A Department Untethered: The Erosion of DOJ Settlement Norms and Implications for Environmental Law

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A Department Untethered: The Erosion of DOJ Settlement Norms and Implications for Environmental Law

The Department of Justice occupies a unique role in American government: it is headed by an attorney general who serves at the pleasure of the president but is at heart a legal institution whose credibility depends on its perceived independence from political influence. Managing that tension has, over decades and across administrations, produced a set of norms — some formalized in policy, some embedded in practice, some reinforced by courts — that guide how DOJ conducts litigation and resolves cases. These norms around the appropriate content of settlement agreements and conduct when the government changes position in litigation reinforce a commitment to resolving litigation to benefit the public interest rather than to achieve political goals and reflect respect for administrative processes and separation of powers. DOJ has historically functioned as an institution where process and deliberation are valued, forbearance from unjust use of power is a basic tenet, and the rule of law is paramount.[1] The internal deliberative work of DOJ is often invisible to outsiders, but these norms help sustain public trust in DOJ's litigation choices and by extension in the integrity of the judicial process.

The second Trump administration has tested those norms, pushing past them in consequential and troubling ways that have already touched environmental law and will continue to do so. In this paper, I examine one slice of that broader pattern: how DOJ approaches negotiated resolution of litigation and changes in litigating position. DOJ's behavior around settlements and changes of position has attracted attention. Legal observers and the press have described a pattern of settlements with "friendly adversaries" that the administration has used as a "deregulatory weapon."[2]

The list of examples of unusual behavior has continued to grow. To appreciate why these actions matter, it is helpful to first understand the norms that guide DOJ's settlement decisions and how those norms serve DOJ and the public. Drawing on the Justice Manual, longstanding departmental practice, and caselaw, I identify the norms that have historically governed DOJ's conduct around settlements and changes in position, examine recent actions that appear to deviate from them, and consider what those deviations reveal about an administration willing to use litigation and settlement as instruments of policy. I also identify how this pattern may surface in environmental law, an area of focus for this administration. The administration has already used unusual tactics to rescind or delay

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[1] *See, e.g.*, Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001) (describing deliberative norms around the Solicitor General's decisions, the office's obligation of candor, and the primacy of the public interest in its role); Jeffrey Toobin, *Trump's Shockingly Unqualified U.S. Attorney Picks*, N.Y. TIMES (Apr. 27, 2026), https://www.nytimes.com/2026/04/27/opinion/trump-attorney-general.html [https://perma.cc/4JAK-TEDQ] (critiquing the president's nominations as based on personal and political interests—particularly regarding willingness to pursue targeted prosecutions against political rivals).

[2] John Lewis & Aaron Baum, *Trump's Use of Consent Decrees to Dismantle Policy*, JUST SECURITY (Sept. 23, 2025), https://www.justsecurity.org/121057/trump-consent-decrees-dismantle-policy/ [https://perma.cc/C3QJ-2JZT]; Zach Montague, *With Disputed Legal Maneuver, Trump Tries to Set Policy Without Legislation*, N.Y. TIMES (Mar. 12, 2026), https://www.nytimes.com/2026/03/12/us/politics/trump-lawsuits-settlements.html [https://perma.cc/95EF-MXYV].

environmental regulations and to promote preferred industries and will likely continue to use these tactics as a shortcut for effectuating its desired priorities for environmental policies.

A taxonomy of norms around DOJ's approach to settlements and changes in position

DOJ represents the federal government in court and decides, with agency input, how to conduct that litigation.[3] Its authority includes deciding what positions to take and whether and how to resolve litigation, giving DOJ significant influence over the government's approach to settlement. DOJ has largely wielded that power with care, emphasizing deliberation, consistency, and restraint. The following are foundational principles that govern DOJ settlement behavior, identified based on the Justice Manual, DOJ guidance and directives, longstanding institutional practice, and legal scholarship.

Settlements are based on the public interest, not politics

More than eighty years ago, Attorney General Robert Jackson warned of "the most dangerous power of the prosecutor: that he will pick people that he thinks he should [prosecute], rather than pick cases that need to be prosecuted."[4] This risk — using litigation for political or personal purposes rather than merit — applies to DOJ's conduct more broadly. All DOJ attorneys, from attorneys handling civil matters and prosecutors handling criminal cases to the solicitor general (who represents the United States in the Supreme Court) to the attorney general (who leads the department) are subject to a norm prohibiting decisions based on politics.[5]

That norm is formalized in the Justice Manual, an official set of DOJ policies and procedures that guides Department attorneys.[6] DOJ first published the document in 1953, and it was called the "United States Attorneys' Manual" until renamed in 2018.[7] The manual has undergone many revisions; the political independence norms it codifies were sharpened and formalized in the

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[3] Some agencies have independent litigating authority; most do not. *See, e.g.* Courtney R. McVean & Justin R. Pidot, *Environmental Settlements & Administrative Law*, 39 HARV. ENVT. L. REV. 191, 202 (2015).

[4] Robert H. Jackson, Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf [https://perma.cc/P83W-HHUV].

[5] *See* Waxman, *supra* note 1 (describing the challenge of discerning the interests of the United States as a whole, and citing FRANCIS BIDDLE, IN BRIEF AUTHORITY (1962), in stating that the Solicitor General "has no master to serve except his country").

[6] The Justice Manual is a guidance document, not a regulation, and does not have the force of law. The Manual states that it "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal." It does not place "any limitations . . . on otherwise lawful litigation prerogatives of DOJ." U.S. Dep't of Justice, Justice Manual § 1-2000, https://www.justice.gov/jm/jm-1-1000-introduction [https://perma.cc/DQG7-32HJ]; see also Hagan Scotten, *Principles over the Principles: The Enduring Relevance of The Federal Prosecutor*, 139 HARV. L. REV. FORUM 195, 202 (2026) (observing that the Manual's power is limited because "policy manuals created by the Executive cannot constrain the Executive"). The Justice Manual provides direction, guidance, and clear expectations, serves as a first-stop resource for DOJ staff, and helps ensure consistency within and across DOJ.

[7] *United States Attorneys' Manual & Resource Manual Archives*, https://www.justice.gov/archive/usao/usam/index.html [https://perma.cc/NS9H-BUDT].

aftermath of Watergate, when the abuse of DOJ for political purposes produced lasting institutional reforms designed to prevent recurrence.[8] The Justice Manual makes the expectation that legal decisions be apolitical a "fundamental duty of every employee":

> The rule of law depends upon the evenhanded administration of justice. The legal judgments of the Department of Justice must be impartial and insulated from political influence. It is imperative that the Department's investigatory and prosecutorial powers be exercised free from partisan consideration.[9]

To support this policy, the Justice Manual sets out procedures governing communications between DOJ and Congress[10] and directs only limited communication between DOJ and the White House — a policy that advances the DOJ's "independence from inappropriate influences, the principled exercise of discretion, and the treatment of like cases alike."[11] Administrations of both parties have also issued memoranda detailing these policies in an effort to avoid the risk of improper motivations or even the appearance of impropriety.[12]

Because the decision to settle a case involves a "legal judgment," it is subject to the Manual's bar on "political influence."[13] In sections addressing settlement in a range of different contexts, the Manual

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[8] *See* Attorney General Griffin B. Bell, Address Before Department of Justice Lawyers, Washington, D.C. (Sept. 6, 1978), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf [https://perma.cc/MLT3-NCCK] (announcing the contacts policy that came to be formalized, below); Jack Goldsmith, Watergate-Era Reforms 50 Years Later, Harvard Law Today (June 8, 2022), https://hls.harvard.edu/today/watergate-era-reforms-50-years-later/ [https://perma.cc/523C-76W6] (characterizing the policy to ensure Justice Department independence from the White House as among the most important post-Watergate reforms); Justice Manual § 1-8.600, https://www.justice.gov/jm/jm-1-8000-congressional-relations [https://perma.cc/65B6-AHV2] (explaining that the Manual's guidelines on political contacts were developed over four decades through the tenure of a number of attorneys general and in consultation with the Counsel to the President).

[9] Justice Manual § 1-8.000.

[10] *Id.* § 1-8.200.

[11] *Id.* § 1-8.600.

[12] Eric Holder, Memorandum: Communications with the White House and Congress, Office of the Attorney General (May 11, 2009), https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/dl [https://perma.cc/8QP4-8SZX]; Donald F. McGahn II, Memorandum: Communication Restrictions with Personnel at the Department of Justice, The White House (Jan. 27, 2017), https://www.justsecurity.org/wp-content/uploads/2021/07/don-mcgahn-white-house-contacts-memo-janury-27-2017.pdf [https://perma.cc/G7HW-7D3Z]; Merrick Garland, Memorandum: Department of Justice Communications with the White House, Office of the Attorney General (July 21, 2021), https://www.justice.gov/archives/opa/press-release/file/1413756/dl [https://perma.cc/CG4N-A46X]. These policies also usually cover contacts between the White House and Congress. Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. L.& PUB. POL'Y 217, 263–64 (2020), https://djclpp.law.duke.edu/article/federal-prosecutorial-independence-peterson-vol15-iss1/ [https://perma.cc/X94S-BDLV].

[13] Justice Manual § 1-8.000.

directs DOJ attorneys to consider "the public interest,"[14] "litigation risks,"[15] "cost,"[16] and the "seriousness of the violation" in enforcement suits,[17] among other things. Policy preferences of the current administration are not listed among factors to be considered.

Career attorneys whose role transcends any particular administration have significant influence on settlement decisions. While settlement *agreements* must be approved by high-level DOJ officials who are often political appointees (although in some instances authority to settle matters has been delegated to career officials, such as section chiefs[18]), settlement *recommendations* are developed by career attorneys. That process often starts with a recommendation of a client agency, which may inform a career DOJ attorney's recommendation, which then goes to a career section head who may forward it with his or her own recommendation to the official with settlement authority.[19] If a case is already on appeal, the process may involve an additional layer of recommendation by additional career staff.[20] While no formal numbers exist because the settlement recommendation process within DOJ is not public, examples of political officials overriding career attorney recommendations regarding settlement are rare enough to be noteworthy when details surface, reinforcing the strength of the norm.[21]

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[14] *Id.* § 1-20.200, https://www.justice.gov/jm/1-20000-civil-settlement-agreements-and-consent-decrees-involving-state-and-local-governmental [https://perma.cc/8ZB9-ZTN4] (regarding settlements with state and local governments).

[15] *Id.* § 1-18.000, https://www.justice.gov/jm/1-18000-general-civil-settlement-principles [https://perma.cc/YG4N-22ZQ] (regarding settlements of affirmative civil enforcement matters).

[16] *Id.* § 4-3.210, https://www.justice.gov/jm/jm-4-3000-compromising-and-closing [https://perma.cc/N5RP-77FH] (regarding compromising Civil Division claims involving the United States).

[17] *Id.* § 1-18.000 (regarding settlements of affirmative civil enforcement matters).

[18] *See* Environment & Natural Resources Division Directive No. 2024-02, II.B, https://web.archive.org/web/20241211214618/https://www.justice.gov/d9/2024-08/directive_no._2024-02.pdf (outlining situations in which authority to compromise cases was delegated to section chiefs and deputy section chiefs, both career positions).

[19] *Id.* § 5-6.600, https://www.justice.gov/jm/jm-5-6000-environmental-defense-section [https://perma.cc/5EKY-3HFZ] (Environment & Natural Resources Division's Environmental Defense Section recommendation process)

[20] *Id.* § 5-8.600, https://www.justice.gov/jm/jm-5-8000-appellate-section [https://perma.cc/4Y4U-58B2] (procedures for Environment & Natural Resources Division's Appellate Section, explaining that a settlement recommendation package also includes a recommendation from the trial section). Where the Solicitor General's Office has authorized an appeal by the United States, that office's permission is also required for settlement.

[21] *See* Jesse Eisinger & Kevin Wack, *How Trump's Political Appointees Overruled Tougher Settlements With Big Banks,* PROPUBLICA (Aug. 2, 2019), https://www.propublica.org/article/trump-political-appointees-overruled-settlements-with-barclays-royal-bank-of-scotland [https://perma.cc/V8K7-TTV3]. *Cf.* Walter Olson, *Officials Resign En Masse at Justice Department After Political Intervention in Adams Case*, Cato Institute (Feb. 14, 2025), https://www.cato.org/blog/officials-resign-en-masse-justice-department-after-political-intervention-adams-case [https://perma.cc/NL8G-LV3Y].

Lawsuits and settlements are not used as a strategy to achieve politically preferred outcomes or to subvert the normal administrative process

Two additional connected norms guiding DOJ behavior are that: (1) settlements, and litigation generally, are conducted through negotiations between adverse parties and (2) agencies, through DOJ, should not promise substantive results that would subvert normal administrative processes.[22]

As an initial matter, there are serious questions whether courts even have jurisdiction over cases where the parties are not truly adversarial, as such suits do "not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated — a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court."[23] The Supreme Court dismissed an appeal where it became clear that two parties were aligned on the single issue before the Court: "There is, therefore, no case or controversy within the meaning of Art. III of the Constitution."[24] The Court rejected a settlement in 1850 where "the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was to be decided in the manner that both of the parties to this suit desire it to be," and held that the lower court's judgment, rendered on a misapprehension that a conflict between the parties existed, was "a nullity."[25] Despite the Court's clarity, dismissals based on lack of jurisdiction are rare, perhaps because few cases present clear alignment or collusion.

But that is where norms fill in. These norms are best seen through critiques of practices that depart from them. Various administrations have been accused of acting in defiance of this norm, particularly through "sue and settle" tactics. "Sue and settle" refers to a practice — or alleged practice — of an administration inviting or acquiescing to suit by entities as a tactic to assist the administration in achieving a policy goal. For example, entities might challenge a previous administration's policies, with the goal that the new administration agree to rescind and replace those policies, or entities might challenge the government's failure to take a required action with the goal that the new administration initiate a new rulemaking process.

Scholars have debated how common strategic settlements are, with some noting that there are meaningful distinctions between relatively innocuous versions of sue and settle and the more problematic harmful versions that dominate the public narrative.[26] Indeed, much of what has been

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[22] The Administrative Procedure Act requires that agencies use notice-and-comment rulemaking before adopting rules of general applicability — a procedural requirement designed to ensure public participation, agency deliberation, and a reviewable record. An agency publishes a proposed rule and explains its proposed reasoning, gives the public opportunity to comment on the rule, and then finalizes its decision with the benefit of those comments. Initiating such a process does not guarantee that an agency will finalize it and does not presuppose the substantive content of the resulting rule.

[23] United States v. Johnson, 319 U.S. 302, 305 (1943) (quoting Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

[24] Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971).

[25] Lord v. Veazie, 49 U.S. 251 (1850).

[26] *See, e.g.,* Ben Tyson, *An Empirical Analysis of Sue-and-Settle in Environmental Litigation*, 100 VA. L. REV. 1545 (2014) (distinguishing between agreements that include a promise to make some decision using a normal administrative process and agreements that include substantive promises about what those decision would be); Daniel E. Walters, *New "Sue-and-Settle" Bill is Much Ado About Nothing*, THE REGULATORY REVIEW

deemed sue and settle are legitimate lawsuits arising when the government was delinquent in fulfilling statutory duties, the settlement terms were subjected to public scrutiny, and the outcome of the settlement was the government initiating a required rulemaking process in which stakeholders could participate.[27] In such cases, concerns about back-room deals and shutting the regulated community out of processes that affect them are unwarranted, because at most a settlement results in a process, not a desired policy outcome, and entities dissatisfied with the results of that process may challenge it.

But while deals involving substantive policy changes have been uncommon, there is wide agreement that they are norm-violating.[28] (There is also debate about whether such practices are legal. Courts have different views about how far settlements can go in forcing policy changes.[29]) Settlement agreements and consent decrees can undermine the norms of fair dealing and procedural regularity in two ways. First, an agency might commit through settlement to adopt a particular substantive policy, effectively promising the result of a rulemaking before the rulemaking occurs — or bypassing it altogether. Second, an agency might use a judicial order, entered on consent, to "lock in" a legal interpretation without making it subject to public comment and judicial review on the merits. Both tactics allow an administration to achieve policy goals outside the procedural channels Congress established, insulating those goals from public scrutiny and making them harder for a successor administration to undo.

Such practices are contrary to long-standing DOJ policy reflected in memoranda from DOJ leadership. A 1986 memo from Attorney General Edwin Meese directs that DOJ should not ordinarily enter any consent decree that "converts into a mandatory duty the otherwise discretionary authority" of agencies "to revise, amend, or promulgate regulations," nor should DOJ enter "into any settlement agreement that interferes with" an agency's "authority to revise, amend, or promulgate regulations through the procedures set forth in the [APA]."[30] In 1999, Randolph Moss, acting head of DOJ's

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(Mar. 24, 2015), https://www.theregreview.org/2015/03/24/walters-sue-settle/ [https://perma.cc/8QJN-4GCM]; McVean & Pidot, *supra* note 3 at 204 n.76 (noting that settlements that "effectively revok[e] a regulation without following administrative procedures . . . are exceedingly rare").

[27] Walters, *supra* note 26.

[28] *See* William Kovacs, Keith Holman & Jonathan Jackson, *Sue and Settle: Regulating Behind Closed Doors,* U.S. CHAMBER OF COMMERCE (2013); William Kovacs, Keith Holman, Jonathan Jackson & Jordan Crenshaw, *Sue and Settle Updated: Damage Done 2013–2016,* U.S. CHAMBER OF COMMERCE (2017), https://www.uschamber.com/assets/documents/u.s._chamber_sue_and_settle_2017_updated_report.pdf [https://perma.cc/4VJE-25T3]; Tyson, *supra* note 26 (highlighting the Chamber's failure to discriminate between settlements that required only procedures and settlements requiring substantive results, and presenting an empirical analysis showing — contrary to the Chamber's suggestion -- that industry, not environmental groups, far more often sought substantive outcomes through settlement); Simon Brewer*, The Attorney General's Settlement Authority and the Separation of Powers*, 130 YALE L.J. 174, 211 (2011) (contrasting a settlement where the government agrees to undergo administrative procedure to repeal a rule to a settlement, by its own force, vacates a rule).

[29] Brewer, *supra* note 28 at 209–10 (discussing different approaches in the Court of Appeals for the Ninth Circuit and the District Court for the District of Columbia).

[30] Memorandum from Edwin Meese III, Attorney Gen., to All Assistant Attorneys General and All United States Attorneys, Department Policy Regarding Consent Decrees and Settlement Agreements, at 3 (Mar. 13, 1986) ("Meese Memo"), https://www.archives.gov/files/news/samuel-alito/accession-060-89-1/Acc060-89-1-box9-memoAyer-LSWG-1986.pdf [https://perma.cc/J8LX-4YGL]. The memo recognizes that "the Attorney General

Office of Legal Counsel, expanded upon the Meese memo, advising that DOJ should not enter into settlements to do what would otherwise be barred by statute — such as adopt a certain policy when doing so ordinarily required prior notice and comment. While Assistant Attorney General Moss disagreed with Attorney General Meese's conclusion that such agreements would always be barred by the Constitution, he concluded that they were barred by Congress's direction that agencies use certain procedures and retain certain discretion, and that these kinds of agreements would also affect the interests of third parties who would have otherwise had an opportunity to comment on proposed policies.[31] He also noted that in some instances, a settlement that would preclude third parties from participating in an ordinary rulemaking process would raise due process concerns.[32] That these two memoranda — issued by the Reagan and Clinton administrations — reach similar conclusions about the propriety of agencies bargaining away their discretion, although relying on different legal bases, suggests that the guidance reflects an apolitical consensus.

Relatedly, when a proposed consent decree will affect parties beyond those in the litigation, DOJ guidance directs, at least in certain areas, that the public have an opportunity to weigh in.[33] For instance, where the Environment and Natural Resources Division's (ENRD) Environmental Enforcement Section proposes a consent decree to resolve a case about the emissions or discharge of pollutants, the Justice Manual directs that such decrees be published in the Federal Register 30 days before their entry, giving the public opportunity to comment and "the Executive branch to receive the benefit of such input, and to allow it to withdraw or modify its consent to the decree based on such information."[34]

Settlements fit the dispute

Another norm that reflects respect for ordinary processes and restraint is that the government should not seek to extract settlement promises unrelated to the lawsuit. This means that the government should not subvert the administrative process by promising substantive results (discussed above), but it also means that it should not agree to more than necessary to resolve a dispute or extract from other parties promises that go beyond the dispute at hand.

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has broad flexibility and discretion in the conduct of litigation" and may exercise that discretion "to respond to the realities of a particular case" by "granting exceptions to this policy." *Id.*

[31] *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. 126, 167, 170 (1999) ("Moss Memo"), https://www.justice.gov/file/146406/dl?inline [https://perma.cc/9BSV-8JMZ].

[32] Moss Memo at 143.

[33] Courts also have an independent obligation to ensure consent decrees' fairness, including to parties not before the court: "prior to approving a consent decree a court must satisfy itself of the settlement's 'overall fairness to beneficiaries and consistency with the public interest.'" United States v. Trucking Employers, Inc., 561 F.2d 313, 317 (D.C. Cir. 1977) (quoting United States v. Allegheny-Ludlum Industries, 517 F.2d 826, 850 (5th Cir. 1975)).

[34] Justice Manual § 5-12.620, https://www.justice.gov/jm/jm-5-12000-environmental-enforcement-section [https://perma.cc/CLB6-LCHK]. Certain substantive environmental statutes also contain their own publication requirements.

This norm is formalized as to consent decrees: the Justice Manual reminds DOJ attorneys that settlements and consent decrees should not be broader in scope than the case that they resolve.[35] This direction extends from a Supreme Court holding that "a federal consent decree must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based."[36]

Because courts must review proposed consent decrees and ensure they meet legal requirements, including any specific requirements in the statutory context in which the dispute arose, courts have an opportunity — and obligation — to ensure these requirements are met. In most cases, however, courts have no role in reviewing or approving settlement agreements, which are effectively private contracts between the parties. Yet the norm persists even in settlement agreements, with DOJ attorneys adhering to it absent court oversight.

The Supreme Court's recent decision in *Trump v. CASA* also expanded the limits of this norm. In that case, the Supreme Court questioned whether courts have authority to enter universal injunctions (*i.e.*, to order the government to behave a certain way generally, as opposed to just in relation to the particular opponent in litigation).[37] Because the Court held that courts may not enter injunctions broader than necessary to provide "complete relief" to each plaintiff with standing to sue, the government should, if the norm holds, not agree through a settlement to alter its behavior except with regard to the parties in a case.

Changing positions and confessions of error have a sound legal basis and procedurally valid outcome

DOJ has a well-established practice of maintaining positions in active litigation even where there is a change in administration. While changing positions mid-litigation does occur, the bar for changing position is high and historically not often cleared.

Changes in position can manifest under many circumstances. The government might, before any court has rendered a decision, change its view of the law or propriety of a government decision at issue. The government might change its view while an appeal is proceeding: if the government prevailed below, the government would have to decide whether to defend that win on appeal; if the government lost below, it might have to decide whether to drop its appeal and acquiesce in the loss. More significantly, the government might confess error because of a new administration's different

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[35] Justice Manual § 1-20.200.

[36] Frew v. Hawkins, 540 U.S. 431, 437 (2004) (citing Firefighters v. Cleveland, 478 U.S. 501, 525 (1986)). A consent decree still may be "more than what a court would have ordered absent the settlement." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 389 (1992).

[37] Trump v. CASA, 606 U.S. 831 (2025). The case involved challenges to President Trump's executive order directing a new interpretation of the Constitution's Citizenship Clause to not give birthright citizenship to children born to noncitizens in the United States. Several district courts had entered orders blocking the administration from enforcing this new policy.

view of law or policy and ask a court to vacate a prior decision (or a lower court's decision) in the government's favor.[38]

There is a high bar for changing positions, reflecting deeply embedded legal norms and institutional procedures. The Solicitor General's Office, which represents the United States before the Supreme Court and decides whether the United States will appeal from adverse decisions in lower courts, likely has the most well-developed norms and processes for how and when it will change position or confess error, and those norms set the tone and inform the practices of the rest of DOJ. Even where the Office's "lawyers doubt the correctness of a lower court decision, confession of error is not undertaken lightly."[39] Factors to be considered include "the reasonableness of the decision" the government now believes was in error, "any reliance interests of the government and the public," "the impact on" any "victims," and "the effect on the credibility of the United States."[40] Justice Kagan and attorney Paul Clement, both former solicitors general under different administrations, agree that such changes in position should happen infrequently and that there is a presumption against them.[41] Decisions of almost any kind — including a decision to confess error — by the Solicitor General's Office are traditionally "made only after separate components submitted tiers of memoranda," from agencies, trial-level lawyers, and appellate lawyers.[42] Attorneys — nearly all of them career staff — in the Office then add their own memoranda, drawing on their experience, their expertise, and institutional memory, all of which "safeguard against hasty or incompletely analyzed

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[38] *Cf.* Jessica A. Schoenherr & Nicholas W. Waterbury, *Confessions at the Supreme Court: Judicial Response to Solicitor General Error*, J.L. & CTS. 13, 18–20 (Spring 2022) (categorizing confessions of error as (1) mistakes made by someone at DOJ, (2) mistakes made by a lower court judge, and (3) decisions now viewed as incorrect because of an administrative policy change).

[39] Michael R. Dreeben, *The Role of the Solicitor General in the Department of Justice's Appellate Process*, 61 UNITED STATES ATTORNEYS' BULLETIN: APPELLATE ISSUES at 10 (2013), https://www.justice.gov/sites/default/files/usao/legacy/2013/02/21/usab6101.pdf [https://perma.cc/7HPH-NKF8]; *see also* Margaret H. Lemos & Deborah A. Widiss*, The Solicitor General, Consistency, and Credibility*, 100 NOTRE DAME L. REV. 621, 638–39 (2025). For example, in *McKittrick v. United States*, the solicitor general confessed error in a case where a defendant was convicted of shooting a wolf protected by the Endangered Species Act, but where the solicitor general concluded that a jury instruction in the case did not match the statute's requirement that the action be done "knowingly." The Solicitor General argued against certiorari on the ground that "the issue is not likely to recur" because DOJ did not intend to request the instruction in future prosecutions. Brief for the United States in Opposition, McKittrick v. United States, No. 98-5406 (1999). The Court denied cert, 525 U.S. 1072 (1999), and DOJ issued a memorandum instructing all attorneys not to request the instruction going forward. *See* Jeremy Miller, *Bounty Hunters,* Harper's Magazine (Jan. 2017), https://harpers.org/archive/2017/01/bounty-hunters/ [https://perma.cc/3C48-HNLJ]. This example illustrates confession of error based on legal grounds, with the error corrected through institutional channels.

Like the solicitor general's office, the Office of Legal Counsel, a highly regarded office that serves a legal advisory function within DOJ, generally maintains consistency across administrations. *See generally* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1440 (2010). That office has long had a reputation for providing "reasonably independent and credible" counsel and has developed tools to help it guard against political influence. *Id.* at 1451–53, 1456–57.

[40] Dreeben, *supra* note 39 at 10.

[41] Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, YALE L.J.F. 541, 555 (2021); *see also* Waxman, *supra* note 1 (discussing the rareness of changes in legal position).

[42] *Id.* at 561.

reversal."[43] Norms also dictate that the solicitor general — and DOJ attorneys generally — not use confession of error for "political purposes," for instance "to try and align the law with the popularly elected branches' preferences."[44]

Norms also address what happens after a change in position, using procedures that help retain courts' trust. When the government changes positions during litigation, norms dictate that it do so in a way that preserves the integrity of the judicial process and the special relationship between attorneys for the United States and the courts.[45] If, for instance, the government takes a position on appeal that a lower court, at the government's urging, made an error of law, it might ask a court of appeals to vacate that decision and remand for further proceedings.[46] Most relevant here, where the government changes its view about the validity of a regulation, a normal outcome is for the government to use an administrative process to withdraw or change that regulation rather than asking a court to order the regulation invalid, thus thwarting an otherwise-required administrative process. Thus, when the government no longer wishes to defend an agency decision that it had previously defended, it may ask a court to stay litigation while the government reconsiders that decision; it may argue, upon announcing an intent to reconsider an agency decision, that the case is moot; or it may seek a voluntary remand so the agency can revisit the challenged decision. Or, if the government has already lost in a lower court, it may decide — perhaps because of a change in administration — to acquiesce in that decision and accept the result.[47]

These options reflect respect for procedure, whether in a lower court or in an agency. Indeed, asking courts to go further — such as vacating an agency rule that is the subject of litigation — has not been among the government's options when changing positions. Doing so in the context of a challenge to a rule issued after notice-and-comment rulemaking would be, in effect, the government asking the court to do something the government could not do on its own: rescind a rule without going through the process required by the Administrative Procedure Act. A new administration looking to make a quick policy reversal might see this as an attractive option, but it has not been a traditional part of the toolkit when the government changes position in litigation.

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[43] *Id.* at 561; *see also* Waxman, *supra* note 1 (discussing the highly inclusive deliberative process).

[44] Schoenherr & Waterbury, *supra* note 38 at 15 (noting that "the justices do not respond favorably to those actions").

[45] *See* Dreeben, *supra* note 39 at 10 (citing Patricia M. Wald, *"For the United States": Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107, 119–27 (Winter 1998)); Schoenherr & Waterbury, *supra* note 38 at 14 ("Confessions of error are a quirk of the solicitor general's relationship with the justices; because the solicitor general and the Supreme Court deal with the long-term development of federal law, the solicitor general is the only Supreme Court litigator who is expected to tell the Court that an error resulted in an undeserved win for their client in federal court." (internal citations omitted))

[46] Schoenherr & Waterbury, *supra* note 38 at 18.

[47] Several Supreme Court justices have questioned whether even accepting and effectuating a district court's vacatur of a rule after a change in administration "comport[s] with the principles of administrative law." Arizona v. City and County of San Francisco, California, 596 U.S. 763, 766 (2022) (Roberts, J., concurring in the dismissal of certiorari as improvidently granted).

One administration does not bind the next

A related and longstanding norm is that one administration does not make commitments through settlement agreements that will bind a future administration by restricting its future decision to act within its lawful discretion or commits the government to a particular interpretation of a statute going forward.

In addition to directing DOJ to avoid settlements and consent decrees that would limit agencies' options in issuing or amending regulations generally, Attorney General Meese's 1986 memo directs DOJ to ordinarily avoid consent decrees that limit the discretion of successor administrations to respond to changing circumstances, to make policy choices, or to protect the rights of third parties.[48] The Moss memo, while not reflecting Attorney General Meese's concerns about the constitutionality of such agreements, points out that agency commitments of shorter duration are less likely to unlawfully limit the discretion that Congress has given an agency.[49] Again, these two memoranda — still, for the moment, in force — reflect longstanding, cross-administration norms about what the government may and should do in resolving litigation.

A new pattern of departures from norms in settlements and changes in position

DOJ's actions have stretched past these norms on many occasions during the second Trump administration. The examples below occur in a range of subject areas and procedural contexts. While they are on a sliding scale of norm violation (and I have not attempted to discern where each example falls), together they illustrate how departing from norms is becoming a pattern and that strategic suits and settlements are being used to achieve quick policy change and lock in legal interpretations.[50]

- **Political direction overrides career attorneys' objection to dropping criminal charges in defeat device cases:** In January 2026, a high-level DOJ political official issued a memo directing federal prosecutors to drop all pending criminal defeat device prosecutions under the Clean Air Act.[51] The memo ordered federal prosecutors to abandon more than a dozen pending cases and twenty-plus ongoing investigations. DOJ's new position was based on an untested legal theory raised by a defendant in one such case who had argued that these violations could be raised only as civil, not criminal offenses. This directive overrode the conclusions of

[48] Meese Memo at 3–4.

[49] Moss Memo at 167.

[50] This list is far from comprehensive. *See, e.g.* Democracy Forward Foundation, Litigation Responses to Collusive Litigation Tactics under the Trump-Vance Administration (Mar. 19, 2026), https://docsend.com/view/en3dm8s8hy395ck4 (cataloguing additional examples of new settlements and efforts to alter existing agreements).

[51] Defeat devices tamper with air pollution control systems in vehicles, allowing them to meet emissions requirements when those emissions are tested and then exceed emissions requirements (for gains in horsepower or mileage) outside the testing context.

career prosecutors and EPA attorneys who had considered and rejected that theory and came at the request of another DOJ political appointee.[52]

- This example touches two of the norms discussed above: that DOJ center the recommendations of career attorneys about the proper conduct and resolution of cases and that changes in position be well considered and based on a regular process. The prosecutions were career staff-led and the result of "seasoned investigators" who "dedicated years to ensuring that these cases were properly investigated, properly charged and were working through the system in a way that really was to serve the public and to serve public health."[53] Reporting suggests that DOJ may not have followed the normal procedures for confession of error,[54] under which such determinations involve careful, institutionally constrained deliberation, not top-down political direction.[55]

- **Immigration-related consent decree between federal and state government binds future administrations**: The State of Florida sued Department of Homeland Security (DHS) officials in 2023, challenging a Biden administration policy that allowed certain non-citizens entering the country to avoid detention until their immigration proceedings conclude. Upon taking office, President Trump issued an executive order directing that the policy end.[56] The state and federal parties then started negotiating to resolve the case. The resulting consent decree — lodged with the court in late January 2026 and adopted by the court in early February 2026 — declares the Biden era policy unlawful, requires that DHS not enforce the policy or adopt any similar policy that uses its statutory parole authority to create a similar policy for 15 years.[57]
  - The consent decree departs from DOJ policy that one administration not bind the next. The consent decree — now judicially enforceable — will, unless modified, prevent future administrations from using discretion to adopt a similar immigration policy until 2041. That the federal government reached this sweeping, norm-bending agreement also indicates that the two parties were not in opposition to each other

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[52] Sarah N. Lynch, *Justice Dept. Kills Cases Cracking Down on Auto Emissions Cheating,* CBS NEWS (Jan. 22, 2026), https://www.cbsnews.com/news/justice-department-auto-emissions-cheating-cases/ [https://perma.cc/MN84-N8H3]; Dawn Reeves, *Memos Show EPA, DOJ Back Defendants' Claims Against Criminal Tampering*, INSIDE EPA (Mar. 19, 2026), https://insideepa.com/daily-news/memos-show-epa-doj-back-defendants-claims-against-criminal-tampering.

[53] Reeves, *supra* note 52 (quoting former U.S. Attorney Vanessa Waldref).

[54] *See* Lynch, *supra* note 52.

[55] The determination whether and how to bring an environmental criminal case is nuanced and necessarily reflects policy judgments. There has long been controversy around decisions to pursue or not pursue environmental criminal charges, and, more fundamentally, about whether the entire realm of environmental criminal law involves too much prosecutorial discretion and too few structural limits. *See, e.g.*, Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO L.J. 2407 (1995); Lois J. Schiffer & James F. Simon, *The Reality of Prosecuting Environmental Criminals: A Response to Professor Lazarus*, 83 GEO L.J. 2531 (1995).

[56] Securing Our Borders, Exec. Order 14165, 90 Fed. Reg. 8467 (Jan. 20, 2025).

[57] Consent Motion to Enter Consent Decree, Florida v. Mayorkas, 23-cv-9962 (N.D. Fla. Jan. 30, 2026) (signed by court on February 4, 2026), https://iptp-production.s3.amazonaws.com/media/documents/2026.01.30_Consent_Decree_-_Florida_v._Mayorkas.pdf.

after the change in administration. The new administration's decision to abandon the policy should, under normal circumstances, have led to dismissal of the case, but the administration instead used the litigation against a friendly party to, as a former DHS attorney put it, "forfeit[]" the "discretionary authority" that Congress gave DHS via statute.[58]

- **EPA confesses error mid-litigation, swaps sides, and asks court to vacate challenged air pollution rule**: In 2024, EPA issued a rule that strengthened the standards for fine particulate matter ($PM_{2.5}$) under the Clean Air Act.[59] Some states and industry groups challenged the rule, arguing that EPA lacked authority for its rule change. EPA defended the rule in the Court of Appeals for the D.C. Circuit through briefing and oral argument in December 2024. In November 2025, before the court issued a decision in the case, EPA told the court that it was "confess[ing] error," that it had determined that its 2024 rule was unlawful, that it would no longer defend the rule, and that it was joining the rule's challengers in asking the court to vacate the rule.[60] States and groups that had intervened to defend the rule have objected; as of this publication, the court has not ruled on EPA's request.
    - By asking the D.C. Circuit to vacate the rule challenged in the litigation, EPA, through DOJ, departs from the norm that confessions of error not be used to circumvent the administrative process. Rather than ask to have the court hold the litigation in abeyance while the administration engages in a notice-and-comment rulemaking process to rescind the rule it no longer prefers or to replace it with a new rule, it has asked the court to do what the administration cannot do on its own: rescind the rule without that required process.
- **SEC asks court to rescind climate disclosure rule it no longer wishes to defend; court refuses**: In March 2024, the Securities and Exchange Commission (SEC) finalized a climate-related risk disclosure rule requiring public companies to report material climate risks and, for some large companies, greenhouse gas emissions. Industry groups and state attorneys general challenged it. The SEC suspended implementation of the rule pending resolution of the litigation. After the Trump administration took office in 2025, the SEC declined to defend the rule in court. Instead, in July 2025, the SEC asked the Court of Appeals for the Eighth Circuit to decide the case on the merits, arguing that a judicial decision rejecting the SEC's authority to issue the rule would conclusively resolve whether the agency could promulgate climate-related disclosure rules.[61] In September 2025, the Eighth Circuit rejected this maneuver, holding the case in abeyance, and stating, "[i]t is the agency's responsibility to determine

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[58] Stuart Anderson, *Trump Using Legal Settlements to Enact Immigration Restrictions*, FORBES (Feb. 24, 2026), https://www.forbes.com/sites/stuartanderson/2026/02/24/trump-using-legal-settlements-to-enact-immigration-restrictions/ [https://perma.cc/3T93-M7SZ] (quoting Tom Jawetz, former DHS general counsel).

[59] Environmental & Energy Law Program, Regulatory Tracker: National Ambient Air Quality Standards (NAAQS) for Particulate Matter (PM), https://eelp.law.harvard.edu/tracker/epa-finalized-stricter-national-ambient-air-quality-standards-naaqs-for-particulate-matter-pm/ [https://perma.cc/Z27N-QA9N].

[60] Respondents' Motion for Vacatur, Kentucky v. EPA, No. 24-01050 (D.C. Cir. Nov. 24, 2025).

[61] Sara Dewey & Sarah Hart-Curran, *Eighth Circuit Says SEC Must Defend or Revise Climate Risk Disclosure Rule*, Environmental & Energy Law Program (Oct. 8, 2025), https://eelp.law.harvard.edu/eighth-curcuit-says-sec-must-defend-or-revise-climate-risk-disclosure-rule/ [https://perma.cc/889S-Y6VP] (describing the rule, litigation strategy, court's response, and how the agency's strategy departs from norms).

whether its Final Rules will be rescinded, repealed, modified, or defended in litigation."[62] The SEC has now proposed to rescind the rule using an administrative process.[63]

- The SEC's request to the court — rejected by the Eighth Circuit — departs from established norms in several respects. First, the SEC's move would have achieved through litigation what should have been accomplished through an administrative rulemaking process, contra the norm that changes in position have a procedurally valid outcome. As the court recognized, the normal course in this kind of situation is to hold the case in abeyance while the administration uses valid administrative procedures to decide whether to make a policy change. Moreover, the administration's goal went deeper than accomplishing a temporary policy change: it sought to have the court adopt a binding legal interpretation that ran counter to the government's prior position, therefore, binding future administrations to that new reading. The court's response reinforced that changes in policy — even based on new legal interpretations — should not be outsourced to courts as a shortcut to avoid administrative processes.

- **Administration "settles" with offshore wind company, funneling federal money into unrelated, politically preferred investments**: In 2022, TotalEnergies, a French company, purchased two leases for offshore wind development off the coasts of North and South Carolina and New York and New Jersey. Permitting is not complete for projects on either lease. In March 2026, the Department of the Interior announced that it and TotalEnergies had reached an "innovative agreement" under which the United States will pay the company nearly $1 billion, and the company will both relinquish its offshore wind leases and invest the same sum into oil and gas projects in Texas and in the Gulf of Mexico.[64] The administration has now made additional agreements with other companies: the government will make large payments; the companies will abandon plans to build offshore wind projects and will instead invest in oil and gas projects.[65]
  - Reporting suggests that TotalEnergies had threatened to sue over the administration's pause of wind permitting.[66] Although no litigation was filed, both

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[62] Order, Iowa v. U.S. Securities & Exchange Comm'n, No. 24-1522 (8th Cir. Sept. 12, 2025), https://storage.courtlistener.com/recap/gov.uscourts.ca8.108437/gov.uscourts.ca8.108437.00805348431.0.pdf.

[63] Press Release, U.S. Securities & Exchange Comm'n, SEC Proposes Rescission of Climate-Related Disclosure Rules (May 29, 2026), https://www.sec.gov/newsroom/press-releases/2026-49-sec-proposes-rescission-climate-related-disclosure-rules (linking to pre-publication version of the proposed rule).

[64] Press Release, U.S. Department of the Interior, Interior and TotalEnergies Agree to End Offshore Wind Projects, Lowering Costs for American Families (Mar. 23, 2026), https://www.doi.gov/pressreleases/interior-and-totalenergies-agree-end-offshore-wind-projects-lowering-costs-american [https://perma.cc/4FEM-7HBK]; Press Release, TotalEnergies, United States: TotalEnergies Signs Agreements with U.S. Department of Interior to End its U.S. Offshore Wind Projects (Mar. 23, 2026), https://totalenergies.com/news/press-releases/united-states-totalenergies-signs-agreements-us-department-interior-end-its-us [https://perma.cc/B67Q-TPEK].

[65] Maxine Joselow & Brad Plumer, *Trump Administration Will Pay More Energy Firms to Cancel Wind Farms*, N.Y. TIMES (Apr. 27, 2026), https://www.nytimes.com/2026/04/27/climate/trump-administration-wind-farms.html [https://perma.cc/U623-MNGW].

[66] Emily Pontecorvo, *What We Don't Know About Trump's #1 Billion Deal with Total Could Kill It*, HEATMAP (Mar. 26, 2026), https://heatmap.news/energy/trump-total-offshore-wind-deal [https://perma.cc/YTL5-JYTU]; Erika Kranz, *Federal Court Vacates Wind Energy Authorization Pause*, Environmental & Energy Law Program (Dec.

parties have styled the TotalEnergies agreement to shift investment from wind to oil and gas as a "settlement," suggesting that the agreement was reached in the context of potential future litigation. Whatever that litigation might have looked like, requiring a company to shift its investment from one type of energy development to another would not have been within the scope of remedies available to the United States. The agreement thus is in tension with the norm that settlements fit the dispute, as well as at least the spirit of specific DOJ guidance that payments through settlements to third parties must "have a strong connection to the violations at issue."[67]

- The agreement directly implicates a deeper norm: that settlements be used to further the public interest rather than to pursue politically preferred policies (or investments) and do so in a valid way. It is unclear whether there was any genuine threat of litigation at the time of the settlement, as a federal district court held that pause unlawful in December 2025, so it was no longer effective when the parties settled.[68] Instead, it appears that the settlement here was negotiated between two aligned parties (TotalEnergies stated that it was "pleased to . . . support the Administration's Energy Policy"),[69] and thus is more akin to strategic "sue and settle" (even absent a real suit) to achieve a policy goal. The settlement uses the federal Judgment Fund[70] to halt potential energy projects not preferred by the Trump administration and then requires that those federal funds be funneled into energy projects preferred by the Trump administration. The administration asserts that the agreement defeats "ideological subsidies" for offshore wind, but the direction of almost $1 billion of federal funds to a politically preferred industry is not comparable to the business decisions of offshore wind developers to invest in that industry.[71]

16, 2025), https://eelp.law.harvard.edu/federal-court-vacates-wind-energy-authorization-pause/ [https://perma.cc/N7VK-39KY].

[67] Justice Manual § 1-17.000, https://www.justice.gov/jm/jm/1-17000-settlement-payments-third-parties [https://perma.cc/LRD9-8346].

[68] *See* Erika Kranz, *Federal Court Vacates Wind Energy Authorization Pause*, Environmental & Energy Law Program (Dec. 16, 2025), https://eelp.law.harvard.edu/federal-court-vacates-wind-energy-authorization-pause/.

[69] Press Release, TotalEnergies, *supra* note 64.

[70] It was initially unclear what source of funds the administration would use to effect the promised payments under the "settlement." *See* Pontecorvo, *supra* note 66; Maria Gallucci, *Trump's $1B Offshore Wind Payout to TotalEnergies Sparks Legal Concerns*, CANARY MEDIA (Mar. 26, 2026), https://www.canarymedia.com/articles/offshore-wind/trumps-1b-payout-totalenergies-legal-concerns [https://perma.cc/6N42-R6R8]. It has become clear that the administration used the Treasury Department's Judgment Fund, a bottomless pot of federal funds reserved for paying certain court judgments and to resolve "actual or imminent litigation." 31 U.S.C. § 1304; 31 C.F.R. § 256.1. *See* Niina H. Farah, *Trump Admin Pays Out $1B Offshore Wind* Settlement, E&E NEWS (Apr. 30, 2026), https://www.eenews.net/articles/trump-admin-pays-out-1b-offshore-wind-settlement/ [https://perma.cc/LE84-YD9D] (identifying a series of payments in the judgment fund database).

[71] Because the "settlement" does not resolve pending litigation and it is unclear if the threat of litigation was genuine (and unclear what kind of litigation that would have been), it is questionable whether this use of the Judgment Fund is legal, or, at a minimum, legitimate. Representatives on the House Judiciary and National Resources Committee have launched an investigation into the deal. Letter to Patrick Pouyanné, Chairman & Chief Executive Officer, from Rep. Jared Huffman & Rep. Jamie Raskin (Apr. 29, 2026), https://democrats-naturalresources.house.gov/imo/media/doc/2026-04-28_jh_jbr_to_totalenergies_re_settlement.pdf

- **USDA invites complaints, setting up sue and settle:** The Trump administration has criticized the Biden administration's approach to rangeland management. In April 2025, the Trump administration announced that it had dropped criminal charges brought under the prior administration against ranchers that had allegedly been illegally using federal lands for their ranch operation.[72] The Department of Agriculture also opened an online portal, inviting "farmers, ranchers, agricultural producers, and other USDA customers who have fallen victim to unfair or politically motivated lawfare to provide USDA with information regarding the potential lawfare."[73]
  - By inviting aligned parties to submit grievances that would result in changes in litigation strategy or settlement, USDA challenges the norm that litigation and settlement be guided by law and fact rather than by politics. The Trump administration accuses its predecessor of engaging in politically motivated prosecutions, but its own call for submissions that undermine and call into question the agency's work appears to have a political basis.
- **Administration creates fund to benefit third parties, settling President Trump's lawsuit as judge questioned whether parties were truly adverse**: In early 2026, President Trump, two of his sons, and the Trump family business sued the Internal Revenue Service (IRS), seeking at least $10 billion in damages for the leak of their tax returns during his first term and alleging that the IRS failed to prevent a former contractor from disclosing their tax information to news outlets.[74] In April, the Trumps asked the court to extend all litigation deadlines so they

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[https://perma.cc/HW9K-HGFE]. *See also* Letter to Secretary of the Interior Doug Burgum from Sen. Edward J. Markey & Rep. Alexandria Ocasio-Cortez (Mar. 31, 2026), https://ocasio-cortez.house.gov/sites/evo-subsites/ocasio-cortez.house.gov/files/evo-media-document/totalenergies_offshore_wind_payoff_letter.pdf [https://perma.cc/5DMG-EW8L]; Letter to Secretary of the Interior Doug Burgum and Acting Attorney General Todd Blanche from Rep. Jared Huffman & Rep. Jamie Raskin (Apr. 6, 2026), https://democrats-naturalresources.house.gov/imo/media/doc/2026-04-06%20JH%20and%20JR%20Letter%20to%20DOI%20and%20DOJ%20re%20Offshore%20Wind%20Contract%20Cancellation%20(2).pdf; Letter to Patrick Pouyanné, Chairman & Chief Executive Officer from Sen. Sheldon Whitehouse (Apr. 9, 2026), https://aboutblaw.com/blpi [https://perma.cc/RP93-B69V]. But the fund was designed with few enforceable limitations, leaving it susceptible to misuse. *See generally* Paul F. Figley, *The Judgment Fund: America's Deepest Pocket & Its Susceptibility to Executive Branch Misuse*, 18 J. CONST. L. 145 (2015). Agencies may push to use the Judgment Fund rather than their own appropriated funds; it has been up to DOJ to "guard[] the Fund against abuse." *Id.* at 183 (quoting Jeffrey Axelrad, *What is the Judgment Fund?*, 1 Ann. 2004 ATLA-CLE 435 (2004)).

[72] Press Release, U.S. Department of Agriculture, Trump Administration Announces that the U.S. Government Has Dropped Criminal Charges Against Small Farmer/Rancher Maude Family (Apr. 28, 2025), https://www.usda.gov/about-usda/news/press-releases/2025/04/28/trump-administration-announces-us-government-has-dropped-criminal-charges-against-small [https://perma.cc/ABV6-X7C5].

[73] USDA Lawfare Submission Portal (last accessed Apr. 7, 2026), https://www.usda.gov/lawfare [https://perma.cc/Y54X-9UBP] (describing "lawfare" as motivated by "[p]olitical considerations and extreme environmental and other progressive policy goals"). USDA has since launched its "Farmer and Rancher Freedom Framework" that also purports to address "lawfare" under a broader definition of that term. USDA, Lawfare: The Farmer and Rancher Freedom Framework, https://www.usda.gov/sites/default/files/documents/lawfare.pdf.

[74] Complaint, Trump v. Internal Revenue Serv., No. 1:26-cv-20609 (S.D. Fla. Jan. 29, 2026).

could "engage in discussions designed to resolve this matter."[75] In response, the court ordered the parties to submit briefs addressing whether they are "sufficiently adverse to each other so as to satisfy Article III's case or controversy requirement," noting that the situation — involving "the sitting president and his named adversaries" that "are entities whose decisions are subject to his direction" — presents a "unique dynamic."[76] The court also appointed six outside attorneys to "assist the Court in identifying the applicable law governing an analysis" of the jurisdictional issue.[77] Even as that process unfolded, White House and DOJ officials were reportedly discussing a settlement.[78] On May 18, two days before jurisdictional filings were due, the Trumps moved to dismiss their suit and the Trump administration announced that, as part of a settlement agreement in the case, it had agreed to create a nearly $1.8 billion "Anti-Weaponization Fund," capitalized by the Judgment Fund and empowered to pay claims to those who assert they were harmed by supposed Biden-era "weaponization" of government.[79] That fund will be controlled by a five-appointee commission that will have no obligation to disclose its process for making award decisions, the award decisions will be unreviewable, and the president will have authority to remove commission members without cause.[80] The next day, the administration announced that the United States had agreed to be forever barred from pursuing a set of claims against the Trumps that includes any tax audits for past years.[81]

- Similar to the TotalEnergies agreement discussed above, this settlement touches on multiple norms discussed in this paper. First, the government's agreement to create a $1.8 billion compensation mechanism — financed by the Judgment Fund, likely to be tapped by the president's political allies, and overseen by a commission the president can control — departs from the basic expectation that settlements be grounded in legal merit and the public interest. Former IRS officials have raised

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[75] Motion for a 90 Day Extension, No. 1:26-cv-20609 (S.D. Fla. Apr. 17, 2026) (representing that the Trumps' counsel had conferred with counsel for the IRS, though no attorney for the government has yet entered an appearance).

[76] Order, Trump v. Internal Revenue Serv.. No. 1:26-cv-20609 (S.D. Fla. Apr. 24, 2026).

[77] Order, Trump v. Internal Revenue Serv., No. 1:26-cv-20609 (S.D. Fla. Apr. 29, 2026).

[78] Andrew Duehren & Alan Feuer, *Justice Dept. Officials Consider Settling Trump Suit Against I.R.S.*, N.Y. TIMES (May 12, 2026), https://www.nytimes.com/2026/05/12/business/trump-suit-irs.html [https://perma.cc/JU8G-5C8P]; Katherine Faulders, Peter Charalambous & Alexander Mallin, *Trump Poised to Drop IRS Suit, Launch $1.7B 'Weaponization' Fund for Allies: Sources*, ABC NEWS (May 14, 2026), https://abcnews.com/US/trump-poised-drop-irs-suit-launch-17b-weaponization/story?id=132962661 [https://perma.cc/RHY4-RAPD].

[79] Office of the Attorney General Document (May 18, 2026), https://www.justice.gov/opa/media/1441086/dl [https://perma.cc/X36U-C9JM].

[80] Settlement Agreement, Trump v. Internal Revenue Serv., at 2–4 (May 18, 2026), https://www.justice.gov/opa/media/1441201/dl?inline [https://perma.cc/PF2T-LCBD]. *See also* Andrew Duehren, Glenn Thrush & Alan Feuer, *Justice Dept. Announces $1.8 Billion Fund in Settling I.R.S. Suit*, N.Y. TIMES (May 18, 2026), https://www.nytimes.com/2026/05/18/us/trump-irs-lawsuit.html [https://perma.cc/6ZAN-WRD9]; Press Release, Justice Department Announces Anti-Weaponization Fund (May 18, 2026), https://www.justice.gov/opa/pr/justice-department-announces-anti-weaponization-fund [https://perma.cc/2YR5-P289].

[81] Office of the Attorney General Document (May 19, 2026), https://www.justice.gov/opa/media/1441216/dl [https://perma.cc/9JU3-YVG6].

questions about whether the Trumps' lawsuit has merit and whether a settlement is legally justified.[82] Reporting indicates that career IRS attorneys had prepared a memorandum identifying defenses to the Trumps' claims.[83] Relatedly, and beyond concerns about the ultimate merits of the case, if the court lacked jurisdiction over the lawsuit that was the basis for the settlement, it is not clear that this could be a valid use of the Judgment Fund.[84] Second, using negotiated resolution to create a fund for third parties not in the litigation bears little relationship to the underlying dispute over the government's liability for a contractor's misconduct, straining the norm that settlements fit the dispute and do not concede remedies unrelated to the claims at issue. The government's agreement to drop pending audits and forgo future investigations or claims involving President Trump, his family, and his businesses also extends well beyond the scope of the underlying suit, and it is unclear how such an agreement serves the public interest.

- This example also shows why norms are important: there may be no other effective, immediate backstop to prevent a collusive result.[85] The district court judge's efforts to satisfy herself of the existence of a case or controversy (and the absence of a "feigned or collusive" assertion of rights[86]) are important and consistent with the court's duty to ensure its own jurisdiction. But once the Trumps voluntarily dismissed their lawsuit, it was not clear that the court had a continuing role to intercede (nor would courts ordinarily have a role in reviewing or approving an out-of-court settlement). In the days since that dismissal, a group of thirty-five former federal judges filed a motion in the case urging the district court to reopen the case, arguing that there may have been "a fraud on the court" in the form of a collusive settlement reached to avoid answering the court's serious jurisdictional questions.[87] The court reopened the case on May 29, 2026, and ordered briefing on adversity of the parties, the allegations of deception, and the question whether fraud on the court occurred.[88]

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[82] Duehren & Feuer, *supra* note 78.

[83] Andrew Duehren, *The IRS Thought It Could Fight Trump's Lawsuit, but It Struck a Deal Anyway*, N.Y. TIMES (May 19, 2026), https://www.nytimes.com/2026/05/19/admin/irs-trump-lawsuit-deal.html [https://perma.cc/K9LW-PRSC] (noting that defenses discussed included potential arguments about jurisdiction and whether the United States could be liable for a contractor's action).

[84] A group of members of Congress made this point in a proposed amicus brief filed just after the Trumps filed their notice of dismissal. Brief of Amici Curiae 90 Members of the United States House of Representatives at 12–15, Trump v. Internal Revenue Serv., No. 1:26-cv-20609 (S.D. Fla. May 18, 2026), https://litigationtaskforce.house.gov/sites/evo-subsites/litigationandresponse.house.gov/files/evo-media-document/54-1.pdf [https://perma.cc/LQ79-R8Y2]. *See supra* note 71 for further discussion.

[85] *Cf.* Brandon DeBot & Dave Hubbard, *Statement on Trump Lawsuit and Potential Settlement,* NYU Tax Law Center (May 13, 2026), https://taxlawcenter.org/blog/statement-on-trump-lawsuit-and-potential-settlement [https://perma.cc/A5AM-PX3T] (identifying applicable law, including the tax code's protections against political interference, and potential repercussions for violations).

[86] Order at 2, No. 1:26-cv-20609 (S.D. Fla. Apr. 24, 2026) (quoting *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 981 (11th Cir. 2020)).

[87] Motion for Relief from Judgment or Order, or, in the Alternative, for Leave to Appear as *Amici Curiae*, by Thirty-Five Former Federal Judges, No. 1:26-cv-20609 (S.D. Fla. May 27, 2026).

[88] Order, No. 1:26-cv-20609 (S.D. Fla. May 29, 2026).

- **Strategic suits and settlements with aligned states**: In 2001, Texas enacted a law that allowed qualifying undocumented immigrants living in the state to pay in-state tuition at Texas higher education institutions.[89] Since then, some Texas lawmakers had tried, but failed, to repeal the law through the legislative process.[90] On June 4, 2025, DOJ filed a lawsuit alleging that Texas's law is preempted by federal law and is unconstitutional.[91] On the same day, Texas's attorney general filed a joint motion with the United States asking the court to enter a final judgment declaring that the law is unconstitutional and invalid and to issue a permanent injunction preventing its enforcement.[92] The court immediately granted the requested judgment.[93] A high-level DOJ official publicly explained that the result was coordinated: "Because we were able to have [a] line of communication and talk in advance, a statute that's been a problem for the state for 24 years, we got rid of it in six hours."[94] The administration has also filed suits in other states seeking to invalidate other states' similar laws.[95]
    - While notice to states and local governments before DOJ files a suit is normal (and is memorialized in the Justice Manual[96]), the coordinated strategy to achieve a political

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[89] HB 1403, 77th R.S., 2001, Texas Education Code §§ 54.051(m) and 54.052(a).

[90] S.E. Jenkins, *Texas Agrees to End In-State Tuition for Undocumented Immigrants After DOJ Lawsuit Filed Against the State*, CBS NEWS (June 5, 2025), https://www.cbsnews.com/texas/news/doj-lawsuit-texas-in-state-tuition-undocumented/ [https://perma.cc/SP9Q-JBJE]; *see also* American Immigration Council, *Texas Dream Act Survives—Because Texans Showed Up* (May 30, 2025), https://www.americanimmigrationcouncil.org/blog/texas-dream-act-undocumented-students-legislation/ [https://perma.cc/6WW7-PYNP] (noting that lawmakers had filed nine bills in the 89th Texas legislative session to repeal the law, but none passed).

[91] Complaint, United States v. Texas, No. 7:25-cv-00055-O (N.D. Tex. June 4, 2025), https://www.justice.gov/opa/media/1402576/dl.

[92] Joint Motion for Entry of Consent Judgment, United States v. Texas, No. 7:25-cv-00055-O (N.D. Tex. June 4, 2025), https://www.texasattorneygeneral.gov/sites/default/files/images/press/Joint%20Motion%20for%20Entry%20of%20Consent%20Judgment.pdf.

[93] Order and Final Judgment, United States v. Texas, No. 7:25-cv-00055-O (N.D. Tex. June 4, 2025), https://www.texasattorneygeneral.gov/sites/default/files/images/press/In%20State%20Tuition%20Final%20Judgment.pdf.

[94] Ryan J. Reilly, *DOJ Coordinated with Texas AG to Kill Texas Dream Act, Trump Official Says*, NBC NEWS (June 26, 2025), https://www.nbcnews.com/politics/justice-department/doj-coordinated-texas-ag-kill-texas-dream-act-trump-official-says-rcna214871 [https://perma.cc/AED4-Q8M6]; *see also* Eleanor Klibanoff, *Texas' Swift Surrender to DOJ on Undocumented Student Tuition Raises Questions about State-Federal Collusion*, TEXAS TRIBUNE (June 9, 2025), https://www.texastribune.org/2025/06/09/texas-doj-undocumented-tuition-courts-friendly-lawsuit-paxton/[https://perma.cc/Y3FH-BD63] (quoting professor Ilya Somin regarding what "seems" like "collusion" between the parties).

[95] For example, DOJ filed a suit regarding a similar state law in Oklahoma; as in the Texas case, on the same day the case was filed, the state and United States filed a joint motion to entry of consent judgment, with the state acquiescing to the government's suit. *See* Motion, United States v. Oklahoma, No. 6:25-cv-00265-RAW (Aug. 5, 2025), https://oklahoma.gov/content/dam/ok/en/oag/news-documents/2025/august/Motion%20for%20Consent%20Judgment.pdf. After DOJ filed a similar suit against Minnesota, that state defended its law; a court dismissed the United States' suit in March 2026. United States v. Walz, No. 25-cv-02668-KMM-DTS, 2026 WL 851231 (D. Minn. Mar. 27, 2026).

[96] Justice Manual § 1-10.100, https://www.justice.gov/jm/jm-1-10000-litigation-against-state-governments-relations-client-agencies [https://perma.cc/PN95-CSMH].

objective that Texas's legislature had rejected does not appear to fit the norm that settlements be apolitical and not be used as a coordinated policymaking strategy. One legal commenter observed that this goes beyond the sue and settle examples that have been criticized in the past, as this pre-arranged settlement "basically erase[s] a state law from the books."[97] Where a government declines to defend its own law or rule, there may be intervenor parties who step in to do so. But the Texas court denied a nonprofit organization's motion to intervene to contest the consent decree and defend the state law, holding that the group's intervention would be futile because its legal argument was incorrect.[98] The group has now filed an appeal, arguing that they should have had a full opportunity to defend the law.[99]

- **IRS attempts to lock in new legal interpretation through consent decree**: The Johnson Amendment is a 1954 law that prohibits nonprofit organizations, including religious institutions, from participating in political campaigns. The IRS has traditionally not enforced the law against religious institutions for speech about politics made in worship services; Congress has considered bills that would have codified this practice, but none have passed. In 2024, two churches and other groups sued the IRS, alleging that the law unconstitutionally restricts their First Amendment rights. In December 2024, IRS argued that the churches' case should be dismissed for lack of jurisdiction and otherwise not presenting a claim the court could consider.[100] But in July 2025, IRS joined the plaintiff groups in asking the court to enter a consent judgment under which the IRS would adopt an interpretation of the Johnson Amendment that would not reach speech within houses of worship. The agreement would prevent the government defendant entities "as well as their successors . . . from enforcing the Johnson Amendment against" the plaintiff churches and asserts that the "best reading of the Johnson Amendment" is one that does not address political speech during worship services.[101] Amici weighed in, disputing the court's jurisdiction, the reasonableness of the legal interpretation it would adopt, and the validity of using a judicial order to bind the government to the new interpretation.[102] The district court did not approve the consent judgment because in March 2026 it determined that it lacked jurisdiction over the case.[103]
  - Although the IRS has generally not enforced the Johnson Amendment against religious institutions for speech about politics made in worship services, the consent decree can be understood as an attempt to bind future administrations to a

[97] Klibanoff, *supra* note 94 (quoting Steve Vladeck). As Vladeck noted, the government also appears to have strategically selected a friendly single-judge district in which to file its case.

[98] Order, United States v. Texas, No. 7:25-cv-00055-O (N.D. Tex. Aug. 16, 2025).

[99] Opening Brief of Appellants La Unión del Pueblo Entero, Austin Community College, and Oscar Silva, United States v. Texas, No. 25-10898 (5th Cir. Sept. 29, 2025).

[100] Motion to Dismiss, National Religious Broadcasters v. Long, No. 6-24-cv-00311 (E.D. Tex. Dec. 23, 2024).

[101] Joint Motion for Entry of Consent Judgment, National Religious Broadcasters v. Long, No. 6-24-cv-00311 (E.D. Tex. July 7, 2025).

[102] *See* Brief of *Amicus Curiae* Americans United for Separation of Church and State, National Religious Broadcasters v. Long, No. 6-24-cv-00311 (E.D. Tex. July 25, 2025).

[103] Opinion and Order, National Religious Broadcasters v. Bessent, No. 6:24-cv-00311, 2026 WL 884020 (E.D. Tex. Mar. 31, 2026).

> particular interpretation of the law: that such speech is legal and a contrary interpretation is unconstitutional. The consent judgment would have achieved a policy goal of the administration that it had not been able to achieve through legislation.[104] In that way, it also attempted to provide relief to parties not in the lawsuit at hand — which is in tension with the norm that settlements match the dispute — by committing the IRS to a particular interpretation across the board, not simply to the two churches that had sued.

Taken together, these examples reflect a pattern of an administration willing to use litigation and settlement as instruments of policy, unconstrained by the norms and procedures that have historically governed DOJ's conduct.

Concerns for environmental law: a hollowed-out workforce, eroding norms, politicized processes, and an administration testing limits

As the above examples show, deviations from norms around political insulation, settlement, and changes in position are already touching environmental law. Several additional factors suggest reason to expect continuing norm erosion in this area.

Dramatic reductions in the numbers of career staff at ENRD — and at its client agencies — will likely reduce the force of norms and remove institutional checks that have slowed or stymied improper political influence.[105] Mass departures of long-tenured attorneys cause the loss of long-term memory about the institution's norms and the consequences of their erosion.[106] This loss cannot be rectified through new hiring. Meanwhile, morale is low, and remaining career staff who have institutional memory and ingrained norms are stretched thin.[107] And if a case is handled primarily by political appointees or allies at DOJ, there may be fewer (or no) career attorneys drafting a recommendation regarding settlement for consideration by appointed DOJ officials. More generally, while the Justice Manual remains in force, it is not enforceable, and its function and effectiveness as guidance depend on leadership that emphasizes its importance.

Concerns about politicization regarding settlement also extend to agencies. For example, a December 2025 memo by EPA's then-Acting Assistant Administrator Craig Pritzlaff requires the political head of enforcement at EPA to approve any settlements containing mitigation, third-party

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[104] Exec. Order No. 21,675, 82 Fed. Reg. 21675, 21675 (May 4, 2017).

[105] Pamela King, *Staff Exodus, Case Gridlock: DOJ Environment Division Under Trump 2.0*, E&E NEWS (Feb. 3, 2026), https://www.eenews.net/articles/staff-exodus-case-gridlock-doj-environment-division-under-trump-2-0/ [https://perma.cc/E2CG-QTXL]; Marianne Lavelle & Peter Aldhous, *EPA Hits 40-Year Lows in Staffing After Trump Targets Its Public Health Experts*, INSIDE CLIMATE NEWS (Mar. 6, 2026), https://insideclimatenews.org/news/06032026/trump-epa-staffing-lows/ [https://perma.cc/W5MB-MQ53].

[106] *Cf.* Justice Connection, *By the Numbers: The Quiet Collapse of Justice* (Apr. 7, 2026) (analyzing data on the average tenure of departing DOJ staff and leadership), https://justiceconnection.substack.com/p/by-the-numbers-the-quiet-collapse?utm_source=publication-search [https://perma.cc/3YN9-MVD9].

[107] King, *supra* note 105; Kevin Bogardus, *Survey Finds Feds' 'Morale is as Low as Imaginable,'* E&E NEWS (Mar. 20, 2026), https://www.eenews.net/articles/survey-finds-feds-morale-is-as-low-as-imaginable/ [https://perma.cc/SP3B-JGVE].

audits, advanced monitoring, or stipulated remedies.[108] Centralizing enforcement and settlement decisions could allow the administration to rapidly and broadly deploy its industry-friendly approach.[109]

While some settlement or enforcement decisions may function as one-offs, others have troublingly broader consequences. As the above immigration-related consent decree example indicates, this administration is open to acting in defiance of DOJ policy that bars settlements that bind future administrations. This approach is also consistent with the administration's strategy more generally to adopt — and have endorsed by courts — new interpretations of the law that would bind future administrations. In several instances already the administration has cited *Loper Bright v. Raimondo*, which eliminated deference to agency interpretations of ambiguous statutory language, to argue that its new interpretation of a statute (often one that limits an agency's power) is the only permissible interpretation.[110] As EELP explained in its analysis of EPA's endangerment finding withdrawal, this tactic, if accepted by courts, would prevent a future administration from taking a different approach.[111]

More generally, the administration has embraced a wide variety of tactics to circumvent notice-and-comment rulemaking — for example by claiming that public notice and opportunity to comment is unnecessary,[112] by urging that where the administration makes a new legal interpretation no process is required,[113] and by taking a novel view of the scope of the Congressional Review Act, submitting to

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108 Craig J. Pritzlaff, Memorandum: Reinforcing a "Compliance First" Orientation for Compliance Assurance and Civil Enforcement Activities, EPA Office of Enforcement and Compliance Assurance (Dec. 5, 2025), https://www.epa.gov/system/files/documents/2025-12/reinforcing-a-compliance-first-orientation-for-compliance-assurance-and-civil-enforcement-activities.pdf [https://perma.cc/PG67-VKHZ],

109 *Cf.* Letter from Attorneys General of New York, Massachusetts, Washington, California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, Oregon, Rhode Island, and Vermont to Lee Zeldin (Mar. 18, 2026), https://agportal-s3bucket.s3.us-west-2.amazonaws.com/Environmental%20Protection%20Division/3%2018%2026%20letter%20to%20EPA%20administrator.pdf?VersionId=jP4NS7RxRPwRs8XdqyLlXmDBJiMicCTV [https://perma.cc/FN6K-LYEE].

110 *See, e.g.,* Erika Kranz, Carrie Jenks & Sara Dewey, *Eliminating the Foundation: Vulnerabilities in and Implications of EPA's Endangerment Finding Rescission*, Environmental & Energy Law Program, at 10–11 (Mar. 2, 2026), https://eelp.law.harvard.edu/wp-content/uploads/2026/03/Eliminating-the-Foundation-Vulnerabilities-in-and-Implications-of-EPAs-Endangerment-Finding-Rescission.pdf [https://perma.cc/AJK8-KARU] (explaining EPA's reliance on *Loper* for its new assertion that it lacks authority to regulate greenhouse gas emissions from vehicles); Carrie Jenks, Sara Dewey & Ari Peskoe, *Trump's Administration's Aggressive Anti-Regulatory, Pro-Fossil Fuel Directives*, Environmental & Energy Law Program, at 3 (April 2025), https://eelp.law.harvard.edu/wp-content/uploads/2025/05/Trump-EOs-Summary-April-2025.pdf [https://perma.cc/UV3F-GXK5] (highlighting how the administration has used *Loper* as part of its justification for rolling back the definition of "harm" in the Endangered Species Act). The administration has also argued, citing *Loper*, that when it has adopted a new "best" interpretation of a statute, that it need not use an otherwise-required rulemaking process to rescind regulations in conflict with its new reading. *See* Jack Jones, Chris Mykrantz & Max Sarinsky, *Preventing Public Participation* (April 2025), https://policyintegrity.org/files/publications/Good_Cause_Policy_Brief_vF_A.pdf [https://perma.cc/UMV4-3SW9].

111 Kranz, Jenks & Dewey, *supra* note 110, at 10.

112 *See, e.g.,* Maintaining Acceptable Water Pressure in Showerheads, Exec. Order 14,264 (Apr. 9, 2025).

113 Office of Management and Budget, *Office of Information and Regulatory Affairs, Memorandum: Guidance Implementing the President's Memorandum Directing the Repeal of Unlawful Regulations*, M-25-28 (May 7,

Congress for review (and eventual veto) rules not previously thought to be reviewable.[114] And the administration has deployed emergency powers in ways not previously understood as legal, has taken a broad view of executive authority, and has triggered special exceptions in statutes never used before.[115]

This broader picture is the backdrop to the administration's efforts to inject political and policy preferences into settlements, to bind future administrations, and to achieve through settlement what it cannot or prefers not to do through administrative or legislative processes. Each has real consequences: when the administration achieves a policy outcome via settlement, it circumvents an administrative process that would have invited comments from interested stakeholders or a legislative process where lawmakers have democratic accountability. When the administration locks in a legal interpretation or binds future administrations to a particular policy, it attempts to impose its preferences, regardless of democratic will. And as DOJ acts in ways that are incompatible with the norms that have made it a trusted institution, courts may find reason to distrust the Department more generally, including questioning whether it has engaged in a thorough process when it changes positions or whether its proposed settlements are fair to parties not in court.[116] The full weight of this loss of institutional trust is unlikely to be regained quickly, even if the next administration commits to a return to norms discussed here.

As the administration continues to push past norms, in the environmental context, we may see:

- Affirmative lawsuits against and quick settlements with politically aligned states to achieve policy changes in those states
- Changes in position in pending lawsuits, with the government switching sides and urging courts to vacate rules or decisions it had previously defended — as we have seen with the $PM_{2.5}$ and climate disclosure litigation — attempting to accomplish via judicial decision what should only occur via rulemaking (or other required) process

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2025), https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-28-Guidance-Implementing-the-Presidents-Memorandum-Directing-the-Repeal-of-Unlawful-Regulations.pdf [https://perma.cc/U3DC-VJ22].

[114] Sarah Hart-Curran, *The Congressional Review Act in 2025: Expanding Use and Emerging Questions*, Environmental & Energy Law Program (Feb. 5, 2026), https://eelp.law.harvard.edu/wp-content/uploads/2026/02/Congressional-Review-Act.pdf [https://perma.cc/2547-HKQZ].

[115] *See* Erika Kranz, *Endangered Species Committee Exempts Oil and Gas Activities in the Gulf Based on National Security Finding*, Environmental & Energy Law Program (Apr. 3, 2026), https://eelp.law.harvard.edu/endangered-species-committee-exempts-oil-and-gas-activities-in-the-gulf-based-on-national-security-finding/ [https://perma.cc/GWT6-G5B3]; Erika Kranz, *One Year of Trump's 'Energy Emergency' in Context and in Court*, Environmental & Energy Law Program (Jan. 21, 2026), https://eelp.law.harvard.edu/wp-content/uploads/2026/01/One-Year-of-Trumps-Energy-Emergency-in-Context-and-in-Court.pdf [https://perma.cc/W32J-GZ68]; Kendall McPhearson, *The Limits of Deference: Judicial Review of Pretextual National Security Rationales*, Environmental & Energy Law Program (May 11, 2026), https://eelp.law.harvard.edu/wp-content/uploads/2026/05/Judicial-Review-of-Pretextual-National-Security-Rationales.pdf [https://perma.cc/3KZE-LNCL].

[116] For more analysis on how courts may approach this distrust, *see* Erika Kranz, *When Government Gets It Right: A Framework for Assessing When Agencies Deserve a Presumption of Regularity*, Environmental & Energy Law Program (Apr. 3, 2026), https://eelp.law.harvard.edu/wp-content/uploads/2025/07/When-Government-Gets-it-Right-Presumption-Regularity.pdf [https://perma.cc/VKM5-5R5A].

- Decisions to drop enforcement actions that the current administration deems are based on inappropriate factors, such as environmental justice[117]
- Settlements that go beyond the case at hand, either by incorporating novel remedies — as in the TotalEnergies agreement — or by requiring the government to adopt new legal interpretations even regarding parties not part of the lawsuit
- Efforts to prevent intervenors or other third parties from weighing in to prevent such settlements or to defend government policies when the government has decided no longer to defend them
- Government intervention in citizen suits as means to steer those cases toward a negotiated settlement[118]
- Litigation strategies that take advantage of openings created by aligned states or groups[119]

Intervention is a powerful, though imperfect, tool for resisting these types of efforts. Where groups have intervened or participated as amici, they have, at times, seen success in defending agency rules, pushing for administrative process where the government seeks to avoid it, and encouraging courts to take the interests of third parties into account. Intervenors can remind courts of their own duty to ensure consent decrees are in the public interest and to not enter government-sought remedies without probing whether those remedies are valid; amici can contest courts' jurisdiction if the parties are so aligned as to not meet Article III's case or controversy requirement.[120] Some

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[117] For instance, in March 2025, the Trump administration announced that it was dropping a lawsuit against a Louisiana petrochemical plant brought under the Biden administration. EPA sued Denka in 2023, arguing that chloroprene emissions from its plant posed an unacceptable cancer risk to the nearby majority-Black community overburdened by pollution. *See* Michael Phillis & Matthew Daly, *US Sues Chemical Company Over Cancer Risk to Minority Area*, AP News (Feb. 28, 2023), https://apnews.com/article/epa-chloroprene-cancer-lawsuit-louisiana-1a57d0402a144bfa4da5d939b34ae6ea [https://perma.cc/D26L-RG9D]. The Trump administration stated that the suit was an example of "ideological overreach" and "racial preferencing" because of its environmental justice basis. Press Release, Justice Department Dismisses Suit Against Denka, Delivering on President Trump's Mandate to End Radical DEI Programs, (Mar. 7, 2025) https://www.justice.gov/opa/pr/justice-department-dismisses-suit-against-denka-delivering-president-trumps-mandate-end [https://perma.cc/JMR7-UKKH].

[118] A possible example is pending now. In April 2026, the NAACP filed a citizen suit against X.AI, alleging that the company is violating the Clean Air Act by running unpermitted gas turbines to power a data center in Mississippi. Complaint, NAACP v. X.AI, No. 3:26-cv-00074-DMB-JMV (N.D. Miss. Apr. 14, 2026). In May 2026, the United States filed a notice in the case stating that it was "evaluating this suit for possible intervention or amicus participation," and that the lawsuit concerns the United States' "substantial interest" in "global AI dominance." Notice, No. 3:26-cv-00074-DMB-JMV (N.D. Miss. May 13, 2026). Intervention could allow the government to steer the litigation toward a negotiated resolution; this case is particularly worth watching because of the close relationship between Elon Musk and the administration.

[119] The United States' unusual brief in support of Supreme Court review in a climate-related tort case falls into this category. After fossil fuel companies filed a petition for certiorari in August 2025, the United States quickly took the opportunity to encourage the Court to hear the case and adopt the government's new view that such tort cases are unlawful. *See* Erika Kranz, *Suncor Energy v. Boulder County: The United States Urges the Supreme Court to Stop Climate Suits While EPA Questions Authority to Regulate Emissions*, Environmental & Energy Law Program (Oct. 2025), https://eelp.law.harvard.edu/wp-content/uploads/2025/10/Boulder-and-endangerment-finding.pdf [https://perma.cc/Y8LM-XBQK]. The quick timing of the United States' filing suggests possible coordination with the petitioners.

[120] For example, the amicus filings in the Trumps' suit against the IRS helped inform the court's subsequent probe into jurisdictional questions and potential collusion. *See* Brief of Amici Curiae Former Government Officials and Public Interest Organizations, No. 1:26-cv-20609 (S.D. Fla. Feb. 5, 2026) (motion to file granted

settlements will provide no opportunity for intervention or even amicus participation. In those instances, Congressional oversight may be effective; recent examples of oversight suggest that legislators are interested in this issue.[121]

More fundamentally, the Justice Manual and policy memos may prove to be insufficient to restrain an administration that does not intend to follow established norms. A future administration seeking to reinstate such norms may need to consider if there are more durable approaches, including by adopting rules that make important parts of the Justice Manual legally binding. Likewise, efforts may emerge to urge Congress to evaluate whether any aspects of the Meese and Moss memos should be required through legislation that enables an enforcement mechanism.

EELP will continue to note and analyze deviations from settlement-related norms in environmental cases. You can stay updated on our Administrative Law page.

on Feb. 27, 2026); Brief of *Amici Curiae* Citizens for Responsibility and Ethics in Washington and Public Citizen, No. 1:26-cv-20609 (S.D. Fla. Feb. 12, 2026) (motion to file granted on Feb. 27, 2026). And the motion by non-party former federal judges led the court to reopen the case. *See supra* notes 87 & 88. See *also* Democracy Forward Foundation, *supra* note 50 (for a discussion of intervention and amicus considerations and example filings).

[121] *See, e.g. supra* note 71 (regarding Congressional interest in the TotalEnergies settlement); *see also* To Prohibit the Use of Federal Funds for the Payment of Claims Submitted to the Anti-Weaponization Fund, H.R. 8955, 119th Cong. (introduced in the House May 21, 2026), https://www.congress.gov/bill/119th-congress/house-bill/8955/all-actions./