceed less formally than committee and subcommittee hearings. Congressional staff can examine agency investigative practices by asking questions of the agency directly and requesting documents.[262] Members can directly contact the White House for help influencing how an agency investigates.[263] Congress can use its appropriations power to fund or defund the agency as a whole or parts of the agency to control how the

254. Lawson, *supra* note 124.

255. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) ("The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."); *id.* at 2130–31 (Alito, J., concurring); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

256. *See* U.S. CONST. art. I, § 1; Watkins v. United States, 354 U.S. 178, 187 (1957); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1459–66 (2003).

257. Cuéllar, *supra* note 79, at 274–75.

258. *Id.* at 296–97.

259. *Id.* at 297 (citing Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166–68 (1984)).

260. *See The Federal Trade Commission and Its Section 5 Authority: Prosecutor, Judge, and Jury: Hearing before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2014), https://www.govinfo.gov/content/pkg/CHRG-113hhrg90892/pdf/CHRG-113hhrg90892.pdf [https://perma.cc/GNU9-376M].

261. *Id.* at 9.

262. Cuéllar, *supra* note 79, at 297 (citing JAMES Q. WILSON, BUREAUCRACY 235–44 (1989)).

263. *Id.*

agency conducts investigations.[264] Scholars have questioned whether congressional oversight is actually effective.[265] Conversely, agencies may internalize congressional oversight signaling as a mechanism to mitigate the adverse attention that flows from acting in defiance to congressional concerns.[266]

Congress may also, of course, enact statutes channeling or directing agency investigation processes. Reporting statutes are one example. The Government Performance and Results Act of 1993[267] "requires federal agencies to develop long-term strategic plans to clarify their missions, develop short-term performance plans to identify performance measures for outputs and outcomes, and report to Congress on how they performed against those goals."[268]

Another Article I check on agency investigations is the strategic use of the Senate's confirmation powers. Officers of the United States must be appointed in accordance with Article II.[269] The Constitution thus permits Congress to freeze the consideration of nominees or reject them outright in response to agency investigations or information sharing—even indirect to the nominee or the nomination itself—that proceed contrary to Congress's wishes.[270]

B. Statutory Constraints

1. Administrative Procedure Act

The Constitution provides the minimum procedural and substantive rights against agency investigative acts. With the APA's prescriptive positive procedures for agency adjudication and rulemaking and its waiver of sovereign immunity to facilitate judicial review, one might assume that the statute similarly confers positive procedures for agency investigations and procedural protections to individuals who are the subject of investigative acts. As demonstrated in the chart and analysis below, the APA imposed no meaningful constraints on administrative investigation.

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264. *Id.*; *see* U.S. CONST. art. I, § 9, cl. 7.

265. *See, e.g.*, Philip J. Weiser, *Entrepreneurial Administration*, 97 B.U. L. REV. 2011, 2081 (2017).

266. *See id.* at 2045; Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

267. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 283 (codified in scattered sections of titles 5, 31, and 39 of the U.S. Code).

268. Matthew S. Schoen, *Good Enough for Government Work?: The Government Performance Results Act of 1993 and Its Impact on Federal Agencies*, 32 SETON HALL LEGIS. J. 455, 456–57 (2008) (footnote omitted).

269. U.S. CONST. art. II, § 2, cl. 2.

270. *See, e.g.*, Burgess Everett & Marianne Levine, *The Senate's Record-Breaking Gridlock Under Trump*, POLITICO (June 8, 2020, 4:30 AM), https://www.politico.com/news/2020/06/08/senate-record-breaking-gridlocktrump-303811 [https://perma.cc/WR2A-QXQA].

Table 4. Administrative Procedure Act Explicit Treatment of Agency Investigative Acts

APA Section	Effect
5 U.S.C. § 555(c)	Standard for administrative subpoenas: must be enforced "as provided for by law"
5 U.S.C. § 555(d)	Procedural basis to challenge administrative subpoenas and "similar process or demand"
5 U.S.C. § 554(d)	Miscellaneous provisions, including the limited constraints on administrative law judges reporting to agency investigators

The drafting history of the APA evinces little consideration of investigative acts.[271] The Supreme Court held that the APA procedures available for adjudications and rulemakings do not apply to agency investigations.[272] Indeed, one of the few APA provisions concerning investigative acts arises in a section entitled "Ancillary matters."[273]

The APA contains investigation-specific provisions, although they have not been vigorously invoked by litigants or applied by courts.[274] In 5 U.S.C. § 554(d), the APA acknowledges agency civil investigations by stating that an employee who participated in the investigation may not make a formal adjudication of the resulting matter.[275] Under § 555(d), affected parties and agencies may go to court to contest or enforce, respectively, "subp[o]ena[s] or similar process or demand."[276] These provisions were intended to leave unchanged the existing (i.e., pre-1946) law on judicial review of subpoenas.[277]

This part of the APA is unclear and rarely litigated—especially so in the past few decades.[278] When an affected party challenges a subpoena or similar process, the few

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271. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 113, at 66–69, 131–32. The Supreme Court has deferred to the Attorney General's Manual on the APA to the extent it does not conflict with the APA. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979).

272. Hannah v. Larche, 363 U.S. 420, 452–53 (1960).

273. 5 U.S.C. § 555.

274. We note that our definition of an "investigative act" excludes an agency proceeding governed by positive APA procedures. We do not consider § 555(c) and (d) to provide such procedures. Otherwise, because those sections do relate to investigative acts, counting them as positive APA procedures would have the exclusion swallow the rule and exclude everything we have yet deemed to be an agency investigation.

275. 5 U.S.C. § 554(d).

276. *Id.* § 555(d).

277. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 113, at 68–69, 131–32.

278. As of November 14, 2021, Westlaw recorded only 1411 case citations to the entirety of 5 U.S.C. § 555, although approximately 100 of those cases were decided in the last year alone. The database shows that of those, there are only 38 cases that use the term "555(c)" or "6(b)" (which is the section of the APA codified at 5 U.S.C. § 555(c)). Westlaw also shows that of those 1411 cases, there are only 40 cases that use the term "555(d)" or "6(c)" (which is the section of the APA codified at 5 U.S.C. § 555(d)). These meager figures are overinclusive, as some of these cases cite to provisions within sections 555(c) and (d) that do not relate to

courts to consider this provision have held that the agency bears the burden to show that the subpoena is for a lawful purpose.[279]

The APA includes a substantive standard for a litigant to reference when invoking the cause of action available under § 555(d). Under 5 U.S.C. § 555(c), any investigative act—including subpoenas, process, inspection, and so forth—must be made and enforced "as authorized by law."[280] This provision appears separate from the familiar APA cause of action in 5 U.S.C. § 706(2), which provides for the setting aside of final agency action that is contrary to law or is "arbitrary or capricious."[281] As with the procedural § 555(d), litigants rarely invoke § 555(c) to challenge agency investigations. Both have been used sparingly.[282] This may be consistent with the APA drafters' expectation that this standard was a mere "restatement of existing law."[283] Interestingly, the House Judiciary Committee Report broadly declared that the provision codified at § 555(c) was "designed to preclude 'fishing expedition' and investigations beyond the jurisdiction or authority" of an agency.[284] However, the enacted provision—barring investigative process "except as authorized by law"—is textually weaker than the Committee Report's remark suggests.

Nevertheless, § 555(c) may be significant because it is not coextensive with § 706(2), a distinct solution for challenging investigative behavior. Section 706(2) is subject to the requirement that the challenged agency conduct be "final,"[285] whereas the provision for judicial review of agency investigative tools appears to be unencumbered by that qualification.[286] Another constraint applicable to adjudication and rulemaking, § 553, does not to apply to § 555(d) actions because an investigation does not appear to be an adjudication or rulemaking under the APA's definition of those terms.[287]

There are several arguments to be made for using these APA provisions to more robustly police investigative acts. The APA House Judiciary Committee Report went further than what the sparse § 555(c) and (d) case law holds. The Committee claimed that by restricting investigative acts to those "authorized by law," the APA

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investigative acts or cite to completely distinct uses of those sections.

279. United States v. Sec. State Bank & Tr., 473 F.2d 638, 642 (5th Cir. 1973) (citing "the acceptable practice under analogous administrative schemes").

280. 5 U.S.C. § 555(c).

281. *Id.* § 706(2).

282. *See, e.g.*, Sch. Bd. of Broward Cnty. v. Dep't of Health, Educ. & Welfare, 525 F.2d 900, 906 n.6 (5th Cir. 1976); United States v. Morton Salt Co., 338 U.S. 632, 646 (1950) (implying a § 555(c) violation is judicially enforceable); Kent v. Hardin, 425 F.2d 1346, 1350 (5th Cir. 1970) (same); *In re* FTC Corp. Patterns Rep. Litig., No. 76-0126, 1977 WL 1438, at *2 (D.D.C. July 11, 1977) (same).

283. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 113, at 66; *see also* ASIMOW, *supra* note 8, at 47 ("The provision seems to add nothing to existing law." (footnote omitted)).

284. H.R. REP. NO. 79-1980, at 264 (1946). One court has held that the APA does not prohibit "fishing expeditions" in and of themselves, but rather *ultra vires* "fishing expeditions." Pac. Westbound Conf. v. United States, 332 F.2d 49, 53 (9th Cir. 1964).

285. 5 U.S.C. § 704.

286. *See id.* § 555(c), (d) (not referring to judicial review "agency action," which § 704 generally requires to be final).

287. *Id.* § 551(5), (7); Hannah v. Larche, 363 U.S. 420, 452–53 (1960).

authorized quashing investigative acts that "disturb or disrupt personal privacy, or unreasonably interfere with private occupation or enterprise."[288] The Report also warned agencies that their investigations "should be conducted so as to interfere in the least degree compatible with adequate law enforcement."[289]

However, the enacted bill does not textually incorporate these principles, and these guideposts were not repeated in the influential *Attorney General's Manual*.[290] They have been cited precisely once by a federal court—in 1964.[291] Further, under pre-APA case law, which the *Attorney General's Manual* concluded was left intact by the APA, until final agency action occurs to a respondent's detriment, a court cannot determine whether the respondent is actually subject to the law the agency is purporting to enforce.[292] Also, the § 555(d) standard, that an agency investigation is "authorized by law," is, according to one court, merely coextensive with the § 706(2)(A) "arbitrary or capricious" standard.[293]

There is also uncertainly as to what "law" an agency subpoena or warrant could be quashed for violating. The *Attorney General's Manual* states, "'Law' refers to the statutes which a particular agency administers, together with relevant judicial decisions."[294] At the very least, "law" should include the Constitution. Some courts hold that only the organic statute can be the authorizing "law," which tends to tip the scales against the affected parties.[295] Some courts hold only federal law is the authorizing "law," not state law.[296] And some courts hold that even the agency's regulations can be the authorizing "law," which tips the scales in favor of the agency.[297] Depending on the meaning of "law," the standards to which an agency subpoena or warrant could be held might be higher than the mere constitutional minimums discussed later in this Article.

That is the extent of APA review for a party aggrieved by an agency investigation. Standard § 706 review does not apply to investigative acts because that provision

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288. H.R. REP. NO. 79-1980, at 264 (1946).

289. *Id.*

290. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 113, at 66.

291. Pac. Westbound Conf. v. United States, 332 F.2d 49, 53 n.10 (9th Cir. 1964).

292. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 113, at 69 (citing Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943)); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186 (1946) ("Nothing in the language of section 6(c) suggests any purpose to change this established rule.")); *see also* City of Arlington v. FCC, 569 U.S. 290 (2013) (Roberts, C.J., dissenting).

293. *In re* FTC Corp. Patterns Rep. Litig., No. 76-0126, 1977 WL 1438, at *2 (D.D.C. July 11, 1977) (citing United States v. Morton Salt Co., 338 U.S. 632 (1950) and noting that *Morton Salt* was reviewed under § 555 alone and not § 706).

294. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 113, at 69.

295. Belle Fourche Pipeline Co. v. United States, 554 F. Supp. 1350, 1358 (D. Wyo. 1983); *see* United States v. Morton Salt Co., 338 U.S. 632, 646 (1950); *see also* Appeal of FTC Line of Bus. Rep. Litig., 595 F.2d 685 (D.C. Cir. 1978) (per curiam) (finding that the "law" referred to is at least the agency's organic statute).

296. Kent v. Hardin, 425 F.2d 1346, 1350 (5th Cir. 1970).

297. *Id.*

requires "final agency action," which agency investigations are definitionally not.[298] The Supreme Court has held that an agency's initiation of an investigation is not final agency action,[299] which would reasonably include antecedent investigatory acts. This decision perhaps would have come out differently if decided today, given more recent court cases and the analysis in this Article. Relying on that case, lower courts have held that certain investigation-related acts do not constitute final agency action,[300] including informational reports after investigation[301] or certain decisions not to investigate.[302]

That is not to say that *no* agency act associated with an investigation can be a final agency action. Some cases in recent years have subverted the notion that such a bright line exists. In 2016, the Supreme Court held in *U.S. Army Corps of Engineers v. Hawkes Co.* that an approved jurisdictional determination by the Corps is final agency action.[303] The affected parties successfully argued that the jurisdictional determination imposed practical burdens on them and thus met the test of finality.[304] The *Hawkes* decision creates the possibility of placing other marginal investigative activity under the purview of federal jurisdiction. For example, agency investigatory tools could constitute final agency action if they are not ad hoc, but rather the agency has developed a program, policy, or practice of investigations that crosses the line into full rule territory.[305]

Agency investigative acts are also arguably prosecutorial decisions (at least where the organic statute does not require the commencement of an investigation because of a specific trigger).[306] This renders them presumptively unreviewable under *Heckler v. Chaney*[307] or subject to the APA's discretionary fiat[308] via the organic

298. *See* 5 U.S.C. §§ 551(13), 704.

299. FTC v. Standard Oil Co., 449 U.S. 232, 239–45 (1980); Veldhoen v. U.S. Coast Guard, 35 F.3d 222, 225 (5th Cir. 1994) ("An agency's initiation of an investigation does not constitute final agency action.").

300. *E.g.*, Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n, 324 F.3d 726, 731 (D.C. Cir. 2003); Martin v. Naval Criminal Investigative Serv., 539 F. App'x 830, 832 (9th Cir. 2013); Mobil Exploration & Producing U.S., Inc. v. Dep't of the Interior, 180 F.3d 1192, 1198–99 (10th Cir. 1999).

301. Parsons v. U.S. Dep't of Justice, 878 F.3d 162, 169 (6th Cir. 2017); Joshi v. Nat'l Transp. Safety Bd., 791 F.3d 8, 11 (D.C. Cir. 2015); *cf.* United States v. L.A. & Salt Lake R.R. Co., 273 U.S. 299, 309–10 (1927).

302. Jallali v. Sec'y, U.S. Dep't of Educ., 437 F. App'x 862, 865 (11th Cir. 2011).

303. 578 U.S. 590 (2016).

304. *Id.*; *see also* Rhea Lana, Inc. v. Dep't of Labor, 824 F.3d 1023, 1029 (D.C. Cir. 2016) (agreeing that "legal consequences flow from" an agency letter "because it makes [the regulated party] eligible for civil penalties in any future enforcement action"); CSI Aviation Servs., Inc. v. U.S. Dep't of Transp., 637 F.3d 408, 412–13 (D.C. Cir. 2011) (finding an "immediate and significant burden" where the government "flexed its regulatory muscle").

305. *See* U.S. Dep't of Lab. v. Kast Metals Corp., 744 F.2d 1145, 1150 (5th Cir. 1984).

306. Gifford-Hill & Co. v. FTC, 523 F.2d 730, 733 n.7 (D.C. Cir. 1975) (dicta); *In re* FTC Corp. Patterns Report Litig., No. 76-0126, 1977 WL 1438, at *3 (D.D.C. July 11, 1977).

307. 470 U.S. 821 (1985) (holding discretionary action is an exception to the presumption in favor of judicial review of agency action).

308. 5 U.S.C. § 701. This is to the extent that investigative acts are not reviewable under, for example, 5 U.S.C. § 555(d).

statute. The Constitution's respect for horizontal separation of powers also compels that result.[309] Thus, courts should generally refrain from inserting themselves into decisions of how agencies should use their resources.[310]

But for immunity to be granted based on prosecutorial discretion, the statute must truly give the agency discretion to investigate or not investigate. As one example, the D.C. Circuit has found justiciable the Food and Drug Administration's failure to initiate certain enforcement actions against a pharmaceutical wholesaler after the court interpreted a statute to entirely deprive the FDA of discretion to decline.[311] Because the organic statute forced the FDA to take enforcement action, that decision was not "committed to agency discretion by law"[312] and thus was subject to APA review.[313] The upshot is that Congress may sometimes directly cabin executive prosecutorial discretion and, by extension, investigation discretion.[314]

Whether an agency investigation can be challenged under 5 U.S.C. § 555(d) or § 706, parties have no ability to raise substantive defenses *during* the agency investigation that will bear on their enforcement proceeding. For example, the parties cannot successfully raise claims of collateral estoppel,[315] argue that the act upon which the investigation is based does not apply to respondents, or contest that the respondents are within the agency's jurisdiction.[316] As it stands, this raises a separation of powers consideration, as Chief Justice Roberts noted in his *City of Arlington v. FCC* dissent.[317]

One benefit the APA does provide challengers is their ability to be represented by counsel at hearings or interviews. The Sixth Amendment right to counsel "does not attach until after the agency has moved beyond the investigative stage,"[318] but

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309. *See, e.g.*, Memorandum from Patrick Philbin, Deputy Assistant Att'y Gen., Off. of Legal Couns., to Daniel J. Bryant, Assistant Att'y Gen., Off. of Leg. Affs. (Apr. 8, 2002); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 541 n.280 (2017).

310. *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 716 (1990).

311. Cook v. FDA, 733 F.3d 1, 7–10 (D.C. Cir. 2013).

312. 5 U.S.C. § 701(a)(2).

313. *Cook*, 733 F.3d at 10 (citing Heckler v. Chaney, 470 U.S. 821, 833 (1985)).

314. Citizens for Resp. & Ethics in Wash. v. FEC, 892 F.3d 434, 441 (D.C. Cir. 2018); *see also* Greer v. Chao, 492 F.3d 962, 965 (8th Cir. 2007) (quoting Giacobbi v. Biermann, 780 F. Supp. 33 (D.D.C. 1992)).

315. FTC v. Texaco, Inc., 555 F.2d 862, 879 (D.C. Cir. 1977) (en banc).

316. FTC v. Ken Roberts Co., 276 F.3d 583, 584 (D.C. Cir. 2001); Fed. Mar. Comm'n v. Port of Seattle, 521 F.2d 431 (9th Cir. 1975); SEC v. Savage, 513 F.2d 188 (7th Cir. 1975).

317. 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) ("[T]here is another concern at play, no less firmly rooted in our constitutional structure. That is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well.").

318. RONALD F. WRIGHT, ORGANIZATION OF ADJUDICATIVE OFFICES IN EXECUTIVE DEPARTMENTS AND AGENCIES 542 (1993) (footnote omitted), https://www.acus.gov/sites/default/files/documents/1993-Statement%2316%20Organization%20of%20Adjudicative%20Offices%20in%20Executive%20Departments%20and%20Agencies.pdf [https://perma.cc/K8G8-GPDY]; *cf.* Middendorf v. Henry, 425 U.S. 25 (1976) (holding that the Sixth Amendment right to counsel is limited to criminal proceedings).

the APA permits a party compelled to appear before an agency to be accompanied, represented, and advised by an attorney.[319]

As an additional minor point, one of the APA's other few references to investigative action is its prohibition on administrative law judges being supervised by employees who investigate on behalf of the agency.[320] Similarly, an investigating employee generally may not be involved in the decision except as witness or counsel.[321] A violation of these structural limitations would presumably give rise to a challenge that the agency action rendered was unlawful for failing to observe required procedures.[322] However, non-administrative-law-judges are not subject to these requirements.[323]

2. Non-APA Statutory Constraints

Some agencies' organic statutes erect additional constraints, both in terms of substantive controls and independent oversight.[324] Under the Inspector General Act of 1978, inspectors general "conduct and supervise audits and investigations relating to the programs and operations" of the executive departments.[325] The Inspector General Act requires the agency to give its inspectors general "timely access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials available to the" agency and which "relate to" the inspector general's responsibilities.[326] Inspectors general may also issue subpoenas to non-federal agencies and take testimony of "any person,"[327] though they may not issue subpoenas to federal agencies.[328]

These provisions have caused friction between the inspectors general and the heads of executive agencies, particularly the Federal Bureau of Investigation. Some agency heads have contended that they alone hold the authority to release documents, and even if they do not, the agency head determines which documents are "relate[d]" to the programs and operations under review.[329] To the contrary, inspectors general

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319. 5 U.S.C. § 555(b).

320. *Id.* § 554(d)(2).

321. *Id.* § 554(d).

322. *Id.* § 706(2)(D).

323. Marcello v. Bonds, 349 U.S. 302, 311 (1955) (rejecting this challenge under the Due Process Clause).

324. *E.g.*, Letter from FTC Inspector General Roslyn A. Mazer to Jason Chaffetz, Chairman, House Comm. on Oversight & Gov't Reform, & Elijah E. Cummings, Ranking Member, House Comm. on Oversight & Gov't Reform (Sept. 30, 2015), https://causeofaction.org/wp-content/uploads/2018/10/ORIGINAL-Signed-OIG-Letter-to-HOGR-staff-9-30-2015.pdf [https://perma.cc/DK3M-B7YS].

325. 5 U.S.C. app. § 1–2. Some agencies have their inspectors general authorized under other authorities. *See generally* CONG. RSCH. SERV., STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER app. B (2019), https://crsreports.congress.gov/product/pdf/R/R45450/4 [https://perma.cc/6H2A-JB3D].

326. 5 U.S.C. app. § 6(a)(1).

327. *Id.* § 6(a)(5).

328. *Id.* § 6(a)(4).

329. *Obstructing Oversight: Concerns from Inspectors General: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014) (statement of Michael E. Horowitz,

have argued in favor of permitting access to agency records so that the agency cannot stonewall the inspectors general.[330]

The Freedom of Information Act (FOIA) provides another bulwark. Under an earlier version of FOIA and case law from the 1970s, investigatory files remained exempt from public disclosure even after agency proceedings terminated.[331] But now, an agency must produce a requested record unless its disclosure meets one of six conditions, such as that it "could reasonably be expected to interfere with enforcement proceedings" or could disclose law enforcement techniques.[332]

Under that broad rubric, regulated entities and individuals can use FOIA to request information on investigations.[333] For example, *ProPublica* has used FOIA to research the Department of Health and Human Services and the investigation-close-out letters it sent to healthcare providers.[334] Although not under FOIA, the Equal Employment Opportunity Commission releases a full set of materials contained in a charge file at the conclusion of its investigation, although apparently only to the person who filed the charge under its own statute.[335] The FOIA constraint is of limited efficacy. Courts tend to defer to agencies in their assertions of exemptions.[336] Agencies are disincentivized from complying with the requests.[337] FOIA responses are also only as good as the information that the agency collects, which can be limited.[338]

Another statute that provides protections is the Privacy Act of 1974. The Act is useful not because it substantively limits how an agency undertakes its investigative acts but because it limits the fruits of those acts—thereby serving as a backend check. This Act prohibits federal agencies from "disclos[ing] any record which is contained in a system of records by any means" to another agency unless the individual whose information is in the record consents, or if the disclosure would be for a "routine use" or for a "civil or criminal law enforcement activity" provided a certain written request is made.[339] A "routine use" is defined as "the use of such record for a purpose which is compatible with the purpose for which it was collected."[340] The "law enforcement activity" exception is broader than criminal investigations, and does not require an

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Inspector General, U.S. Department of Justice), https://oig.justice.gov/sites/default/files/2019-12/09.10.14.pdf [https://perma.cc/WXE2-EL34].

330. *Id.*

331. *See, e.g.*, Frankel v. SEC, 460 F.2d 813 (2d Cir. 1973); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970).

332. 5 U.S.C. § 552(b)(7).

333. Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204 (2018).

334. *Id.* at 2212 (citing Charles Ornstein, *The Secret Documents that Detail How Patients' Privacy Is Breached*, PROPUBLICA (July 21, 2016, 8:00 AM), http://www.propublica.org/article/the-secret-documents-that-detail-how-patients-privacy-is-breached [https://perma.cc/UQQ8-Y2TS].

335. *Id.* at 2238.

336. Aram A. Gavoor & Daniel Miktus, *Oversight of Oversight: A Proposal for More Effective FOIA Reform*, 66 CATH. U. L. REV. 525, 535–37 (2017).

337. *Id.* at 529–31 (describing how agencies take advantage of FOIA's ambiguities and gaps).

338. Kwoka, *supra* note 316, at 2221.

339. 5 U.S.C. § 552a(b)(3), (7).

340. *Id.* § 552a(a)(7).

active investigation or a "current law enforcement necessity."[341] The agency faces penalties for violations. For example, if an agency releases records to another agency without an exception to the Privacy Act, liability can lie against the government under the Federal Tort Claims Act.[342] Relatedly, for several agencies, the agency's employees are subject to criminal penalties (fines of up to $5,000 and imprisonment of up to a year) for disclosing any information obtained by the agency (presumably through its investigation) without the agency's authority.[343] The Privacy Act provides another incentive for agencies to carefully conduct their investigations and to be careful with what they do with the information obtained through their investigations.

C. Executive Branch Constraints

Though often impermanent, the Executive Branch can and occasionally does self-impose limiting principles to its investigative practices. The latest significant iterations of this behavior were a pair of executive orders issued in 2019—now revoked—titled *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* ("Executive Order 13,892") and *Promoting the Rule of Law Through Improved Agency Guidance Documents* ("Executive Order 13,891").[344] Executive Order 13,892 prohibited agencies from enforcing rules that they have not made publicly available prior to that enforcement action.[345] It mandated that agencies must promulgate rules of agency procedure governing administrative inspections.[346] It also encouraged agencies to offer opinion letters to members and entities of the regulated public to facilitate knowledge of and compliance with the law.[347] Notably, Executive Order 13,892 excluded investigative activity by the Department of Justice with respect to any "homeland security function," and it likewise exempted any provision of the order if any agency's head determined that compliance would undermine national security.[348]

Executive Order 13,891 added value by requiring agencies to post their guidance documents online so that the regulated public may access them.[349] This partially mitigated the risk of secret law in the form of internal guidance documents against which the public is held accountable but for which it is unaware.[350] Most agencies

341. Maydak v. United States, 363 F.3d 512, 517 (D.C. Cir. 2004).

342. Doe v. DiGenova, 779 F.2d 74, 88 (D.C. Cir. 1985); *see* 28 U.S.C. §§ 1346, 2671–2680.

343. 5 U.S.C. § 552a(i)(1).

344. Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 9. 2019); Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (Oct. 9, 2019); *see also* Exec. Order No. 13,992, 86 Fed. Reg. 7,049 (Jan. 20, 2021) (revoking Exec. Orders 13,891 and 13,892).

345. Exec. Order No. 13,892, 84 Fed. Reg. at 55,241.

346. *Id.* at 55,240; DAVID FREEMAN ENGSTROM, DANIEL E. HO, CATHERINE M. SHARKEY & MARIANO-FLORENTINO CUÉLLAR, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 19 (2020) ("Here lies the most sobering finding: For most government applications (61%), there is insufficient publicly available technical documentation to determine with precision what [AI] methods are deployed.").

347. Exec. Order No. 13,892, 84 Fed. Reg. at 55,242.

348. *Id.* at 55,242–43.

349. Exec. Order No. 13,891, 84 Fed. Reg. at 55,236.

350. *See* Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803, 812 (2018).

took steps to comply with the executive orders.[351] Taken together, Executive Orders 13,891 and 13,892 were a positive step towards mitigating the problem of administrative investigations. Their substantial exclusions, limited scope, and express disclaiming of creating any substantive right to the regulated public left more to be done in the space of presidential actions and the lesser field of agency self-restraint.[352] In tacit recognition of this point, the Office of Management and Budget published a request for information in the *Federal Register* in January 2020, seeking "ideas that will ensure each and every American enjoys adequate protections in regulatory enforcements and adjudications."[353] The first topic of interest enunciated on this score relates to investigative fairness.[354]

Four months later, the President signed *Executive Order on Regulatory Relief to Support Economic Recovery* ("Executive Order 13,924")—now also revoked—which enunciated ten "principles of fairness in administrative enforcement and adjudication" that agencies should consider in revising their "procedures and practices."[355] Most notably, section 6(g) states that "[a]dministrative enforcement should be free of improper Government coercion."[356] Notwithstanding the efficacy of presidential actions to cause behavioral change, the efficacy of such actions is contingent on the will across executive branch agencies to enforce them as well as the variable agency-specific interpretations of the meaning of "coercion" and the types of "governmental coercion" that are "improper."[357] And, when agencies comply with executive orders, agencies' interpretations can naturally vary.[358] However, in furtherance of section 6 of Executive Order 13,924, the Office of Information and Regulatory Affairs issued an implementing memo with over twenty unique best practices for agencies to consider and apply to their rules of procedure and management.[359] By December 2020, multiple cabinet agencies had modified their rules.[360]

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351. *See* Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. 71,714 (Dec. 27, 2019) (Department of Transportation's response to Exec. Orders 13,891 and 13,892); Clyde Wayne Crews, *A One-Stop Executive Order 13891 Guidance Document Portal*, COMPETITIVE ENTER. INST. (Mar. 2, 2020), https://cei.org/blog/one-stop-executive-order-13891-guidance-document-portal [https://perma.cc/2KL6-WETX].

352. Exec. Order No. 13,891, 84 Fed. Reg. at 55,238; Exec. Order No. 13,892, 84 Fed. Reg. at 55,243; *cf.* David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 180–85 (2018) (discussing the jurisprudential contours of the rule of law).

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

354. *Id.* at 5484.

355. Exec. Order No. 13,924, 85 Fed. Reg. 31,353, 31,355 (May 19, 2020); *see also* Exec. Order No. 14,018, 86 Fed. Reg. 11,855 (Feb. 24, 2021) (revoking Exec. Order No. 13,924).

356. Exec. Order No. 13,924, 85 Fed. Reg. at 31,355.

357. *See* Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285, 290–91.

358. *See* Udall v. Tallman, 380 U.S. 1, 4 (1965) (counseling judicial deference to reasonable agency interpretations of executive orders).

359. Memorandum from Paul J. Ray, Adm'r, Off. of Information and Regul. Aff., to the Deputy Sec'ys of Exec. Dep'ts & Agencies (Aug. 31, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/08/M-20-31.pdf [https://perma.cc/HZ6D-A8XU].

360. *See, e.g.*, Memorandum from Susan Parker Bodine, Assistant Adm'r for Enf't &

IV. WHY INVESTIGATIVE ACTS SHOULD BE CHECKED

Having set out what agency investigations are and how they are permitted, we now ask: are investigative acts a good and useful thing, given the inadequate constraints under the law to advance their legitimate purpose in the constitutional system? In this Part, we aim to determine the positive and negative aspects of investigative acts. Knowing what investigative acts are capable of, and their consequences, helps inform whether more or fewer constraints on investigative acts are necessary.

A. The Benefits of Agency Civil Investigative Behavior

Agency investigations provide Americans with significant benefits. The Attorney General's Committee acknowledged this before the passage of the APA, calling it "imperative" that a "careful investigation" take place before an agency commences formal proceedings.[361] Indeed, at least for rulemaking, the Attorney General's Committee saw "the investigation, or study, of the problems to be dealt with" as one of the four distinct stages in administrative rulemaking.[362] The Supreme Court, too, has noted that "it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry."[363]

Agencies execute the Executive Branch's general constitutional mandate from the confluence of organic statutes and the Take Care clause.[364] The President cannot personally see to the creation and implementation of policy for the entire U.S. federal government, and consequently needs a bureaucracy to carry out the functions of the President and other officers of the United States. Agencies enforce the law and investigate numerous subjects, including fraud,[365] corruption,[366] forgery,[367] and public health.[368] Agencies strive to achieve these goals in many situations. Evidence

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Compliance Assurance, EPA, Implementation of Executive Order 13924 (Nov. 25, 2020); Memorandum from Steven G. Bradbury, Gen. Couns., U.S. Dep't of Trans., to Secretarial Officers & Heads of Operating Admins. (Nov. 13, 2020) https://www.transportation.gov/mission/enforcement/implementation-section-6-executive-order-13924 [https://perma.cc/67BC-4VGR].

361. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 47, at 62.

362. *Id.* at 102.

363. United States v. Morton Salt Co., 338 U.S. 632, 642 (1950).

364. U.S. CONST. art. II, § 3, cl. 5.

365. *See* U.S. DEP'T OF LAB., EMP. BENEFITS SEC. ADMIN., FACT SHEET, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.pdf [https://perma.cc/R773-4LCZ] (describing how in Fiscal Year 2020, the Employee Benefits Security Administration had enforced the Employee Retirement Income Security Act by closing 1122 civil investigations and collecting over $1.48 billion).

366. DEP'T OF STATE, FOREIGN OPERATIONS & RELATED PROGRAMS, CONGRESSIONAL BUDGET JUSTIFICATION (Mar. 11, 2019), https://www.usaid.gov/sites/default/files/documents/1868/FY_2020_CBJ.pdf [https://perma.cc/9WGY-4TKT].

367. *Id.*

368. DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION,

of a regulatory violation frequently resides solely within the hands of the regulated entity.

Investigative action helps agencies achieve their respective statutory and executive mandates.[369] Accordingly, the Supreme Court has recognized that the constitutional basis for agency investigative acts "would seem clearly to be comprehended in the 'necessary and proper' clause, as incidental to both [Congress's] general legislative and its investigative powers."[370] As Professor Davis wrote the year after the enactment of the APA, "Investigations are useful for all administrative functions, not only for rule-making, adjudication, and licensing, but also for prosecuting, for supervising and directing, for determining general policy, for recommending legislation, and for purposes no more specific than illuminating obscure areas to find out what if anything should be done."[371] Professor Sunstein has argued that agencies have evolved to become "modern America's common law courts," meaning they "specify abstract standards (often involving reasonableness) and to adapt legal rules to particular contexts as facts, social understandings of facts, and underlying values change over time."[372] The ability to investigate furnishes agencies with the facts that are a necessary predicate to agency action in such a "common law court." That said, as the Supreme Court recently recognized, agencies' decisions are "routinely informed" by considerations external to the affected parties: considerations of politics, foreign relations, and national security.[373] The difference in what agencies do and what agencies regulate may lead to different uses, and abuses, of agency investigations.[374]

Investigations can save resources for the agency and, collaterally, the regulated parties. Investigative actions allow the agency to explore whether to commence an agency action without committing to doing so. An agency saves resources by looking into an issue within the agency's enforcement domain without fully committing the agency to pursuing final action.[375]

Agency investigations can also serve as a platform upon which it can bring attention to issues; "[a]gencies may be able to solve collective action problems by . . . more readily generating media attention."[376] So, too, can agency investigations lead

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JUSTIFICATION OF ESTIMATES FOR APPROPRIATION COMMITTEES, https://www.cdc.gov/budget/documents/fy2021/fy-2021-cdc-congressional-justification.pdf [https://perma.cc/ZW8N-W4LJ].

369. *See* HICKMAN & PIERCE, *supra* note 19, § 8.1; Jack W. Campbell IV, *Revoking the "Fishing License:" Recent Decisions Place Unwarranted Restrictions on Administrative Agencies' Power to Subpoena Personal Financial Records*, 49 VAND. L. REV. 395, 396 (1996).

370. Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 214 (1946).

371. Davis, *supra* note 13, at 1111. The word "prosecution" in this quote seems to mean civil prosecution, not criminal prosecution. The APA uses the same term in a civil manner as well. 5 U.S.C. § 554(d)(2).

372. Cass R. Sunstein, *Is Tobacco A Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019 (1998).

373. Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019).

374. Bagby, *supra* note 7, at 349 ("The courts and the Congress should reevaluate investigatory powers if evidence mounts of abuse by either regulators or 'targets.'").

375. Campbell, *supra* note 369, at 434.

376. Cuéllar, *supra* note 79, at 286.

Congress to legislate.[377] Agencies have been observed to use their civil powers appropriately.[378] However, due to the nebulous and largely non-public nature of administrative investigations, the benefits that they generate evade precise measurement: "[t]he costs and benefits of government investigations are diffuse."[379]

B. Abuses of Agency Civil Investigative Practice

There are numerous problematic aspects of how agencies are currently undertaking their investigatory rights, obligations, and privileges. Since the twentieth century, government agencies have been "flush with power to make highly informal decisions affecting people, where 'the usual quality of justice' may be quite low."[380] This is especially problematic where those decisions are discretionary, because agencies may find discretionary actions to be "tempting levers to create favorable . . . perceptions" "as a sort of signal that the public (or political superiors) can use in forming judgments about the competence" of the agency.[381] As the Supreme Court admonished in a 1936 opinion from the era in which the Court viewed agency investigations with skepticism, permitting an agency to compel individuals to produce evidence in the absence of jurisdiction "violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest," and places the government at risk of "becom[ing] an autocracy."[382]

Agency investigations deploy immense investigatory power to target individuals and entities with often crippling and voluminous document, inspection, and interview requests.[383] The announcement of an investigation can affect share prices as well as investor and public confidence.[384] When it was publicly revealed that the Department of Justice and the FTC were launching antitrust investigations into Facebook, Amazon, and Google's parent company, those companies' shares dropped 7.5%, 4.6%, and 6.1%, respectively.[385]

Improperly scoped agency investigations can stifle individual freedoms. Once under investigation, an individual or entity may enter the orbit of criminal penalties in responding to government requests for information. A misstep in the presentation of a material fact can theoretically carry criminal consequences because making false

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377. Davis, *supra* note 13, at 1117.

378. *See* H.R. REP. No. 96-1321, at 4 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3874, 3877.

379. *In re* Columbia/HCA Healthcare Corp. Billing Pracs. Litig., 293 F.3d 289, 312 (6th Cir. 2002) (Boggs, J., dissenting).

380. Cuéllar, *supra* note 79, at 279 (citing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 216 (1969)).

381. *Id.* at 263.

382. Jones v. SEC, 298 U.S. 1, 23–24 (1936).

383. Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 218–19 (1946) (Murphy, J., dissenting).

384. Lauren Feiner, *Facebook Tumbles on Antitrust Concerns*, CNBC (June 3, 2019, 11:06 AM), https://www.cnbc.com/2019/06/03/amazon-facebook-and-google-stocks-stumble-over-antitrust-concerns.html [https://perma.cc/6AWJ-XNBP].

385. *Id.*

statements in a matter within the jurisdiction of the executive branch is a crime,[386] as is corrupt interference in an official proceeding.[387] Under the FTC's organic statute—which applies to the many other agencies for which their respective organic statutes incorporate the FTC's—a person who "neglect[s] or refuse[s]" to attend, testify, answer lawful inquiries, or produce documentary evidence in response to a federal district court order directing compliance with the agency's order commits a crime punishable by a fine up to $5000, or one year of imprisonment.[388]

Less directly, an agency can use a civil administrative investigation to bolster a parallel criminal case.[389] An agency can often avoid judicial review and thereby strengthen its enforcement leverage.[390] Short of criminal penalties, an agency can also take adverse action against an employee for making false statements during an investigation of alleged misconduct by the employee.[391] Although the government may lawfully engage in "good faith" parallel civil and criminal investigations, the standards for "good faith" are indeterminate, and even when met, the agencies may freely exchange information without prior notice to the regulated party.[392]

Agency investigations can pose existential threats to the regulated entities. In addition to the case of LabMD cited in the Introduction,[393] the Consumer Product Safety Commission aggressively investigated a company that produced magnetic desk toys on the grounds that they were unsafe; the agency pursued personal liability

386. 18 U.S.C. § 1001; *see, e.g.*, United States v. Stover, 499 F. App'x 267 (4th Cir. 2012) (affirming the conviction of a mine security director who had lied during an administrative agency deposition he voluntarily sat for).

387. 18 U.S.C. §§ 1505, 1512(c).

388. 15 U.S.C. § 50 (Federal Trade Commission), *incorporated by* 7 U.S.C. § 1636(i)(3) (Department of Agriculture for livestock mandatory reporting); 21 U.S.C. § 467d (Food and Drug Administration to enforce poultry and poultry products inspection); 26 U.S.C. § 5274 (Internal Revenue Service to enforce the collection of alcohol, tobacco, and certain other excise taxes); 27 U.S.C. § 202(g) (Department of Treasury to enforce the Federal Alcohol Administration Act); 29 U.S.C. § 209 (Department of Labor Wage and Hour Division to enforce the Fair Labor Standards Act). Criminal charges have been successfully brought under such statutes. *See, e.g.*, United States v. Young, 413 F.3d 727, 728 (8th Cir. 2005).

389. Anthony O'Rourke, *Parallel Enforcement and Agency Interdependence*, 77 MD. L. REV. 985, 986–87 (2018) (citing the case of SAC Capital's Mathew Martoma, who was pursued by both the SEC and the U.S. Attorney's Office; "the SEC shared every document it obtained through civil discovery from SAC Capital with prosecutors," and "SEC attorneys and SDNY prosecutors also jointly conducted twenty interviews of a dozen witnesses"). For example, the Health Insurance Portability and Accountability Act "marked the first time that Congress granted th[e] broad [administrative] investigative subpoena power solely for criminal law enforcement purposes." Berkower, *supra* note 90, at 2265, 2286–87 (citing a delegation to the Attorney General in 18 U.S.C. § 3486(a)(1)(B)(i)). As of 2005, the Attorney General had delegated this power only to assistant U.S. attorneys and the Criminal Division, not the Federal Bureau of Investigation, allowing them to perform a gatekeeping function. *Id.*

390. Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1137 (2016).

391. Lachance v. Erikson, 522 U.S. 262, 268 (1998).

392. Persaud, *supra* note 240, at 89–90.

393. *See supra* notes 1–6 and accompanying text.

against the CEO and ultimately caused the company to be dissolved and jobs to be lost while competitors continued to conduct business unabated.[394]

Even short of existential threats, zealous investigations can unduly vex regulated parties. The Internal Revenue Service (IRS) conceded in 2013 to screening organizations' applications for tax-exempt status for politically loaded terms.[395] The IRS's exempt organizations office would search for conservative-associated terms like "Tea Party," "patriots," or "9/12," and progressive-leaning terms like "progressive," "occupy," and "green energy."[396] The agency would then subject such groups to heightened scrutiny and request additional information from them.[397]

Targets of agency investigations may not have the resources to defend against investigations or subsequent multi-year enforcement actions, and instead enter into judicially unreviewable consent decrees. All of these consequences of unsound investigative action can be exacerbated by "regulatory overlap."[398] A regulatory breach might carry both civil administrative and criminal consequences and an agency might partner with the Department of Justice to investigate.[399] This collaboration could be ripe for abuse and undermine public faith in both the rule of law and law enforcement. For example, an administrative sanction can serve as a pretext for a criminal investigation, theoretically allowing the agency and prosecutors to take advantage of the lower constitutional standard for administrative subpoenas versus criminal warrants.

Scholars have identified agency over-regulation in the setting of rulemaking (and agency investigations preceding rulemaking).[400] In the aggregate, regulatory overlap creates redundancy, which increases the cumulative cost of agency action and thus, presumably, the antecedent agency investigations.[401] The same overlap concerns should hold true for agency investigations preceding enforcement or adjudication. That setting faces an additional problem: "multiple potential enforcers who

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394. Josh Hicks, *Federal Regulators Suing Buckyballs Founder in Rare Product-Recall Case*, WASH. POST (Jan. 7, 2014), https://www.washingtonpost.com/politics/federal_government/federal-regulators-suing-buckyballs-founder-in-rare-product-recall-case/2014/01/05/5b8c19ec-5087-11e3-a7f0-b790929232e1_story.html [https://perma.cc/4LPM-TRP8].

395. Brendan O'Brien, *Justice Department Settles with Conservative Groups over IRS Scrutiny*, REUTERS (Oct. 26, 2017, 8:14 AM), https://www.reuters.com/article/us-usa-tax-conservative/justice-department-settles-with-conservative-groups-over-irs-scrutiny-idUSKBN1CV1TY [https://perma.cc/PVW5-MQVL].

396. *Id.*; Alan Rappeport, *In Targeting Political Groups, I.R.S. Crossed Party Lines*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/politics/irs-targeting-tea-party-liberals-democrats.html [https://perma.cc/A4A3-5DCH].

397. O'Brien, *supra* note 395.

398. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1138–51 (2012).

399. O'Rourke, *supra* note 389.

400. *See generally* J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757 (2003) (examining the problem of regulatory accretion, whereby the administrative state has grown to encompass a massive number of rules).

401. Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 897 (2006).

undoubtedly already have jurisdiction over an issue might have incentives to show enforcement zeal, even if duplicating others' efforts."[402]

Conversely, regulatory overlap could actually incentivize under-regulation, which is also known as the "regulatory commons" effect.[403] Under this theory, overlapping agency jurisdiction can actually stymie agency action (and agency investigations),[404] assuming that one agency has not naturally become the prime or traditional regulator of an issue despite others' potential authority.[405] There may even be some advantages to regulatory overlap and administrative crossfire, such as overcoming regulatory inertia, breaking down jurisdictional barriers, and spurring regulatory innovation.[406] However, these doctrines should be viewed in consideration of modern Congresses, which have been riven with legislative torpor.[407]

Regulated parties' reputations may be at stake because agencies are inconsistent with how they publicly address their investigative work.[408] Some have called out, for example, the FTC's "practices of 'issuing news releases and the adverse effects resulting therefrom,'" to which the D.C. Circuit and Congress "had essentially acquiesced."[409] Often, the reputational risk is built into the statute. If the Securities and Exchange Commission censures a business association, that entity can face additional disclosure requirements, ineligibility to obtain federal contracts, and the possibility of criminal proceedings, civil securities class actions, or shareholder derivative actions.[410] Additionally, when persons affiliated with the business association (such as customers, vendors, moneylenders, shareholders, and

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402. William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 29 n.81 (2003).

403. *Id.* at 22, 27.

404. *Id.*

405. *Id.* at 29 n.81.

406. Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 334 (citing Ahdieh, *supra* note 401, at 882–83).

407. *See* Drew DeSilver, *A Productivity Scorecard for the 115th Congress: More Laws than Before, but Not More Substance*, PEW RSCH. CTR. (Jan. 25, 2019), https://www.pewresearch.org/fact-tank/2019/01/25/a-productivity-scorecard-for-115th-congress/ [https://perma.cc/V63P-K7WY]; Mark Murray, *Unproductive Congress: How Stalemates Became the Norm in Washington DC*, NBC NEWS (June 30, 2013, 5:25 AM), https://www.nbcnews.com/news/world/unproductive-congress-how-stalemates-became-norm-washington-dc-flna6c10495877 [https://perma.cc/7E46-BAQP]; Michael Ellement, *The Supreme Court Meets a Gridlocked Congress*, 84 GEO. WASH. L. REV. ARGUENDO 116 (2016).

408. Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371, 1394, 1429 (contrasting the guidelines of the Consumer Products Safety Commission with those of the FTC).

409. *Id.* at 1386; *see Commission Closing Letters*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings/closing-letters-and-other-public-statements/commission-closing-letters [https://perma.cc/A6S7-LK7T] (listing the FTC's letters announcing the close of investigations).

410. CORPORATE GOVERNANCE AVOIDING AND RESPONDING TO MISCONDUCT § 14.06.

employees) are contacted by the SEC, rumors can take root.[411] The mere initiation of the investigation may be as damaging as a guilty verdict.[412]

Agency investigations, even when appropriate, carry significant economic costs on the public fisc and on targets. Taxpayers bear the brunt of most agency investigative costs.[413] For example, for fiscal year 2019, the FTC requested an increase of $3,383,000 for "expert witness needs due to increased numbers of complex investigations and litigation in both competition and consumer protection matters."[414] The FTC requested a total appropriation of $309.7 million for fiscal year 2019.[415] Under the now-lapsed Ethics in Government Act of 1978 and other authorities, independent counsel investigations, too, can cost millions of dollars to the independent counsel's office and to the target defending against the charges.[416] That said, some agencies *return* money to the Department of Treasury. To again use the example of the FTC, the agency returns billions annually to Treasury.[417] These costs might not affect or incentivize any particular agency behavior, but they are important to consider in appreciating the scope of investigative acts.

Responding parties, too, can incur sizable monetary costs to respond to an investigation.[418] For example, ignoring an Environmental Protection Agency information request could cost up to $25,000 per day of noncompliance.[419] Not only can agencies engage in the above practices, but they may become comfortable doing so. An agency might come into the agency investigation with—or develop over the course of the investigation—outcome-determinative bias or preordination. An agency has strong motives to do so in the absence of meaningful, systemic countermeasures.

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411. Lewis B. Merrifield III, *Investigations by the Securities and Exchange Commission*, 32 BUS. LAW. 1583, 1594 (1977).

412. *Id.* Prosecutors may consider the collateral consequences of criminally prosecuting a corporate entity, which include "the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it . . . ." U.S. Dep't of Just., Just. Manual § 9-28.1100(B) (2020), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/D4U5-8V64].

413. *See, e.g.*, Campbell, *supra* note 369, at 435–36.

414. FED. TRADE COMM'N, FISCAL YEAR 2019 CONG. BUDGET JUSTIFICATION (Feb. 12, 2018), https://www.ftc.gov/system/files/documents/reports/fy-2019-congressional-budget-justification/ftc_congressional_budget_justification_fy_2019.pdf [https://perma.cc/JDB4-6C8E].

415. *Id.*

416. Hanly A. Ingram, United States v. Tucker*: Should Independent Counsels Investigate and Prosecute Ordinary Citizens?*, 86 KY. L.J. 741, 768 (1997).

417. FED. TRADE COMM'N, FISCAL YEAR 2021 CONG. BUDGET JUSTIFICATION 60 (Feb. 10, 2020), https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf [https://perma.cc/8WUK-6949].

418. United States v. Am. Target Advert., Inc., 257 F.3d 348, 353–54 (4th Cir. 2001).

419. United States v. Gurley, 384 F.3d 316, 319, 324 (6th Cir. 2004) (validating the assessment of civil penalties of up to $25,000 per day for noncompliance per 42 U.S.C. § 9604(e)(5)(B) and affirming the levy of a smaller amount against a defendant, $1.9 million for seven years of willful noncompliance).

Absent an admission from an agency decisionmaker or a judicial finding, one might not be able to conclude that a particular agency is engaging in bad practices. Agencies generally commence rulemaking procedures with an anticipated outcome—if the agency does not think the rule was fundamentally viable, it would not have started the rulemaking efforts.[420] What a challenger might be able to show is that the agency is cutting corners based on precedent, past behavior, or political expediency.[421] But it is very difficult to prove an unalterably closed mind.[422] Even when the Supreme Court held the Secretary of Commerce had improperly used pretext to justify its asking of a new census question, it did not conclude that was foreclosed from reconsidering.[423]

Another harm from improper agency investigations is more abstract: constitutional horizontal separation of powers concerns. Many administrative agencies operate in a zone that is free of oversight from both the policy prerogatives of the First Branch and the oversight of the Third Branch, especially if the organic statute provides no guidelines or Article III review of investigative practices. The result, anecdotally and systemically, is the risk of tyrannical behavior by agencies and within them, bureaucrats who are not politically accountable as principal or inferior officers of the United States under the Appointments Clause.[424] The concerns expressed here about administrative investigations could echo beyond this context, given the similarities between congressional investigations and administrative investigations.[425] Congress's own investigative powers, including the issuance of subpoenas,[426] have raised concerns about Congress targeting executive branch officials under the guise of a legislative investigation in order to avoid political consequences.[427]

A key caveat must be reinforced in this assessment of the harms of overzealous agency investigations: it is impossible to know the full extent of how agencies are investigating. To the extent such information even could be aggregated, agencies rarely report it publicly, such that one could readily research it. Agencies generally do not report who and how they are investigating.[428] Thus, not every agency will

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420. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019); FTC v. Cement Inst., 333 U.S. 683, 700–03 (1948).

421. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 265–66 (1954) (holding that an agency must follow its own regulations).

422. Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd., 663 F.3d 476, 487–88 (D.C. Cir. 2011).

423. Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–76 (2019).

424. *See* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443 (2018).

425. Epstein, *supra* note 111, at 41, 48.

426. *See supra* note 111.

427. Epstein, *supra* note 111, at 46 ("When Congress pursues oversight, then seeks to avoid a political remedy by substituting the government target for a non-governmental one, it has failed to effectively depoliticize its regulatory investigation." (citing Trump v. Mazars USA, LLP, 940 F.3d 710, 748 (2019) (Rao, J. dissenting))).

428. For instance, "[i]n general, the Department of Justice does not publicly announce investigations or investigative findings." U.S. DEP'T OF JUST., CIV. RTS. DIV., *When Does the Division Announce Investigations?*, https://www.justice.gov/crt/when-does-division-announce-investigations [https://perma.cc/Q6BL-M2UH] (Oct. 18, 2018). The Department of

announce the commencement of an investigation, detail an expansion of the investigation's scope, or issue close-out letters.[429] Even when an agency provides a "cold comfort letter" announcing that it harbors no present intentions to take additional enforcement action against an entity, such letters are often not enforceable and give no indication as to when an investigation might come back to life.[430]

This potential for the above abuse is real and has been occasionally recognized since the rise of the administrative state. Over 70 years ago, Justice Murphy, dissenting in *Oklahoma Press Publishing Co. v. Walling*, noted with trepidation the metastatic growth of the administrative state (which has only accelerated since he wrote in 1946).[431] He implored agency investigators to feel "a new and broader sense of responsibility," lest they succumb to the "open invitation to abuse" the immense power of agency investigations and repeat the missteps of the pre-Revolution British monarchy.[432] "Only by confining the subpoena power exclusively to the judiciary," Justice Murphy opined, "can there be any insurance against this corrosion of liberty."[433] While such an absolutist view raises the question of how agencies would effectively carry out any enforcement authority if they had to petition a court for subpoenas, this view reflects the longevity of concerns about agencies' investigatory powers.

The concurrences in the 1985 *Heckler v. Chaney* opinion expressed trepidation that the majority opinion "empowered" agencies to administratively close investigations. Justice Brennan, concurring, listed circumstances in which he believed that, statutory language aside, non-enforcement decisions should be reviewable.[434] Justice Marshall's separate concurrence went further, arguing that district courts had invented remedies aimed at agencies to ensure "administrative fidelity to congressional objectives."[435] In his view, the majority's creation of a "presumption of unreviewability" was an act of the Supreme Court failing to use "a scalpel rather than a blunderbuss" to correct those remedies.[436] Justice Marshall posited that "[t]raditional principles of rationality and fair process do offer

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Justice justifies its policy by citing the possibility that a premature announcement may impair the Department's ability to build a case, as well as the possible prejudice to the responding party. *Id.* However, the Department may announce investigations when they result in enforcement action or when law enforcement entities are involved. *Id.*

429. Some agencies do report certain statistics on investigations opened after the fact, for example, the Department of Justice's Antitrust Division. U.S. DEP'T OF JUST. ANTITRUST DIV., WORKLOAD STATS, https://www.justice.gov/atr/file/788426/download [https://perma.cc/M6WP-2UL2].

430. Fresenius Med. Care v. United States, 526 F.3d 372, 374–76 (8th Cir. 2008); Jonathan Cone, Robert Rhoad & Robert Sneakenberg, *Negotiating False Claims Act Settlements*, 14-3 BRIEFING PAPERS 1, 10 (2014); *see, e.g.*, Debtors' Motion for Entry of an Order Authorizing, but Not Directing, the Debtors' Entry into the Settlement Agreement & Approving the Settlement of the *Qui Tam* Claims and Related Matters, *In re* Trident Holding Co., No. 19-10384 (Bankr. S.D.N.Y. filed Aug. 29, 2019).

431. 327 U.S. 186, 218 (1950) (Murphy, J., dissenting).

432. *Id.* at 218–19.

433. *Id.* at 219.

434. 470 U.S. 821, 839 (1985) (Brennan, J. concurring) (internal citations omitted).

435. *Id.* at 852 (Marshall, J., concurring in judgment only).

436. *Id.*

'meaningful standards' and 'law to apply' to an agency's decision not to act, and no presumption of unreviewability should be allowed to trump these principles."[437]

Justice Marshall's points may gain greater force when read in light of one of the majority's key justifications and considering how that justification has aged. The majority concluded that agency exercises of administrative civil prosecutorial discretion are presumptively non-reviewable, as "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing."[438] As showcased above, the empirical predicate of *Heckler* may be eroding, especially in light of the possibility of technology-facilitated total enforcement. At minimum, it is a clear expression of the Court justifying its holding based on an agency's limited ability to enforce at high volumes, which implies a similar limitation on its ability to investigate.

The above harms are all the more important to study given the potential for disruptive new technologies to increase agencies' abilities to investigate. The deployment of machine learning[439] and other artificial-intelligence-based technologies that are already pervasive in the criminal justice system[440] have begun to change the Administrative State. Researchers recently applied machine learning to analyze existing satellite data to identify previously unknown industrial animal farms in North Carolina for Clean Water Act enforcement.[441] This transaction evidences how transformative, scalable, and affordable artificial intelligence can be for administrative investigative practices.[442] By replicating and improving upon human cognitive and personnel capability, artificial intelligence harkens the possibility of a total enforcement environment where many more regulatory violations could be brought to account.[443] In light of this exercise of administrative power, it is necessary to consider the limiting principles that are in place to guide

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437. *Id.* at 854.

438. *Id.* at 831 (majority opinion).

439. "Machine learning" is a type of artificial intelligence that uses algorithms to construct computer models that analyze large data sets, typically to predict the future. *See* Federal Agency Data Mining Reporting Act of 2007, 42 U.S.C. § 2000ee-3(b)(1)(A) ("The term 'data mining' means a program involving pattern-based queries, searches, or other analyses of 1 or more electronic databases . . . to discover or locate a predictive pattern or anomaly indicative of terrorist or criminal activity . . . .").

440. Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277, 1293 (2018).

441. Laura Poppick, *Environment Watchdogs Harness AI to Track Overflowing Factory-Farm Waste*, SCI. AM. (Apr. 11, 2019), https://www.scientificamerican.com/article/environment-watchdogs-harness-ai-to-track-overflowing-factory-farm-waste/ [https://perma.cc/35BM-MHYQ].

442. Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 88 (2014) ("In the last few decades, researchers have successfully used machine learning to automate a variety of sophisticated tasks that were previously presumed to require human cognition."). These tasks include language translation, vehicle driving, revealing bank fraud, calculating credit risk, and so forth.

443. The seminal case that rendered administrative prosecutorial discretion presumptively unreviewable was undergirded by an assumption that "agency generally cannot act against each technical violation of the statute it is charged with enforcing." Heckler v. Chaney, 470 U.S. 821, 831 (1985).

agencies in the increasingly likely hypothetical scenario in which one decides to run an inspection-enforcement program that involves mailing packages full of machine-sight-enabled drones to map, examine, and inspect a warehouse and every product running in an assembly line, and then transmit the data on a 5G wireless network to a government supercomputer that is running a deep learning[444] algorithm to test the possible violation of numerous statutes and regulations.

In sum, while investigative acts are necessary to agencies fulfilling their constitutional and statutory duties, they also open the door to unaccountable abuse.

V. APPLYING MEANINGFUL CONSTRAINTS TO AGENCY INVESTIGATIONS

As this Article has demonstrated, there is no currently applied meaningful constraint to investigative acts violating the Constitution or statutes. Professor Davis observed seventy-three years ago that "[n]arrow judicial interpretations have given rise to strikingly large grants of power."[445] His observation remains correct today. As applied by the courts, the APA does not provide for meaningful or timely judicial review to challenge agency subpoenas or other process due to the "authorized by law" substantive standard. While that phrase is textually capacious, courts have construed it narrowly. The marginally less deferential § 706(2) judicial review provision of the APA, which assesses whether an agency act is "arbitrary or capricious," is hamstrung by the requirement that the tool be "final agency action."

Since 1950, the Supreme Court has given little effect to many of the individual liberty provisions of the Constitution, which are incorporated by the APA's "authorized by law" standard.[446] The standards that apply to agency subpoenas, warrants, or other investigative techniques need only meet minimal thresholds such as not being "unduly burdensome" or being "reasonably relevant." Regulated entities should recognize and use other tools to shed light on the murky area of agency investigations.

First, individuals and entities should make more robust use of existing judicial constraints and push courts to expand the boundaries of judicial review.[447] This is not an easy task, given courts' tendencies to uphold investigative acts under the thinking that "[j]udicial supervision of agency decisions to investigate might hopelessly entangle the courts in areas that would prove to be unmanageable and would certainly throw great amounts of sand into the gears of the administrative process."[448]

The greatest potential source of assistance for helping guard against abusive agency investigations may be the Fourth Amendment. The Supreme Court, upon being confronted with the issue, should revisit the current state of the law by more

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444. Deep learning is a term for a strand of AI processes by which a computer program refines its own internal models to improve its ability to process a set of information. Yann LeCun, Yoshua Bengio & Geoffrey Hinton, *Deep Learning*, 521 NATURE 436 (2015).

445. Davis, *supra* note 13, at 1117.

446. *See supra* Part IV.A.

447. Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1162 (2016) (describing advantages of judicial review of agency enforcement practices).

448. SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 127 n.12 (3d Cir. 1981) (en banc) (quoting Dresser Indus., Inc. v. United States, 596 F.2d 1231, 1235 n.1 (5th Cir. 1979)).

closely reviewing agencies' interpretations of their investigations and investigative acts.[449]

To accomplish that, courts could create a better remedy for an overbroad, burdensome, or *ultra vires* subpoena or warrant. The current review regime is almost unassailably deferential to the agency, offers a remedy of simply having the agency limit the scope of the subpoena, and makes the respondent wait until the commencement and termination of agency adjudication to be able to challenge the agency, at which point the challenge can be practically, if not legally, moot. Courts can simply grant declaratory relief to plaintiffs with limiting instructions. More careful Fourth Amendment scrutiny would deter the agency from being overbroad or needlessly intrusive from the start, especially given the disincentives responding parties face to contesting such improper investigative acts.[450] Litigants and judges should also pay very close attention to the agencies' enabling statutes and ensure that agency investigative powers are authorized by the statute. More modern views of statutory interpretation techniques since *Oklahoma Press Publishing* and *Morton Salt* could lead courts to arrive at new conclusions about what, precisely, Congress has actually authorized an agency to do with regard to an individual or entity it is investigating. Relatedly, a challenger might seek reexamination of a 1947 Supreme Court decision that absent an explicit statutory prohibition, an agency head may delegate down the chain of command to sign and issue subpoenas.[451]

The Supreme Court should balance the separated powers against the odd and problematic state of administrative law, today. These constitutional arguments are not wholly new. The Supreme Court endorsed them in pre–World War II cases, when the Court was much more skeptical of agency investigatory techniques.[452] A resurgence of those cases' reasoning would help rein in abusive investigations. One part of that resurgence could perhaps be the resurrection of the Supreme Court's limitation of subpoenas to where "the sacrifice of privacy is necessary—those where the investigations concern a *specific* breach of the law."[453] Litigants could also appeal to the Court's bygone concern of roving inquiries into regulated parties' records and conduct, which it previously deemed as "contrary to the first principles of justice."[454] Those barriers fell with *Oklahoma Press Publishing* in 1946,[455] but they could be restored. Such a view would dovetail with the recent, general judicial evolution toward closer inspection of agency activity.[456]

Specifically, the Court should revisit *Oklahoma Press Publishing* and *Morton Salt*, which discounted stare decisis to make the very deferential Fourth Amendment

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449. Persaud, *supra* note 240, at 89–90.

450. *See* Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1686–88 (2019) (arguing for remedies to clean up "regulatory slop," such as fee-shifting provisions, injunctions, tailored instructions on remand, and the contempt power).

451. Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 121–22 (1947).

452. Scherb, *supra* note 152, at 1079.

453. Harriman v. Interstate Com. Comm'n, 211 U.S. 407, 419–20 (1908) (emphasis added).

454. FTC v. Am. Tobacco Co., 264 U.S. 298, 306 (1924).

455. HICKMAN & PIERCE, *supra* note 19, § 8.1.

456. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2440 (2019).

case law that is in force today. The Court should apply a standard for quashing agency subpoenas or warrants with fidelity to the requirement that only the organic statute provides the agency authority to perform an investigative act. In so doing, the Court should eschew constraints such as the limitation that investigative acts not be performed in "bad faith," which arguably reserves discretion for judges to be lax in policing the use of investigative acts. The Court should consider setting probable cause as the standard for issuing an administrative warrant, especially given the potential for a civil investigation founded on an administrative warrant to morph into a criminal investigation.[457] Courts should also prohibit administratively obtained investigative materials from being used against the producing party in a criminal case unless such material could have been obtained in a criminal investigation under the Fourth Amendment.

Further, the Fifth Amendment should be reinvigorated in this arena. Courts should recognize a due process property and liberty interest to more robustly challenge an administrative investigation that is onerous and abusive. This could be a corollary to the current Fourth Amendment defense against unduly burdensome investigations. This interest might protect, for example, parties from having to produce privileged information to agencies.[458]

This constitutional landscape will be difficult to shape. Litigants may have greater success with the APA, though the Court has been increasingly willing to robustly review administrative authority as of late.[459] The APA's provisions for challenging agency subpoenas, warrants, and other process, 5 U.S.C. § 555(c) and (d), are very rarely used, especially throughout the past few decades. Litigants could breathe new life into these provisions and help develop case law regarding their meaning. These provisions are textually not limited by the final-agency-action requirement, and so could be used in lieu of, or in addition to, the more broadly available provision for challenging agency action, 5 U.S.C. § 706. Of course, this provision may not be as helpful to affected parties as they may like, though, because the Fourth Amendment already permits respondents to challenge subpoenas and warrants on the ground that the agency lacks the authority to issue them.

Litigants may consider arguing for a more robust interpretation of § 555(c), which states that investigative acts must be "authorized by law."[460] A more respondent-friendly interpretation of § 555(c) might accord with the APA House Judiciary Committee Report, which stated that APA investigative acts not only had to fall within the agency's jurisdiction, but also had to respect, to the greatest reasonable degree, personal privacy and industry.[461] To avail itself of the House Judiciary Committee Report language, a party does not have the benefit of case law—which appears to have cited, but not applied, this language only once.[462] But, such a party

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457. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978).

458. *See* cases cited *supra* note 145.

459. Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 1 ("Administrative law today is marked by the legal equivalent of mortal combat, where foundational principles are fiercely disputed and basic doctrines are offered up for 'execution.'").

460. 5 U.S.C. § 555(c).

461. H.R. REP. No. 79-1980, at 264 (1946).

462. *See* Pac. Westbound Conf. v. United States, 332 F.2d 49, 53 n.10 (9th Cir. 1964);

can point to the fact that the Supreme Court has cited the House Judiciary Committee Report with approval, if not dispositive weight.[463] This may be the only way to argue that § 555(c) is a hook to challenge an investigation as coercive or an abusive use of prosecutorial discretion, which we believe is a reason to curb an agency investigation.

An affected party could argue that a broad agency investigation impermissibly blurs the separation of powers and is thus not authorized by law. A court could quash the investigatory tool on that basis. This aligns with a recent opinion authored by a Justice in the space of non-delegation doctrine, where administrative law impacts on significant national issues tie, arguably fatally, into broader separation of powers considerations.[464]

One semi-efficacious mechanism for entertaining § 555(d) challenges could be the judicial imposition of a "clear statement" requirement as a canon of construction. That is, a statute should have to clearly and expressly provide the agency with particular investigatory powers—a general delegation of authority for rulemaking or adjudication would not suffice. On the aggregate, this approach would benefit privacy and private interests as courts fail to find investigative authority in vague or empty legislative delegations and as Congress's likely inertia or inaction fails to respond.

A "clear statement" requirement would shift the burden from the respondent to the agency. This approach would be consistent with other "clear statement" canons the Court has imposed to protect constitutional values, for example the presumption against retroactivity[465] or the presumption in favor of judicial review.[466] Requiring such a canon here would be compatible with these more recent cases and present an avenue to develop the law in a way that does not squarely challenge stare decisis.[467] Finally, a statement would heed the Attorney General Committee's warning from almost eighty years ago that the power to procure information "should not be withheld" from administrative agencies when needed, "but it should be exercised with restraint and with knowledge that the burden imposed is a mounting one."[468]

A court's careful survey of the text and legislative history of the agency's enabling statute would help ensure that Congress in fact intended to give the agency the power of investigation. Affected parties should also try to make more of § 706 challenges. They could advocate for styling an administrative investigation as adjudication

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Davis, *supra* note 13, at 1134; ASIMOW, *supra* note 8, at 47 ("[Section 555(c)] seems to add nothing to existing law."); *see also* FTC v. Am. Tobacco Co., 264 U.S. 298, 305–06 (1924).

463. *See* Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1680 (2019); Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2436 (2019) (Gorsuch, J., concurring).

464. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

465. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

466. Dep't of Homeland Sec. v. Regents of Univ. of Cal., 140 S. Ct. 1891, 1905–06 (2020).

467. This approach would also vindicate Justice Marshall's concerns in his *Heckler v. Chaney* concurrence about ensuring "administrative fidelity to congressional objectives." 470 U.S. 821, 852 (1985) (Marshall, J., concurring in the judgment only).

468. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 47, at 114.

(either categorically or on a case-by-case basis). Then, certain requests, such as a massive document search, could be classified as a final agency action, especially in the context of adverse consequences for noncompliance. The Supreme Court might also conclude that agency investigations as we have defined them—with the elements of coercion and affirmative steps—are APA final agency actions.

That may be difficult in terms of the current § 704 finality case law from the Supreme Court and circuit courts. But as noted earlier, recent Supreme Court decisions have softened § 704's final action barrier as a response to this problem, including by viewing some closing letters as final agency action.[469] A closing letter is different from a decision to initiate an investigation. As the Sixth Circuit has held, *Hawkes* may be distinguishable; if the agency's report or determination had legal consequences, such as prohibiting the agency from bringing enforcement proceedings or denying the respondent legal safe harbor, then it is a final agency action.[470] But if further decision-making is available, then it may not be final agency action.[471]

The extrastatutory "exceptional circumstances" exception to finality might also yield helpful new constraints on agency investigations. Specific investigatory tactics might also be final agency action.[472] Individuals should keep an eye out for when investigatory patterns emerge such that the policy or practice could itself be challenged under the APA on an as-applied basis to the individual and for failure to comply with rulemaking strictures. For example, an AI-assisted forensic review of an entire database might be such a concrete and widespread act by an agency as to constitute a substantive rule, for which notice-and-comment rulemaking is required and judicial review is available.[473]

Second, individuals and entities should avail themselves of the political process. An agency investigation presumably ought to be typically centered around some discrete body of individuals. The more individuals targeted by an agency, the more effectively those individuals have access to political machinery to resolve an issue. The Internal Revenue Service scandal involving the targeting of political-sounding groups seeking tax-exempt status riled enough groups and representatives that the agency settled a lawsuit and apologized, and its commissioner resigned.[474] But our concern with the absence of countermajoritarian protections is the rights of the individual or near-individual.

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469. *See, e.g.*, Sackett v. EPA, 566 U.S. 120 (2012) (holding that EPA compliance orders are final agency action).

470. Parsons v. U.S. Dep't of Just., 878 F.3d 162, 170–71 (6th Cir. 2017).

471. *Id.*

472. *See* Veldhoen v. U.S. Coast Guard, 35 F.3d 222, 225 (5th Cir. 1994) ("Normally, the plaintiff must await resolution of the agency's inquiry and challenge the final agency decision.").

473. *See* HICKMAN & PIERCE, *supra* note 19, § 8.1 (chronicling the sometimes hazy line between adjudications and rules, but noting that being addressed to unnamed classes of individuals not presently before the agency is a hallmark of rules).

474. Jonathan Weisman, *I.R.S. Chief Out After Protest Over Scrutiny of Groups*, N.Y. TIMES (May 15, 2013), https://www.nytimes.com/2013/05/16/us/irs-says-counsel-didnt-tell-treasury-of-tea-party-scrutiny.html [https://perma.cc/EGX5-CK9A].

Third, Congress should consider legislative fixes. We recognize the political reality that prospective legislation of this sort presents for actual passage into law is a major challenge. The impetus for this might be analogous to when Congress let the independent counsel statute[475] lapse. The history suggests that the law's critics, from both parties, complained that the independent counsel wasted taxpayer money while pursuing offenses short of "high crimes and misdemeanors" and trampling on individual rights.[476] Then-Deputy Attorney General Eric H. Holder, Jr., appears to have testified that a continuation of the special counsel statute was unnecessary, as the Department of Justice can investigate most crimes itself.[477] Thus, Congress would need to free itself of this thinking if it were to consider that agencies might not, in fact, be the best guards of their own investigatory behavior.

Specifically, Congress could go beyond the minimum requirements of Fourth Amendment or other constitutional provisions. Congress could enshrine substantive objections or new procedural vehicles into the APA. Recent Congresses considered a bipartisan bill, the Email Privacy Act, which would have updated the Electronic Communications Privacy Act of 1986 to require agencies to first obtain a judicial warrant before subpoenaing internet service providers for information about individuals' activity on the internet.[478] The Administrative Conference of the United States (ACUS) could also be a model. In December 2016, the Adjudication Committee of ACUS recommended new procedures for evidentiary hearings not required by the APA that are presided over by administrative law judges.[479] Of note, ACUS recommended that:

- Agencies should separate their internal functions. The personnel who investigate, prosecute, and advocate should not also serve an adjudicatory function.[480]
- Agencies should engage in discovery with rules closer to those contained in the Federal Rules of Civil Procedure, including an agency showing of need and cost justification.[481] (We add that requiring the agencies to adhere to "proportionality," as used in Federal Rule of Civil Procedure

475. 28 U.S.C. §§ 591–599 (1994) (expired 1999).

476. David Stout & David Johnston, *Justice Officials to Call for End to Counsel Law*, N.Y. TIMES (Mar. 2, 1999), https://www.nytimes.com/1999/03/02/us/justice-officials-to-call-for-end-to-counsel-law.html [https://perma.cc/S2PJ-SWYV].

477. *Id.*

478. *See* Michael C. Pollack, *Taking Data*, 86 U. CHI. L. REV. 77, 79 n.8 (2019) (listing past unsuccessful attempts to pass this bill); Mark Tapscott, *Congress to Protect Worst Bureaucratic Outrage You've Never Heard About*, DAILY CALLER (Dec. 4, 2015, 12:44 AM), https://dailycaller.com/2015/12/04/congress-set-to-limit-judge-less-subpoenas-at-heart-of-privacy-debate/ [https://perma.cc/9S3X-W2JZ] (describing the changes the bill would bring).

479. ADMIN. CONF. OF THE U.S., ADMIN. CONF. RECOMMENDATION 2016-4, EVIDENTIARY HEARINGS NOT REQUIRED BY THE ADMINISTRATIVE PROCEDURE ACT (2016), https://www.acus.gov/recommendation/evidentiary-hearings-not-required-administrative-procedure-act [https://perma.cc/P6T3-XJ6Q].

480. *Id.* at 4.

481. *Id.* at 6.

26(b),[482] could help properly focus their investigative acts, particularly where the information sought may be primarily electronically stored.)

- Agencies with subpoena or other process power fully detail their subpoena practice.[483]
- Agencies should develop rules of evidence.[484]
- Agencies should provide written or transcribable decisions, and decisions should be made precedential.[485]

ACUS's recommendations appear to be sound support, or are at least good templates, for the sort of reform that Congress should consider to increase transparency in the civil administrative investigation process.

The First Branch could amend agencies' organic statutes to clarify or limit their investigatory authorities to ensure they are in compliance with congressional intent and are well-proportioned to the agency's mission. Congress could refocus agency priorities by explicitly separating compensation and advancement metrics from violation-centered outcomes. That is, agency employees or the agency as a whole should not receive incentives for pursuing investigations that result in enforcement actions. Congress should consider limiting an agency's ability to initiate additional investigations after commencing adjudication, to prevent the pressure of additional investigations from coercing settlement or acquiescence.

Relatedly, the Equal Access to Justice Act (EAJA), which provides for attorneys' fees to certain prevailing private parties in "civil actions" against the federal government, could be amended.[486] The APA has a similar provision for prevailing parties in adversary *adjudications*.[487] These provisions could explicitly apply to § 555(d) challenges of agency investigatory tools. Congress could expand EAJA accessibility for attorney's costs and fees associated with pre-litigation investigations and enforcement actions.[488]

Congress could also reform the oversight process; if regulated entities are not able to hold overzealous investigating agencies accountable, then other government actors should be able to. The Department of Justice has commended judicial review of administrative subpoenas, saying, "judicial involvement in enforcement ensures a good degree of fairness."[489] Funding more inspectors general or expanding their powers might positively impact the oversight process.[490] Congress could also require agencies to report more data on investigations they have begun, including the steps

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482. FED. R. CIV. P. 26(b)(1).

483. ADMIN. CONF. OF THE U.S., *supra* note 479, at 6.

484. *Id.* at 8.

485. *Id.* at 9.

486. 28 U.S.C. § 2412.

487. 5 U.S.C. § 504.

488. The latest edition of the EAJA model rules by ACUS, for what it is worth, do not include any sort of expansion. *See* ADMIN. CONF. OF THE U.S., *supra* note 479.

489. U.S. DEP'T OF JUST., OFF. OF LEGAL. POL'Y, REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES, PURSUANT TO P.L. 106-544, SECTION 7 (2002), https://www.justice.gov/archive/olp/rpt_to_congress.htm#4 [https://perma.cc/98JE-C8DB].

490. Cuéllar, *supra* note 79, at 299.

undertaken in pursuit of the investigation and the eventual result of the investigation. Even if that information is not made public, simply having this information would better enable Congress—and agency heads—to determine whether agency investigators are acting in accordance with the Constitution, the organic statute, and principles of good governance.

Finally, agencies themselves could self-regulate and impose durable constraints on themselves through the rulemaking process.[491] Regulations defining the scope of an agency's investigation and creating procedural opportunities for responding parties to contest an investigation's scope or methods are not unheard of. For example, the Securities and Exchange Commission has a regulation providing that "[p]ersons who become involved in . . . [SEC] investigations may . . . submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation."[492]

Of course, an agency would seem to have little incentive to voluntarily make rules reining in its investigative authority. This is especially so given the costs to the agency of even making the rule. However, there is historical precedent; agencies, especially before the APA was enacted, not infrequently developed standards of conduct which they committed to follow.[493] Even if an agency does not want to self-regulate, respondents have at least two possible routes to pressure the agency to do so: (1) Respondents could submit comments urging the adopting of self-scoping rules when the agency is considering related rules, and (2) Respondents could petition the agency to make these rules under the APA's petition procedure.[494] This would help craft new equipment with which to detect and study the unknown nuances of administrative investigations.

CONCLUSION

The field of administrative investigations is broad and under-researched. This Article endeavors to identify and to establish a framework to explore the space with the knowledge that its depths lie unknown. We have concluded that each branch of federal government that has enabled administrative investigations to flourish unbounded can take discrete steps to bring them back into constitutional alignment.

Given the abuses agencies have engaged in and the potential for new technologies to expand how investigations proceed, it is important that such controls be implemented in the near future. Congress, with its plenary primacy on the policy and powers of the administrative state, ought to take first chair to reform the Administrative Procedure Act. Congress should establish positive procedures that investigating agencies must follow and explicitly create a cause of action for individuals and entities of the regulated public to access the courts for inappropriate exercise of administrative investigative power. The executive branch should establish durable controls of self-restraint so that the American people are treated fairly when agencies act under Article II to "take Care that the Laws be faithfully

491. *See, e.g.*, Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 9. 2019); Exec. Order No. 13,892, 84 Fed. Reg. 55,239 (Oct. 9, 2019).

492. 17 C.F.R. § 202.5(c) (2008).

493. Cuéllar, *supra* note 20, at 1409–10.

494. 5 U.S.C. § 553(e).

executed."[495] The Judiciary should remedy its errors in *United States v. Morton Salt Co.*[496] and *Oklahoma Press Publishing Co. v. Walling*[497] to enforce normative constitutional constraints on administrative behavior. It should reassess the procedural and substantive protections of the APA in line with its legislative history.

Lastly, the American public should be more cognizant of their lack of rights in the face of administrative investigative power and take steps politically and legally to press for their restoration, especially in the face of unchecked investigations like those against LabMD. It is likely that the march of technology and the application of cutting-edge artificial intelligence strands like machine learning and deep learning to administrative investigations will serve as a catalyst for these actions. Until then, Americans will slowly lose more of their rights.

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495. U.S. CONST. art. II, § 3, cl. 5.
496. 338 U.S. 632, 652 (1950).
497. 327 U.S. 186, 209 (1946); *see also* United States v. Stuart, 489 U.S. 353, 359 (1989).