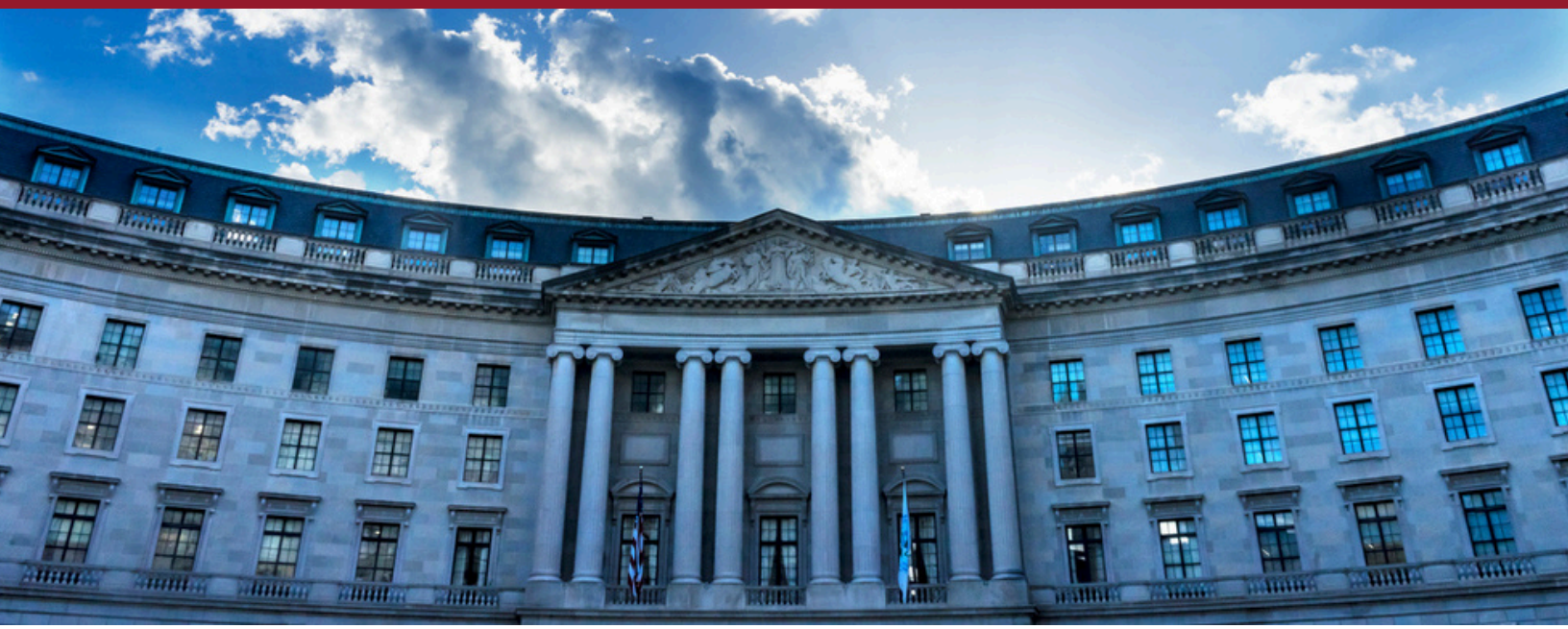
When Government Gets It Right: A Framework for Assessing When Agencies Deserve a Presumption of Regularity

Erika Kranz

July 2025



ENVIRONMENTAL & ENERGY LAW PROGRAM
HARVARD LAW SCHOOL

When Government Gets It Right: A Framework for Assessing When Agencies Deserve a Presumption of Regularity

Introduction

How do courts assess whether they should presume regularity when government decision making seems highly irregular? Courts ordinarily assume that they can trust an agency's assertions about the process it used to come to a decision, the scope of the record on which it relied, and its reasons for reaching a decision. This presumption of regularity — the assumption that the government follows the rules and tells the truth — has attracted scrutiny in recent years, as courts question the federal government's rationales, particularly in cases involving new or changed policies concerning highly political issues.

During the first Trump administration, academics and legal commentators noted that courts were less likely to take the government's explanations at face value.[1] Six months into the second Trump administration, this trend has arisen again.[2] Already, the administration's use of irregular procedures has caused courts to second-guess the government's explanations, a sign that courts are setting aside the presumption of regularity even when not mentioning it by name.[3]

On the rare occasions that courts have rejected the presumption, they have probed the processes agencies used and explanations agencies have given. But circumstances warranting overcoming the presumption are not well defined. In this paper I offer a framework for assessing when the presumption applies: when an executive agency's decisions display the identified features of well-functioning government, its decisions warrant the application of the presumption, but if its actions lack these features, courts may suspend the presumption.

The presumption promotes and respects a functional executive branch

What is the presumption of regularity?

Courts applying the presumption of regularity will assume that an agency's stated reasons for reaching a decision are genuine and the process it used is valid. Courts applying the presumption do not assume the substantive reasonableness or lawfulness of an agency's decision, only the regularity of the process and the agency's factual statements.[4] The presumption is limited yet powerful: it shields the government from judicial inquiries into the validity of its processes, completeness of its record, and internal motivations of agency personnel. Whereas litigation involving private parties might require extensive factfinding to establish basic facts about a process and decision, courts will presume that an agency's statements about its process and decision are accurate.

The presumption of regularity extends from common law origins that predate the Administrative Procedure Act (APA). In pre-APA cases, the Supreme Court rejected lower courts' inquiries into the mental states of government decisionmakers, declined to second-guess executive branch decisions, and highlighted executive branch experience, expertise, and independence as warranting an arms-length role for courts.[5] Post-APA, as courts required agencies to develop a record to explain the bases and

reasons for their decisions, the presumption became narrower. Courts clarified that the presumption did not mean that courts would assume the substantive validity or reasonableness of agency decisions.[6] But even as courts required agencies to show their work, the assumption remained that the government had followed proper processes and rested its decisions on valid bases. Because courts presume that agencies' stated bases and reasons are genuine, they do not allow discovery or examination to probe the truth of those statements or the integrity of agency processes more generally. And just as courts assume that agencies have followed procedures and acted rationally and in good faith in the past, courts also assume that agencies will follow proper procedures and live up to their word in the future.[7]

How does the presumption benefit agencies and courts?

The presumption reflects a balance between judicial oversight and executive independence. Its narrowing in cases like *State Farm* and *Overton Park* reflects courts' understanding that government processes can be influenced by improper motives.[8] Even so, as I explain in the next section, overcoming the presumption requires strong evidence of impropriety.

This balance allows agencies to function, without requiring them to be perfect. The presumption prevents small errors in an administrative process from derailing a court's review or paralyzing the executive branch.[9] It means that decisionmakers can rely on agency staff to manage extensive records and comments,[10] that courts do not assign improper motives to agency choices without strong evidence,[11] and that when government lawyers make statements about agency processes, courts believe them.[12] Because courts presume that government officials will perform their duties with regularity going forward, courts do not need to micromanage ongoing or remanded administrative processes.[13]

When the presumption is overcome, as I discuss below, courts take a closer look at government processes. Scholars have observed that this balance between presumption and rebuttal keeps courts and agencies from drowning in litigation over procedural minutia,[14] preserves comity and separation of powers and allows courts to stay out of the political fray,[15] respects the work of career staff, [16] and promotes efficient and flexible government decision making while deterring serious irregularities and allowing courts to maintain credibility. [17]

When is the presumption overcome and what results from its suspension?

The presumption of regularity in government decision making can be overcome with sufficient evidence of irregularity, but the evidentiary bar is high. Challengers must present clear evidence to make a strong showing that irregularity has occurred. Where challengers make the requisite showing to rebut the presumption, courts may second-guess the government's statements and probe the decision-making process. Thus, the presumption is optimistic, but not blind.

Scholars have observed that the showing necessary to overcome the presumption is not well-defined and is applied inconsistently.[18] Generally, courts look to strike a balance between oversight and accountability on one hand and respect and efficiency on the other, rebutting the presumption only based on clear evidence that runs counter to the presumption.[19] Finding that the presumption has been overcome has traditionally been rare. It is not often that litigants can produce, or courts can take judicial notice of, evidence of irregularity that goes well beyond speculation.[20]

However, courts may find the strong showing by looking to public statements of executive branch personnel that contradict the agency's explanation of its decision or that indicate predetermination.[21] Litigants may use information obtained through FOIA requests or government reports showing decision making irregularities, evidence of significant deviations from the typical speed of decisions or length of the record supporting decisions, or objections or even resignations of career staff in protest of improper processes. Courts may also examine actions by the administration suggesting that it does not intend to comply with court orders or undertake remands in good faith.

While the presumption streamlines judicial review of agency decision, if overcome, a court may hold a hearing, order supplementation of the administrative record, or order discovery — including document requests, interrogatories, and depositions of agency officials — to probe the agency's reasoning and process.[22] And while the presumption ordinarily means that courts will trust an agency to undertake a remand, if a court doubts that an agency it will act in good faith, with procedural regularity, or consistent with deadlines, the court may take a more active role in overseeing that remand.[23]

A framework for applying the presumption

When courts assess whether the presumption of regularity has been overcome, they undertake a fact-specific analysis. As a result, the body of cases applying the presumption defies synthesis into a single test.

I offer a framework to assess when the presumption should attach, and when it has been overcome. The categories I draw from an essay by Judge Patricia M. Wald, who served on the U.S. Court of Appeals for the D.C. Circuit from 1979 to 1999.[24] She observed that judges' expectations for government lawyers in court were often revealed when those expectations were thwarted: "I know it when I don't see it,"[25] and offered "concrete suggestions" for what constitutes the "higher standard" to which judges hold government attorneys: competence, candor, credibility, civility, and consistency.[26]

Those categories apply by analogy or extension and in often-overlapping ways[27] to administrative agencies. When government decision making displays these indicia of regularity, the presumption should apply to facilitate efficient and effective functioning. When they are not present, courts may have good reason to second-guess the government's processes and assertions in individual cases.[28]

Decisions display competence and expertise

Government decision making should be the product of expertise, thoughtful deliberation, and a genuine pursuit of a solution to an identified problem, rather than allegiance to a predetermined or politically preferred outcome. There should be an openness to change based on new information and a respect for data, technical analysis, and valid science. The resulting decision will reveal care and precision.

Decision-making processes that fail to show competence and expertise may reveal sloppiness, an unusually speedy process, failure to consider important aspects of a problem, the sidelining of experts, or an unwillingness to move from a predetermined decision even when confronted with new and contrary information.[29] Processes may involve the "improper influence" of political considerations that override reasoned decision making or that run counter to the law.[30] A civil service that been gutted of

expertise or replaced with people who support a political agenda may be unable to make decisions with the competence and expertise that support a presumption of regularity.[31]

Decisions are supported by explanations

Agency decisions must be explained in a way that allows the public (and reviewing courts) to understand the government's process and reasons.[32] Absent good reason for withholding information, these explanations should be thorough and describe the problem the government was trying to address, how the government arrived at its decision, and why it chose this path rather than an alternative. Where opportunity for public comment is required by the APA or other law, the information that the government provides about its reasoning and proposed decision should be sufficient to allow meaningful public comment. The government does not need to reveal internal deliberations, but agencies must disclose what information they relied on, explain their reasons for reaching decisions, and acknowledge choices they made along the way.

If the government does not have a reasoned explanation, claims privilege or exception from regular disclosure rules without a valid basis, or its explanation does not appear to extend from the information before the agency, it has failed to support its decision.[33]

Explanations and statements are credible

Agencies must do more than offer reasons for their decisions — the reasons given must be genuine. Agencies must tell the truth about why they decided what they decided and about what they will do in the future.

The government has failed to meet this standard where its stated reasons for a decision are not truthful.[34] The government may offer a single, inaccurate explanation or multiple conflicting explanations. These explanations may obscure that a decision has an improper basis (discussed below) or has resulted from predetermination. The government's credibility is also eroded when it says it will do something in the future and fails to do so.[35]

Decisions have a valid basis

The government must also ensure that its reasoning is valid: based on legitimate factors and considerations and consistent with the applicable law. Decisions must be the product of deliberation and weighing of options to solve an identified problem.

Decisions that are based on improper motivations — such as animus or bias — or that display intention to disregard or act in contravention of law fail to meet this standard.[36] The same is true when the government fails to "turn square corners" — i.e., by taking shortcuts, acting unethically, or skirting rules.[37]

Decisions or interpretations are consistent (or changes are explained)

Government decisions should reflect fair treatment, predictability, and consistency. Rationales offered, processes used, and decisions reached should vary only when the government provides a valid, reasoned explanation for the differential treatment or result.

Where the government offers contradictory explanations in different cases, uses the same facts or law to reach divergent outcomes, or makes policy changes without explaining its reasoning, it may fail to meet this standard. While the government can change course, it must acknowledge that it is doing so and explain why facts, law, or other valid considerations warrant that change.[38]

The presumption in today's context

As Judge Wald observed, our expectations for the government may be most obvious when thwarted. Indeed, cases where the presumption of regularity has been overcome tend to reflect the sense that judges "know [regularity] when [they] don't see it."[39]

The framework presented in this paper outlines the features of agency decision making that support application of a presumption of regularity: employing expertise, providing explanations, telling the truth, following the rules, and acting with consistency. Because the presumption is not a *declaration* of regularity, courts assess whether there is strong evidence to rebut the presumption based on the record of each case before them. This framework may help structure that evaluation.

The current administration's deviations from this framework are raising questions for commentators, advocates, and courts about how and whether the presumption of regularity should apply in rulemaking cases. These questions include:

- **How does the presumption of regularity apply in the context of the dismantling of agencies and draining of expertise?** The administration has made deep cuts to the federal workforce and appointed officials opposed to the missions of their agencies as established by Congress. This dismantling of agencies may so deeply undermine their expertise and staff capacity that they are unable to conduct technical analyses or analyze data as required by statutes as needed to develop well-reasoned regulations or make other decisions.[40] If agencies ground their actions on policy objectives articulated in executive orders, rather than on the applicable statutes or on science- or fact-based records,[41] and implement hiring practices that emphasize political alignment,[42] courts are likely to examine whether the government's decision-making processes are appropriately based on expertise and reasoned deliberation.
- **Do shifting explanations or pretextual justifications overcome the presumption of regularity?** Shifting or conflicting explanations for decisions[43] and proffered reasons for decisions with little or no supporting evidence may also lead courts to second-guess the veracity of agency explanations.[44] Courts have recognized that, in some instances, pretextual reasons have been offered to conceal that the real reasons for decisions are invalid, based on animus, or are efforts to target political foes.[45] If courts see evidence for rebutting a presumption of regularity, they may conduct or allow deeper inquiry into the real, potentially invalid, reasons for decisions.
- **Will courts take a more active role when ordering remands or enjoining agency action?** Efforts to thread loopholes or engage in "legalistic noncompliance" may lead courts to question

whether they can trust that the government will do what it says it will do going forward.[46] When the government says one thing and does another, it may lose the credibility that underlies the presumption of regularity, prompting added oversight by courts.[47]

- **Will courts reject efforts to turn a presumption of procedural regularity into a presumption of lawfulness?** Courts may also raise concerns if the administration seeks to stretch the presumption of regularity beyond its proper limits, for example by invoking the presumption to urge a court to assume substantive reasonableness or legality, and not simply procedural regularity or factual accuracy.[48]

As these questions and others are explored, I expect that litigants will consider arguing that the presumption of regularity should be overcome in cases displaying indicia of deep irregularity. We may likewise see more courts probing the government's factual assertions, second-guessing the regularity of the government's decision-making processes, and taking an active supervisory role over remands to agencies. EELP will be watching how courts assess whether agency actions display regularity as identified in our framework and how courts react when those indicia of regularity are absent.

Follow EELP's future analyses of this and other administrative law issues.

---

[1] *See* Alan Rozenshtein, *Another Blow to the Presumption of Regularity*, LAWFARE (March 10, 2020), https://www.lawfaremedia.org/article/another-blow-presumption-regularity; Leah Litman, *Revisiting the Presumption of Regularity*, TAKE CARE (January 28, 2019), https://takecareblog.com/blog/revisiting-the-presumption-of-regularity; Dawn Johnsen, *Judicial Deference to President Trump*, TAKE CARE (May 8, 2017), https://takecareblog.com/blog/judicial-deference-to-president-trump, Richard J. Pierce, Jr., *Reason Trumps Pretext*, THE REGULATORY Review (Jul. 30, 2020), https://www.theregreview.org/2020/07/30/pierce-reason-trumps-pretext/; W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J. F. 825 (2018); Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 CHAP. L. REV. 133 (2018). Cf. Josh Blackman, *'Neutral Principles' and the 'Presumption of Regularity' in the Era of Trump*, LAWFARE (Sept. 7, 2017), https://www.lawfaremedia.org/article/neutral-principles-and-presumption-regularity-era-trump (arguing that courts too quickly discarded or found the presumption of regularity rebutted in reviewing Trump administration decisions); Josh Blackman, *The Legal Resistance*, 9 FALKNER L. REV. 45 (2017) (similar).

[2] Steve Vladeck, *141. Abrego Garcia and the Presumption of Regularity*, ONE FIRST (Apr. 11. 2025), https://www.stevevladeck.com/p/141-abrego-garcia-and-the-presumption; Alan Rozenshtein, *What Happens When Courts Can't Trust the Executive Branch*, LAWFARE (Apr. 10, 2025); Marc Elias, *The Courts Must Stop Presuming Donald Trump is a Regular President*, DEMOCRACY DOCKET (May 3, 2025), https://www.democracydocket.com/opinion/the-courts-must-stop-presuming-donald-trump-is-a-regular-president/; Daniel T. Deacon & Leah M. Litman, *Legalistic Noncompliance*, U of Michigan Public Law Research Paper No. 24-067 (May 5, 2025), https://ssrn.com/abstract=5241936.

[3] *See, e.g.*, *Nat'l Treasury Employees Union v. Trump*, No. 25-0935, 2025 WL 1218044 (D.D.C. Apr. 28, 2025); *Nat'l TPS Alliance v. Noem*, No. 25-cv-01766-EMC, 2025 WL 1276229 (N.D. Cal. May 2, 2025); *Perkins Coie LLP v. U.S. DOJ*, No. 25-716, 2025 WL 1276857 (D.D.C. May 2, 2025); *Talbott v. United States*, No. 25-cv-00240, 2025 WL 842332, at *25 (D.D.C. Mar. 18, 2025).

[4] Even so, some scholars have observed that the presumption of regularity is a predicate for substantive deference to agency decisions. *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. at 2431, 2452 (2018).

[5] *See, e.g.*, *Chicago, Burlington & Quincy Railway v. Babcock*, 204 U.S. 585 (1907); *United States v. Chemical Foundation*, 272 U.S. 1 (1926); *United States v. Morgan (Morgan IV),* 313 U.S. 409 (1941). For further discussion of the development of the presumption through caselaw, *see* Appendix: Caselaw and Scholarship on the Basis for the Presumption of Regularity.

[6] *See, e.g.*, *Citizens to Pres. Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).
[7] *See, e.g., Vermont Yankee Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524 (1978); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).
[8] *See Presumption of Regularity*, *supra* note 4, at 2448.
[9] *See Latif v. Obama*, 677 F.3d 1175, 1186–87 (D.C. Cir. 2012); *District Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 22–23 (D.D.C. 2013).
[10] *Nat'l Small Shipments Traffic Conference, Inc. v. ICC*, 725 F.2d 1442, 1450–52 (D.C. Cir. 1984); *see also Hercules. Inc. v. EPA*, 598 F.2d 91, 123–24 (D.C. Cir. 1978).
[11] *See Nat'l Parks Conservation Assoc. v. U.S. Dep't of the Interior*, 835 F.3d 1377, 1385–86 (11th Cir. 2016).
[12] *See People for the Ethical Treatment of Animals v. USDA*, 918 F.3d 151, 157 (D.C. Cir. 2019).
[13] *See Publ. Employees for Envt'l Resp.*, 605 F. Supp. 3d 28, 39 (D.D.C. 2022).
[14] Alan Rozenshtein, *The Virtuous Executive*, 108 MINN. L. REV. 605, 654 (2023); Rozenshtein, *supra* note 2; Aram A. Gavoor & Steven A. Platt, 74 FLA. L. REV. 729, 760 (2022).
[15] Gavoor & Platt, *supra* note 14, at 759–61; Robert Weiner, *Pretext, Reality, and Verisimilitude: Truth Seeking in the Supreme Court*, 56 U. MICH. J.L. REFORM 385, 389 (2023); Rozenshtein, *supra* note 14, at 655.
[16] Rozenshtein, *supra* note 14 at 655, 638–39.
[17] *Id.* at 655 (citing Adrian Vermeule*, Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 676 (2015)); Gavoor & Platt, supra note 14 at 761; Rozenshtein, *supra* note 2*. Cf.* Weiner, *supra* note 15, at 389 (critiquing the Court's "intentional judicial blindness or suspension of justified belief" as sowing "doubt regarding the Court's candor or impartiality").
[18] Gavoor & Platt, *supra* note 14 at 747–48, 762 (observing that it is difficult in some instances to discern the standard courts have applied in finding the presumption overcome, as courts sometimes invoke (and rebut) the presumption without explicitly referencing it or fail to state with precision the standard for overcoming the presumption that the court has applied); Braden Currey, *Rationalizing the Administrative Record for Equitable Constitutional Claims*, 133 YALE L.J. 2017, 2024 n.69 (2024) (collecting cases showing courts' varying applications of the standard).
[19] *Presumption of Regularity*, *supra* note 4, at 2431.
[20] Though rare, such instances are not limited to particular presidential administrations. *See, e.g.*, *MetrolBR JV LLC v. United* States, 172 Fed. Cl. 277 (2024) (Biden); *U.S. v. Sanitary Dist. of Hammond*, No. 2:93-cv-225-JTM-PRC, 2012 WL 6599919 (N.D. Ind. Dec. 18, 2012) (Obama); *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212 (E.D.N.Y. 2006) (Bush); *Sokaogon Chippewa Cmty. v. Babbitt*, 961 F. Supp. 1276, 1892–84 (W.D. Wis. 1997) (Clinton).
[21] Sources of information might include government reports, *see Tummino*, 427 F. Supp. 2d at 216 n.4 (showing substantial reliance on information from a Government Accountability Office report on the FDA's decision-making process), information received in response to a records request, *see Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1242, 1265 (D. Colo. 2010) (indicating that the plaintiff had obtained documents erroneously omitted from the administrative record through a FOIA request), or public statements, *see National TPS Alliance*, No. 25-cv-01766-EMC, 2025 WL 1276229, at *2–3.
[22] *See, e.g., Dep't of Comm. v. New York*, 588 U.S. 752, 784-85 (2019) (affirming district judge's order for discovery, including depositions of Commerce Department and Department of Justice officials); *Sanitary Dist. of Hammond*, No. 2:93-cv-225-JTM-PRC, 2012 WL 6599919, at *13 (allowing limited discovery in the form of requests for production of documents and interrogatories to obtain information about the fairness of an EPA's decision-making process).
[23] *See, e.g.*, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 2455447 (D. Or. Oct. 7, 2005) (remanding with a fast schedule to correct specific deficiencies and collaborate with specific entities).
[24] Patricia M. Wald, "*For the United States": Government Lawyers in Court*, 6 LAW & CONTEMP. PROBS. 108 (1998).
[25] *Id*. at 111.
[26] *Id.* at 119.
[27] Indeed, many of the cases cited below display problems in multiple categories.

[28] The framework below applies most directly to agency decisions that are subject to the APA. Some government decisions — such as presidential directives — not reviewable under the APA and are not subject to the APA's procedural requirements. *See, e.g.*, Richard J. Pierce, Jr., *On Direct Exercises of Presidential Power*, THE REGULATORY REVIEW (May 5, 2025), https://www.theregreview.org/2025/05/05/pierce-on-direct-exercises-of-presidential-power/. Such decisions may still be reviewable, and reviewing courts may still apply, and overcome, the presumption of regularity, particularly as they consider whether the government's proffered reasons for a decision are genuine.

[29] *See Tummino*, 427 F. Supp. 2d 212 (allowing extra-record discovery based in part on the fact that political decisionmakers had overridden a scientific committee's recommendation, deviating from normal agency practice); *Sokaogon Chippewa Cmty.,* 961 F. Supp. at 1880–84 (allowing extra-record evidence based in part on the overruling of agency staff recommendations without adequate explanation); *Stand Up for California! v. U.S. Dep't of Interior*, 315 F. Supp. 3d 289, 296–98 (D.D.C. 2018) (overcoming the presumption of regularity overcome where a rushed process and shifting government explanations strongly indicated prejudgment).

[30] *See Cottonwood Envt'l Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1078 (9th Cir. 2015) (explaining, as background that the Fish and Wildlife Service had revised a critical habitat designation upon recognizing that its past decision had been "improperly influenced" by a political appointee "and, as a result, may not be supported by the record, may not be adequately explained, or may not comport with the best available scientific and commercial information"); U.S. Department of the Interior, *Investigative Report: The Endangered Species Act and the Conflict between Science and Policy* (Dec. 10, 2008), https://web.archive.org/web/20100106122047/http://wyden.senate.gov/newsroom/interior_ig_report.pdf (detailing political official's overriding of scientific findings and economic determinations that created significant errors in critical habitat designations, as well as harm to the integrity of the ESA decision-making process and the agency's reputation).

[31] *See* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. at 663-64 (2021) (arguing that where administrations intentionally incapacitate agencies, they should not be able to claim incapacitation as grounds for inaction, and that courts may evaluate evidence of this kind of structural deregulation as part of the good faith assessment in considering claims of agency delay).

[32] *Overton Park*, 401 U.S. at 416–17.

[33] *See Wildearth Guardians*, 713 F. Supp. 2d at 1253-64 (finding the presumption of regularity overcome where petitioners had identified clear evidence of documents improperly excluded from the administrative record). *Cf. Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019) (holding that, absent a substantial showing that the record obscured important facts, that the agency had improper supplemented the record with post hoc rationalizations, or that the record was incomplete, the court need not inquire into the propriety of the record or require a privilege log).

[34] *See Dep't of Comm. v. New York*, 588 U.S. 752, 781-85 (2019) (explaining that evidence showed that the Secretary was pre-determined to reinstate a citizenship question in the census and the agency concocted a pretextual rationale to justify that decision); *Tummino*, 427 F. Supp. 2d at 231-34 (allowing extra-record discovery based in part on staff's strenuous objections to decisionmakers that they were resting decisions on improper bases, and where the agency appeared to have delayed its decision making to avoid judicial review); *Nat'l TPS Alliance*, No. 25-cv-01766-EMC, 2025 WL 1276229, at *2–3 (allowing extra-record discovery based, among other things, because public statements of the president and Secretary suggested the different rationale offered by the government was pretextual). *Cf. Elec. Privacy Info. Ctr. v. U.S. DOJ*, 442 F.Supp.3d 37 (D.D.C. 2020) (stating that the Attorney General's public statements so differed from the findings in the Mueller report as to call into question the Attorney General's credibility and, in turn, DOJ's representations about the applicability from FOIA exemptions to the report).

[35] *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) (describing a government request for a voluntary remand as "tak[ing] the prize" for "unusual legal tactics" to "avoid judicial review"); *Nat'l Wildlife Fed'n*, 2005 WL 2455447 (where agency previously made dramatically optimistic representations about the expected timeline of completing work on a prior remand, where the political branches failed to allocate funds to complete the work required by that remand, and where the resulting and delayed work took an approach the

court had already rejected, the court in ordering a new remand put the agency on a tight schedule, ordered the agency to correct specific deficiencies and to collaborate with states and tribes, and required regular status reports).

[36] *Nat'l Treasury Employees Union*, No. 25-0935, 2025 WL 1218044, at *9-12 (finding the presumption of regularity rebutted because, among other things, government statements "bear no relation to the criteria established by Congress" in statute and instead "suggest[] a retaliatory motive to punish unions"); *Sokaogon Chippewa Cmty.,* 961 F. Supp. at 1880–84 (allowing extra-record evidence based in part of strong inferences of improper political influence on a land-into-trust decision); *Tummino*, 427 F. Supp. 2d 212 (allowing extra-record discovery based in part on staff's strenuous objections to decisionmakers that they were resting decisions on improper bases); *Sanitary Dist. of Hammond*, No. 2:93-cv-225-JTM-PRC, 2012 WL 6599919, at *8-9, 13 (allowing extra-record discovery where procedural irregularities — such as individuals holding both adjudicatory and prosecutorial positions — suggested that bad faith or improprieties may have influenced the decision).

[37] *See Heckler v. Cmty. Health Servs. of Crawford Cnty.*, 467 U.S. 51, 61 n.13 (1984).

[38] *Compare Nat'l TPS Alliance*, No. 25-cv-01766-EMC, 2025 WL 1276229, at *3 (identifying the unprecedented nature of the decisions and lack of legal and evidentiary support for them as among the factors warranting extra-record discovery) *with FCC v. Fox Television Stations. Inc.*, 556 U.S. 502, 515 (2009) (finding adequate explanation for a change in policy).

[39] Wald, *supra* note 24, at 111.

[40] *See* Freeman & Jacobs, *supra* note 31, at 663-64.

[41] *See, e.g.*, Repeal of the Definition of Showerhead, 90 Fed. Reg. 15,647 (Department of Energy Apr. 15, 2025).

[42] *See* Erwin Chemerinsky & Catherine Fisk, *Why on Earth Should Air Traffic Controllers Be Pro-Trump*, NEW YORK TIMES (June 6, 2025), https://www.nytimes.com/2025/06/06/opinion/federal-hiring-trump.html.

[43] *See* Vladeck, *supra* note 2; Rozenshtein, *supra* note 2 (cataloguing numerous examples).

[44] *See Am. Fed'n of Gov. Employees, AFL-CIO v. Trump*, No. 25-cv-03689, 2025 WL 1482511, at *22 (N.D. Cal. May 22, 2025) (noting discrepancies between legal position and prior public statements and lack of evidence to support current argument).

[45] *See Perkins Coie*, No. 25-716, 2025 WL 1276857 (holding that government's proffered reasons for taking actions against law firm were pretextual façade to obscure administration's disapproval of plaintiff's protected speech); *Talbott*, No. 25-cv-00240, 2025 WL 842332, at *25 (finding that a policy disqualifying transgender people from serving in the military "is littered with animus and pretext"); *Nat'l TPS Alliance*, No. 25-cv-01766-EMC, 2025 WL 1276229, at *2–3 (allowing extra-record discovery because, among other things, because public statements of the president and Secretary suggested the different rationale offered by the government was pretextual); *see generally* Rozenshtein, *supra* note 2 (cataloguing numerous examples).

[46] *See Sustainability Institute v. Trump*, No. 2:25-cv-2152, 2025 WL 1486979, at *4 n.6 (D.S.C. May 20, 2025) (maintaining supervision over the continued functioning of unlawfully frozen or terminated grants based on government's apparent efforts to evade court orders); *Abrego Garcia v. Noem*, 348 F.R.D. 589 (D. Md. 2025) (allowing expedited discovery based on government's failure to comply with court order); Michael Kunzelman, *Judge Seeks More Information About Trump Administration's Cuts to Voice of America*, AP News (June 23, 2025), https://apnews.com/article/voice-of-america-trump-free-press-9caa4ba84326e7da578e39d791a66d35 (describing judge's concern that Trump administration was not complying with injunction order); Deacon & Litman, *supra* note 2.

[47] *Cf. Trump v. Am. Fed'n of Gov. Employees*, No. 24A1174, Order on Application for Stay, Slip op. at 9 (July 8, 2025) (Jackson, J., dissenting), https://www.supremecourt.gov/opinions/24pdf/24a1174_h3ci.pdf (noting executive order's language promising action consistent with applicable law was at odds with factual record).

[48] *See Khalil v. Joyce*, 2025 WL 849803, at *9 n.5 (S.D.N.Y. Mar. 19, 2025) (rejecting the government's invocation of the presumption of regularity to compel a court to determine the constitutionality of a government action).

Appendix: Caselaw and Scholarship on the Basis for the Presumption of Regularity

Today, courts apply the presumption to assume that agencies' written records include accurate accounts of their decision-making processes and reflect the genuine bases for their decisions. The following cases mark the development of the presumption of regularity as applied to executive agencies. Scholars have also identified theoretical bases for the presumption's development and application.

Presuming proper motives and processes: In *Chicago, Burlington & Quincy Railway v. Babcock* (1907), in considering a state board's determination of the assessment value of railroad companies, the Supreme Court chided a lower court for its inquiry into the mental processes of board members through "an elaborate cross-examination."[49] The Court rejected allegations of arbitrary and politically-influenced -as beyond the Court's inquiry, likening the board to members of a jury that are insulated from inquiry into "motives and influences" underlying their decision.[50] The Court observed that the board kept a record that is the best evidence of its decisions.[51] Absent evidence "of fraud or a clearly shown adoption of wrong principles," the Court would not intrude into the jurisdiction that the state government had entrusted to the "honor and capacity" of the board.[52] The decision previews the presumption that agencies employ valid procedures and reasoning, and the notion that an agency's record is the best evidence of its decision-making process.

Presuming validity absent clear evidence: Often cited as a foundation of the presumption of regularity as applied today*, United States v. Chemical Foundation* (1926) arose from federal officials' authorization of the sale of seized German intellectual property after World War I.[53] The United States alleged that certain U.S. companies deceived officials into transferring property to them so that they could perpetuate their monopoly in the chemical industry and sued to have the sales set aside. In rejecting the United States' claim, the Court determined that the relevant official had authority to authorize the sales.[54] The Court would not review the "validity of the reasons stated in the orders" authorizing the sales "or the basis of fact on which they rest," because "[t]he presumption of regularity supports the official acts of public official, and, in the absence of clear evidence to the contrary, courts presume that they have property discharged their official duties."[55] This decision shows a robust presumption of regularity requiring a high degree of evidence to overcome.

Shielding mental processes of decisionmakers from review: The *Morgan* quartet, a series of cases reaching the Supreme Court between 1936 and 1941, solidified the mental process rule recognized in *Babcock*.[56] The cases involved challenges to the Department of Agriculture's ratesetting in livestock sales. While the Court's first two decisions reflected a high level of judicial oversight over the agency's process, by the fourth decision the Court was satisfied with a more arms-length role for the judiciary (or perhaps was satisfied with the standardization of processes within the agency after its earlier decisions).[57] In *Morgan IV*, the Court held that cabinet members "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstance" and that the Court should respect "the appropriate independence" of the "administrative process."[58] Accordingly, the mental processes underlying the decision were beyond the Court's review.[59]

Requiring agencies to explain their reasoning in a written record: After Congress enacted the APA in 1946,[60] courts grappled with the appropriate level of judicial review of administrative decisions. The

APA's requirement that agencies show their work was in tension with the presumption that agencies' work was all above-board. In *Citizens to Preserve Overton Park, Inc. v. Volpe* (1971), the Court offered some clarity: the presumption of regularity was narrow and required a baseline showing by the agency.[61] Yes, the Court explained, the secretary of Transportation was "entitled to a presumption of regularity . . . . [b]ut that presumption is not to shield his action from a thorough, probing, in-depth review."[62] Because courts must review "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," the agency must present a complete record explaining all of its findings and the basis for them.[63] Absent such a record, agency decisionmakers might be subject to discovery about the basis for their decisions.[64] Yet where there is a contemporaneous administrative record showing the basis for an agency decision, discovery is permissible only upon "a strong showing of bad faith or improper behavior." *Overton Park* confirmed that the presumption of regularity of process applied only where agencies showed their work and would not shield them from a careful substantive review.

Confirming a presumption of procedural, but not substantive, regularity: *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* (1983) confirmed the approach laid out in *Overton Park* — that agencies must prepare a record supporting their decisions, that courts will review that record to discern whether the agency's decision follows from the information before it, and that the presumption of regularity is not a substantive presumption.[65] The Court also held that while agencies are free to change views or directions, they must supply a reasoned analysis for doing so.[66] More specifically, the standards for a court's review of a deregulatory action are the same as when the government is enacting a new regulation.[67]

Presuming agencies will act properly on remand: The Supreme Court has not explicitly connected the presumption of regularity to the principle that the ordinary remedy in a case where an agency's decision has been found deficient under APA review is remand to the agency without specific directions for how to cure defects. But the presumption is seemingly behind the scenes of the Court's decisions in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* (1978), in which the Court held that courts may not require additional procedures beyond those imposed by the APA, other relevant statutes, and the Constitution, and in *Florida Power & Light Co. v. Lorion* (1985), holding that an appropriate remedy is remand to the agency "except in rare circumstances" not specified.[68] Together these cases reflect a view that agencies are presumed trustworthy and capable of remedying procedural defects without micromanagement by courts.

In analyzing and applying the presumption of regularity in these and other cases, scholars and courts have recognized several theoretical bases of the presumption. Some cite the Supreme Court's stated assumption in *Morgan IV* that administrators are "men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstance."[69] Others identify the "common experience" that administrative agencies act lawfully and in the public interest and that government officials tell the truth, properly discharge official duties, act with proper motives, and are generally truthful, ethical, and professional.[70] Others point to the "basic assumptions that typically go without saying," including the assumption that the executive branch's (or more specifically the president's) "decisions reflect a respect for the rule of law, are informed by relevant advisors and information, are based in fact, and are in service of the public interest."[71] Yet others see it as the product of a pragmatic balance between judicial oversight and executive freedom, developed in the

context of a century of mostly lawful and mostly truthful behavior on the part of government lawyers and decisionmakers.[72]

Closely related is the idea that the presumption extends from the separation of powers and prevents a judicial intrusion into the prerogatives of the executive branch.[73] Indeed, some see the presumption as a show of respect to the oath of office taken by the president and executive officers and take the view that the president's election makes their decisions an extension of the popular will.[74] Scholars also note that the presumption does not extend from the APA, nor does the APA reference or codify it. Instead, the APA is in harmony with the presumption, as the statute grants power to courts to remand matters to an agency (rather than direct a result themselves) and codifies a model of limited judicial review and substantive deference.[75]

Some scholars have suggested that the highest-level officials are due the highest level of presumption of regularity — with the president receiving the highest, principal and then inferior officers receiving lower levels, and government employees receiving low-to-no presumption of regularity.[76] But other scholars suggest the opposite: that it is the core of agency employees who work to carry out their agencies' missions, regardless of political administration, that uphold the regularity of process upon which courts have come to rely.[77] Caselaw supports the latter view, as cases where the presumption is overcome tend to include evidence of prejudgment by high-level officials, improper political involvement, override of science-based recommendations of political staff, or pretextual reasons offered in an attempt to smooth over any of the above. As one scholar puts it, elevation of politics over expertise and erosion of norms and morale that can come along with it are "not the hallmarks of a healthy administrative agency."[78]

---

[49] *Babcock*, 204 U.S. at 593.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 598.
[53] *Chemical Found.*, 272 U.S. 1.
[54] *Id.* at 9–14.
[55] *Id.*at 14–15.
[56] *Morgan v. United States (Morgan I),* 298 U.S. 468 (1936); *Morgan v. United States (Morgan II),* 304 U.S. 1 (1938); *United States v. Morgan (Morgan III),* 307 U.S. 183 (1939); *Morgan IV,* 313 U.S. 409.
[57] For a discussion of this debate, see *Presumption of Regularity*, *supra* note 4, at 2438 n.66.
[58] *Morgan IV*, 313 U.S. at 421, 422.
[59] *Morgan IV*, 313 U.S. at 422.
[60] Ch. 324, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).
[61] *Overton Park,* 401 U.S. 402.
[62] *Id.* at 415.
[63] *Id.* at 416–17.
[64] *Id.* at 420 (citing *Morgan IV*, 313, U.S. at 422).
[65] *State Farm*, 463 U.S. 29, 43.
[66] *Id.* at 42, 57.
[67] *Id.* at 42.
[68] *Vermont Yankee*, 435 U.S. at 524; *Florida Power & Light*, 470 U.S. at 744.
[69] *See Presumption of Regularity*, *supra* note 4, at 2438.
[70] Gavoor & Platt, *supra* note 14, at 733.

[71] Johnsen, *supra* note 1 (referring to virtues of the president); *see also* Rozenshtein, *supra* note 14, at 654 (observing that presidential virtue illuminates the presumption of regularity and gives it force).
[72] *See, e.g.,* Vladeck, *supra* note 2; Rozenshtein, *supra* note 14, at 654–55.
[73] *See* David Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 770 (2022).
[74] *See* Gavoor & Platt, *supra* note 14, at 757; Benjamin Wittes, Quinta Jurecic, *What Happens When We Don't Believe the President's Oath*, LAWFARE (March 3, 2017), https://www.lawfaremedia.org/article/what-happens-when-we-dont-believe-presidents-oath.
[75] Gavoor & Platt, *supra* note 14, at 742, 760.
[76] *Id.* at 767. Principal officers are those holding positions requiring presidential nomination and senate confirmation; inferior officers may be appointed by department heads or courts. U.S. CONST. art II § 2, cl. 2. These categories of officers tend to form a thin layer at the top of agencies. By contrast, the overwhelming percentage of the persons serving the government are "mere employees" of the United States. *The Test for Determining "Officer" Status Under the Appointments Clause*, 49 Op. Off. Legal Counsel __, at *12 (Jan. 16, 2025), https://www.justice.gov/olc/media/1385406/dl (quoting *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. 237, 245 (2018)).
[77] *See, e.g.*, Lisa Heinzerling, *The FDA's Plan B Fiasco*, 102 GEO. L.J. 927, 942, 974, 984 (2014) (detailing the many ways that political leadership deviated by the normal processes used by agency career staff in order to reach a politically preferred decision over staff opposition, there by elevating politics over expertise); Freeman & Jacobs, *supra* note 31, at 594, 616 (2021) (describing the permanent civil service as "a source of stability and continuity" and describing agency expertise — extending from staff — as "foundational to the modern regulatory enterprise"); Bridget C.E. Dooling & Rachel Augustine Potter, *Regulatory Body Shops*, 73 DUKE L.J. 1677, 1710 (2024) (highlighting career civil servants' long-term perspective and motivation to "kick the tires" on agency decisions); Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 363–66 (2019) (describing general agreement on the value of civil servants in internal deliberation, information sharing, and expertise-driven decision making; arguing that a decision-making process may be illegitimate when it fails to consider the views of civil servants).
[78] Heinzerling, *supra* note 77 at 984.