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In Search of the Presumption of Regularity

Aram A. Gavoor
George Washington University Law School

Steven Platt

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IN SEARCH OF THE PRESUMPTION OF REGULARITY

Aram A. Gavoor† & *Steven A. Platt*‡

Abstract

The presumption of regularity is an imprecise principle that federal courts apply in varying ways to presume federal officers and employees lawfully and consistently discharge their official duties. The presumption gained national significance during the Trump Administration in several key cases in which it was implicated, but the contours of the presumption were never described by the Supreme Court of the United States. While literature and judicial opinions have invoked the presumption, there has been sparse scholarly accounting for its contours, value, and legitimacy. This Article is the first to trace the contemporary domain of the presumption and its applications from its pre–Founding Era source. This Article finds that because of the Supreme Court's failure to squarely articulate the presumption and its limiting principles, courts have applied it in at least fourteen distinct ways. This Article also argues that the presumption of regularity is inaccurately conflated with the presumption of good faith and that several aspects of its modern uses violate separation of powers principles and the Administrative Procedure Act of 1946. This Article concludes by making the case that the Supreme Court or Congress should articulate a lawful, historically supported, and sensible doctrinal standard for the presumption of regularity to benefit each of the branches of the federal government and the American public.

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† Associate Dean for Academic Affairs and Professorial Lecturer in Law, The George Washington University Law School. The authors thank David Byerley for his research assistance and Dick Pierce, Alan Rozenshtein, Philip Hamburger, Aaron Nielson, David Rubinstein, Ted Hirt, Kati Kovacs, and Paul Verkuil for their helpful comments.

‡ Professorial Lecturer in Law, The George Washington University Law School.

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INTRODUCTION

The presumption of regularity is (usually) a deferential principle that courts apply to presume executive branch officers and employees are lawfully and consistently discharging their duties. The presumption of regularity usually favors the government, though not when the government deviates from its established norms or processes. Although the presumption has a venerable ancestry predating the Founding, its contemporary application has branched broadly from its historical fundament. Notwithstanding, its precise contours defy authoritative

summary. The presumption is elastic. Courts have stretched the principle from a presumption that an agency has compiled a complete administrative record to a presumption that a public official has the authority to act. Yet courts rarely, if ever, explain how they are using the presumption—or even whether they are applying the presumption per se, as a general governmental deference doctrine, or as the default rule that a preponderance of the evidence is needed to prevail in a civil case against the government.

Amid the Trump Administration, scholarly and commentator attention turned to the presumption.[1] Some argued that the presumption took on a new complexion during the Trump Administration and that its officials permanently decreased the deference ordinarily due to them.[2] The Biden Administration has enunciated its view of the presumption, concluding that congressional subpoenas must be presumed valid and within Congress's authority to issue.[3] This directly contradicts the Trump Administration's view on the issue.[4] Despite the presumption's deceptively high search returns on Westlaw,[5] it is a largely under-researched concept. At least one scholar noted her longstanding view that the Supreme Court has long neglected "the shaky foundations of the modern presumption of regularity."[6]

1. *See, e.g.*, Alan Z. Rozenshtein, *Another Blow to the Presumption of Regularity*, LAWFARE (Mar. 10, 2020, 1:47 PM), https://www.lawfareblog.com/another-blow-presumption-regularity [https://perma.cc/XVV2-CV33]; Benjamin Wittes & Quinta Jurecic, *What Happens When We Don't Believe the President's Oath?*, LAWFARE (Mar. 3, 2017, 12:30 PM), https://www.lawfareblog.com/what-happens-when-we-dont-believe-presidents-oath [https://perma.cc/AJM7-ANVZ]; Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publian Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 CHAP. L. REV. 133, 174 (2018) ("[T]he lack of deference to presidential authority that persons outside of Congress have demonstrated in Trump's first year seems unprecedented."); Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2131–32 (2018) [hereinafter Presumption in Exec. Branch].

2. *See, e.g.*, Dawn Johnsen, *Judicial Deference to President Trump*, TAKE CARE (May 8, 2017), https://takecareblog.com/blog/judicial-deference-to-president-trump [https://perma.cc/7EQ4-FW4D].

3. Ways & Means Comm.'s Request for the Former President's Tax Returns & Related Tax Info. Pursuant to 26 U.S.C. S 6103(f)(1*)*, 2021 WL 3418600, at *13–14, *16 (Op. O.L.C. July 30, 2021).

4. *Oversight and Executive Privilege in the Context of Separated Powers: Hearing on "Breaking the Logjam: Principles and Practice of Congressional Oversight and Executive Privilege" Before Subcomm. on Fed. Cts., Oversight, Agency Action, & Fed. Rts. & U.S. S. Comm. on the Judiciary*, 117th Cong. 14 (2021) (statement of Jennifer L. Mascott) (citing Cong. Comm.'s Request for the President's Tax Returns Under 26 U.S.C. § 6103(f), 2019 WL 2563046, at *8–9, *14–15 (Op. O.L.C. June 13, 2019)).

5. *See infra* Part III.

6. Carissa Byrne Hessick, *A Bit of History on the Presumption of Regularity*, PRAWFSBLAWG (Jan. 14, 2019, 7:06 AM), https://prawfsblawg.blogs.com/prawfsblawg/2019/01/a-bit-of-history-on-the-presumption-of-regularity.html [https://perma.cc/Z99R-MJQ8].

This Article delves deeply into the presumption of regularity and endeavors to reveal what, exactly, the contemporary domain of the principle is, and whether that is desirable and consistent with the Administrative Procedure Act of 1946 (APA) and Constitution. Part I traces the evolution of the presumption from the King's Bench through World War II, demonstrating a broadening of the presumption's scope as the Supreme Court determined how to respond to the flourishment of the administrative state. Part I pauses in the interbellum of the World Wars to examine a 1926 Supreme Court case generally viewed as the progenitor of the modern presumption of regularity, *United States v. Chemical Foundation, Inc.*[7] Part II concludes that *Chemical Foundation* is not particularly special in the pantheon of presumption of regularity cases and was essentially a routine application with unfortunately broad dicta. Part III explains how courts use and view the presumption in the present day. This Article develops a methodology for counting the invocations and applications of the presumption in federal court and finds a mixed efficacy. This part concludes that the presumption has proliferated in the courts to carry at least fifteen unique uses, each with its own definitional variation. This Article assesses several uses of the presumption, which have quietly developed without rigorous analysis by the Supreme Court. These uses are complemented with an empirical snapshot finding that challengers in federal court have had mixed success in rebutting the presumption.

Part IV criticizes some of the uses of the presumption in its current form because they stray from common law without justification, are superfluous to portions of the APA compliance, and defy constitutional respect for the executive branch and the oaths taken by its officers. This Article observes that the APA does not abide by the modern application of the presumption, and the modern application of the presumption is mostly undesirable due to its unbounded limits. This Article concludes that the presumption, especially as originally used by courts at the time of the Founding, is desirable and should be retained in a limited fashion. The Supreme Court or Congress should enumerate the domain of the presumption of regularity instead of drawing from imprecise and capacious dicta. In particular, the Court should squarely establish that only a preponderance of the evidence is required to rebut the presumption and not a showing of "clear and convincing evidence," which has been suggested in cases that did not squarely confront the question. The application of these limiting principles would undergird the presumption's protection of the executive branch's predominantly faithful officers and employees while curbing executive overreach by permitting challengers to overcome the presumption in appropriate cases.

7. 272 U.S. 1 (1926).

I. THE ORIGINAL PRESUMPTION OF REGULARITY

The presumption's scope is amorphous and generally undiscussed by the courts, leading one circuit court to conclude that it is "often-invoked, but never satisfactorily explained."[8] It is not a singular evidentiary or proof rule, but rather an array of quasi-doctrinal deference principles that heavily weigh in favor of the government in administrative law litigation. These deference principles occasionally arise in litigation before the judicial branch as well as inter-branch disagreements between the executive branch and Congress. The Supreme Court has described it as "less a rule of evidence than a general working principle."[9] The presumption's prototype arose in the English common law but took root with some modifications in the American republic over the ensuing centuries.

A. *The Common Sense Basis for the Presumption*

The presumption flows from the "common experience"[10] that administrative agencies generally act lawfully and in the best interest of the public.[11] In application, the presumption is largely consistent with "the prosaic notion" that government officials tell "the truth about why [they have] taken specific actions[;]"[12] "have properly discharged their official duties[;]"[13] have "acted with proper motives[;]" and are generally truthful, ethical, and professional.[14] Only when a person aggrieved by these officials sues and makes a "meaningful evidentiary showing" casting doubt on their official acts will the presumption be rebutted, and a court will inquire as to whether the official duties were soundly discharged by the government.[15] By giving the government such credit, the presumption of regularity "narrows judicial scrutiny and widens

8. Tecom, Inc. v. United States, 66 Fed. Cl. 736, 757 (2005).

9. Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 174 (2004); *see also* Conley v. United States, 5 F.4th 781, 791 (7th Cir. 2021) ("The presumption of regularity is an analytic tool, not an excuse to rubberstamp any and all executive action as lawful absent clear evidence to the contrary.").

10. Stone v. Stone, 136 F.2d 761, 763 (D.C. Cir. 1943); *accord* Latif v. Obama, 677 F.3d 1175, 1204 (D.C. Cir. 2011) (Henderson, J., concurring).

11. Daniel B. Rodriguez, *Whither the Neutral Agency? Rethinking Bias in Regulatory Administration*, 69 BUFF. L. REV. 375, 376–77 (2021).

12. Steve Vladeck (@steve_vladeck), TWITTER (July 23, 2020), https://twitter.com/steve_vladeck/status/1286441898757042177 [http://web.archive.org/web/20210315212600/https://twitter.com/steve_vladeck/status/1286441898757042177].

13. United States v. Chem. Found., Inc., 272 U.S. 1, 15 (1926); *accord* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 33 (1827) (Story, J.) ("Every public officer is presumed to act in obedience to his duty until the contrary is shown . . . . It is not necessary to aver, that the act which he may rightfully do, was so done.").

14. Rozenshtein, *supra* note 1.

15. Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 174–75 (2004).

executive discretion over decisionmaking processes and outcomes."[16] Even today, courts are imprecise on the domain of the presumption of regularity. This classification uncertainty is exacerbated by the fact that the Supreme Court has not comprehensively set out the presumption's contours.

B. *The Common Law and Founding Era Use of the Presumption*

The concept finds roots in legal Latin: *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. This maxim is often shortened (when not metonymized as the presumption of regularity) to *omnia praesumuntur rite et sollemniter esse acta*. This phrase means, "All things are presumed to have been done regularly and with due formality until the contrary is proven."[17] Originally manifested in English common law, cases from the Court of King's Bench decreed that "the presumption, that every man has conformed to the law, shall stand till something shall appear to shake that presumption."[18] A typical case was *Rex v. Gordon*,[19] a 1789 criminal case where the prosecutor had to prove that the decedent, the parish constable, was killed "in the due execution of" his public office.[20] The court held that "it was not incumbent on the prosecutors to prove that [the decedent was the parish constable], by [showing] that he had been duly elected into the office."[21] It sufficed for witnesses to have testified that the decedent "was generally known as Constable of the parish."[22] In so doing, the King's Bench applied, with no fanfare, the presumption of regularity.

Courts in the newly independent United States, including the Supreme Court, cited these cases and the presumption of regularity with approval.[23] "It is general principle," the Court opined in an 1816 land dispute case, "to presume that public officers act correctly until the contrary be shown."[24] The Court would also duly apply the presumption

16. Presumption in Exec. Branch, *supra* note 1, at 2432.

17. *Omnia Praesumuntur Rite Et Solemniter Esse Acta Donec Probetur in Contrarium*, BLACK'S L. DICTIONARY (11th ed. 2019); *see also* Aram A. Gavoor & Steven A. Platt, *A History, Taxonomy and Qualified Defense of the Presumption of Regularity*, LAWFARE (Oct. 6, 2021, 10:53 AM), https://www.lawfareblog.com/history-taxonomy-and-qualified-defense-presumption-regularity [https://perma.cc/6WVH-DRJ2].

18. R v. Hawkins, 10 Eng. Rep. 210, 216 (K.B. 1808).

19. 168 E.R. 359 (K.B. 1789).

20. *Id.* at 360.

21. *Id.* at 361.

22. *Id.*

23. *See, e.g.*, Bank of U.S. v. Dandridge, 25 U.S. 64, 69–70 (1827) (Story, J.).

24. Ross v. Reed, 14 U.S. 482, 486–87 (1816) (referring to public officials, a land surveyor, and commissioner issuing a grant); *see also, e.g.*, Jackson ex rel. Sternberg v. Shaffer, 11 Johns. 513, 517 (N.Y. Sup. Ct. 1814) (presuming that the plaintiff's title to the land was void because

to "presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done."[25]

Founding Era courts did not confine the presumption to agencies or even to executive acts of the government. The Supreme Court applied the presumption to credit judicial proceedings with frequency.[26] In the mid-nineteenth century, the Court extended the presumption to private corporations in the same ministerial context enjoyed by government actors: "Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business."[27]

Though the presumption's beneficiaries were broad, courts applied it narrowly and predominantly to bridge gaps in evidence regarding technicalities.[28] The Supreme Court has presumed regularity in the service of subpoenas.[29] It has presumed the correctness of a commissioner's claim for per diem compensation.[30] It has presumed the validity of patents granted by the government even absent any facial recitals that the statutory requisites for issuance were met.[31] Finally, the Court has presumed that a statute, which required presidential

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there was no showing of levy by the sheriff); Hardy v. Harbin, 11 F. Cas. 510, 515 (C.C. N.D. Cal. 1865) ("Authorities are cited to show that presumptions of regularity are to be made in favor of public officers."); Whitcomb v. Spring Valley Coal Co., 47 F. 652, 656 (C.C. N.D. Ill. 1891) (using the presumption to support the decision of commissioner of patents and requiring the defendant to submit proof to the contrary).

25. *Dandridge*, 25 U.S. at 70.

26. Turner v. Bank of N. Am., 4 U.S. 8, 11 (1799) (emphasis added) ("A Circuit Court, though an *inferior* Court . . . [is] entitled to as liberal intendment[] or presumption[].").

27. R.R. Co. v. Howard, 74 U.S. 392, 412–13 (1868) (rejecting a claim that a railroad company lacked authority to guarantee a payment); *accord* Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. Rankin, 241 U.S. 319, 327 (1916); Brief for Executive Branch Officials as Amici Curiae Executive Branch Officials in Support of Respondents, Donald J. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (Nos. 16-1436 & 16-1540), at 6 (citing Herbert Broom, *A Selection of Legal Maxims* 579 (3d ed. 1852) ("The presumption . . . applies also to the acts of private individuals.")).

28. Brief for Executive Branch Officials, *supra* note 27.

29. Schell's Ex'rs v. Fauchè, 138 U.S. 562, 565 (1891) (applying the presumption where subpoenas laid dormant for an extended period of time); *see* R v. Gordon, 168 E.R. 359, 360 (considering deferring service of a warrant).

30. United States v. Jones, 134 U.S. 483, 488 (1890) ("The approval of a commissioner's account by a circuit court of the United States, under the act of February 22, 1875, 18 Stat. 333, is *prima facie* evidence of the correctness of the items of that account; and, in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive."); *accord* United States v. Nix, 189 U.S. 199, 205–06 (1903) (similar).

31. Phila. & T. R. Co. v. Stimpson, 39 U.S. 448, 458 (1840).

authorization for the Attorney General to effect a property seizure, was satisfied when the property was seized by a marshal on a district attorney's orders that included instructions that the Attorney General had ordered the seizure "by virtue of the act of Congress [at issue]."[32]

This history evidences a mostly "modest role" for the presumption, in which its "original purpose was to fill minor gaps in proof relating to formalities or procedural technicalities, especially where circumstantial evidence supported the inference the Government proceeded properly."[33] But the pre-1926 cases show that courts were not simply applying the presumption to highly technical matters that could have been easily proven. For instance, in facing an act of Congress requiring a customs collector to seize and detain any vessel he or she believed intended to violate or evade an embargo law, the Court held that it had to presume that the officer truly held that belief.[34] The Court observed, "The law places a confidence in the opinion of the officer, and he is bound to act according to his opinion; and when he honestly exercises it, as he must do in the execution of his duty, he cannot be punished for it."[35] This exemplifies the Court pushing the boundaries of the historical presumption. In all cases, at least, some sort of evidence from the challenger was required to rebut the presumption.[36]

C. *The Supreme Court's Widely Cited Presumption Case,* Chemical Foundation

The Supreme Court offered an initial marker in 1926 in *United States v. Chemical Foundation*.[37] Frank Polk, Counselor of the Department of State, ordered the purchase of confiscated foreign property on behalf of the United States. In litigation, the government claimed that the sales were invalid because they were "induced by misrepresentation and were made without knowledge of the material facts."[38] The Supreme Court upheld the finding of the Delaware federal district court, which found no misrepresentation, fraud, or conspiracy.[39] As to the contention that Polk acted without knowledge of the material facts, the Supreme Court ruled that

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32. The Confiscation Cases, 87 U.S. 92, 93, 108 (1873).

33. Brief for Executive Branch Officials, *supra* note 27, at 4, 10.

34. Crowell v. McFadon, 12 U.S. 94, 98 (1814).

35. *Id.*

36. Griffin v. Am. Gold Mining Co., 136 F. 69, 74 (9th Cir. 1905) ("But, with the presumption of regularity[,] which accompanies the official acts of a public officer, the party calling these acts in question must, if he wishes to have a judicial examination of these assignments or their legal effect passed upon judicially, make an issue upon them, and put in some proof of want of sufficiency or regularity.").

37. 272 U.S. 1 (1926).

38. *Id.* at 14.

39. *Id.*

> "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. . . . Under that presumption, it will be taken that Mr. Polk acted upon knowledge of the material facts. The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the courts."[40]

This served as an early example of the presumption being used as a sword against the government instead of a shield.

Amid the fitful, incremental, and implicit development of this area of law, conventional wisdom dictates that *Chemical Foundation* is a key case establishing the domain of the presumption of regularity.[41] Before *Chemical Foundation*, the Supreme Court interpreted the presumption to be "only prima facie evidence, subject to rebuttal."[42] As one modern court later described it: "The burden placed on the party seeking to rebut the presumption was nothing special."[43] *Chemical Foundation* is significant because it declared that the presumption of regularity applies absent "clear evidence" to the contrary. The Court appeared to heighten the rebuttal standard, but it did not recognize that it was doing so, and the cases it cited do not appear to justify that heightened standard.[44] Thus, "that case doesn't seem to provide a particularly sound foundation for the presumption—at least not for the presumption as it is currently invoked by the Court."[45] Leading up to *Chemical Foundation*, some lower courts and commentators had called the presumption "a strong one," leaving the Supreme Court to reckon with and apply some contemporary writings of dubious accuracy.[46]

D. *Post–*Chemical Foundation *Applications of the Presumption*

The Court began applying the presumption of regularity with increasing frequency after *Chemical Foundation*, though not always with

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40. *Id.* at 14–15.

41. Hessick, *supra* note 6; Conley v. United States, 5 F.4th 781, 791 (7th Cir. 2021) (calling *Chemical Foundation* "a bedrock presumption-of-regularity case").

42. Tecom, Inc. v. United States, 66 Fed. Cl. 736, 759 (2005) (citing Butler v. Maples, 76 U.S. 766, 778 (1869)).

43. *Id.* The nineteenth-century Supreme Court cases asked the challenger to provide no more than an affirmative showing to the contrary. *Id.* (citing Nofire v. United States, 164 U.S. 657, 660 (1897); Butler v. Maples, 76 U.S. 766, 778 (1869); Rankin v. Hoyt, 45 U.S. 327, 335 (1846)).

44. *Id.* ("Some confusion on this point might have been caused by a 1926 Supreme Court decision concerning a federal officer's decision to dispose of alien property seized from an enemy nation. The Supreme Court added the modifier 'clear' to the maxim . . . ."). *See generally* Brief for Executive Branch Officials, *supra* note 27, at 4, 10 and accompanying text.

45. Hessick, *supra* note 6.

46. Nathan Isaacs, *Judicial Review of Administrative Findings*, 30 YALE L.J. 781, 788 (1921) (citing Shurtleff v. United States, 189 U.S. 311 (1903); Young v. Flower, 22 N.Y. Supp. 332, 335–36 (N.Y. Sup. Ct. 1893); Jew Ho v. Williamson 103 F. 10, 23 (N.D. Cal. 1900)).

the "clear evidence" rebuttal standard. The Court's reasoning and concern about executive decisionmaking demonstrate the similarity that the presumption of regularity can bear to simple judicial deference to agencies.[47] The Court decided several cases where it declined to second-guess the executive's judgment on the basis of broad congressional delegation.[48] For instance, in 1940, the Court ruled under the Tariff Act of 1930 that Congress had granted the President powers so broad that when the President determined that a change of rate was necessary, his judgment was "no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment."[49] This result lies atop the same separation of powers reasoning that supports the presumption of regularity. The Court recognized that it "has long been held" that so long as Congress charged a public officer with making a judgment, "[f]or the judiciary to probe the reasoning" behind a determination "would amount to a clear invasion of the legislative and executive domains."[50] And so reasoned the Court, the judiciary can take the agency's word and opinion for matters because executive agencies are more democratic, given that they are generally accountable to the elected President.[51] The Court viewed the presumption as a means to permit federal government agencies to effectuate the will of Congress and the administration, without the Court engaging in policymaking.

Where congressional procedural directives are followed, a presumption of regularity would be accorded. Where they are not, the judiciary would exercise its power to enforce those procedural rules by rejecting the administrative act. The Supreme Court reasoned in 1942 that despite an agency's protestations that it followed Congress's prescribed

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47. Presumption in Exec. Branch, *supra* note 1, at 2432; *see* Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 762 (2014) ("Whereas judicial review generally originates from the point of view of the judiciary acting as a bulwark against agency overreaching, judicial deference seeks out reasons to limit judicial intervention out of respect for the epistemic and political benefits of agency discretion.").

48. United States v. George S. Bush & Co., 310 U.S. 371, 380 (1940).

49. *Id.*; *see also* Nat'l Broad. Co. v. United States, 319 U.S. 190, 224 (1943) ("Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.").

50. *George S. Bush & Co.*, 310 U.S. at 380.

51. *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978–79 (1992); *see also, e.g.*, Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div., 312 U.S. 126, 145–46 (1941) (noting that the statute under review required the consideration of several factors, and "Congress accepts the administrative judgment as to the relative weights to be given to these factors in each case when that judgment in other respects is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases").

statutory standards, Congress had nonetheless "provided for judicial review as an additional assurance that its policies be executed."[52] The Court warned that despite the deference it would show to the agencies, its review "certainly entails an inquiry as to whether" the agency followed the statutory standards, apart from the application of evidentiary presumptions.[53] The Court also drew a line where the administrator or executive officer's "decision . . . contravene[d] the statutory scheme and disregard[ed] rights which Congress ha[d] bestowed, the fact that he act[ed] pursuant to the directions of the [agency head] d[id] not save his decision from review."[54]

This view—largely deferential, but with some commitment to avoiding the appearance of operating as a rubber stamp—echoes in the APA, as discussed below.[55] It appeared clear at this point that "recitals" of procedure or findings were insufficient substitutes for a record of procedure or findings. The presence of a proto-administrative record became essential to upholding administrative fact finding.[56] The concept of record review developed in the 1940s as well. In *New York v. United States*, the Court ruled that evidence not submitted before the agency could not be considered by a district court upon judicial review.[57] The Court admonished that the "correct practice" was that the parties should present evidence to the agency in the first instance and not to the district court "as though it were conducting a trial *de novo*."[58]

E. *The Administrative Procedure Act's Interaction with the Presumption*

In parallel, Congress perceived the need to codify and expand regulated parties' ability to challenge administrative action. In 1946,

52. United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 489 (1942).

53. *Id.*; *see also* E.-Cent. Motor Carriers Ass'n v. United States, 321 U.S. 194, 209–10 (1944) ("Whether this is the effect or not, we have no means of knowing on this record. Nor can we tell, other than by sheer acceptance of the Commission's conclusion, in the form of its statement of the result and cryptic formulation of the policy on which it is rested, whether the proposed rates will give the motor carriers an undue competitive advantage . . . . Upon a matter of such consequence and complexity, our function in review cannot be performed without further foundation than has been made.").

54. Barr v. United States, 324 U.S. 83, 94 (1945).

55. 5 U.S.C. § 706(2)(A).

56. Colorado Wyoming Gas Co. v. Fed. Power Comm'n, 324 U.S. 626, 634 (1945) ("The review which Congress has provided for these rate orders is limited. Sec. 19(b) says that the 'finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.' But we must first know what the 'finding' is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest . . . Their absence can only clog the administrative function . . . .").

57. 331 U.S. 284, 335 (1947).

58. *Id.*

Congress passed the landmark APA.[59] The APA did not directly codify or regulate the presumption of regularity, but such silence does not necessarily negate the presumption's validity. The APA failed to render statutory certain contemporaneous tenets of administrative deference, such as *Skidmore v. Swift & Co.*[60] (1944) and *Bowles v. Seminole Rock & Sand Co.*[61] (1945) deference.[62]

As a whole, the APA committed the judiciary to a deferential body of review of administrative "action," with a preexisting record as the body of evidence.[63] The agency-deferential orientation woven into the fabric of the APA is exemplified by 5 U.S.C. § 706, which permits plaintiffs to challenge agency action and have a court set aside the agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[64]—a fairly agency-friendly standard.[65] The arbitrary or capricious standard is distinct from the presumption of regularity; the former is more cabined and strictly confined to the merits. Nevertheless, the Supreme Court, speaking loosely in a manner reminiscent of its reference to "clear error" in *Chemical Foundation*, has suggested that the arbitrary or capricious standard equates to the presumption of regularity.[66] In a footnote explaining that arbitrary or capricious review requires something more than the constitutional minimum needed to satisfy due process, the Court in *State Farm* stated, "[w]e do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate."[67] This

59. 5 U.S.C. §§ 551–559.

60. 323 U.S. 134, 140 (1944).

61. 325 U.S. 410, 414 (1945).

62. *See also* Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897, 907 (2019) (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513–14 (1989).

63. 5 U.S.C. §§ 704, 706 (providing for judicial review upon "the whole record").

64. 5 U.S.C. § 706(2)(A).

65. *See, e.g.*, FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021) ("Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.").

66. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

67. *Id.* at n.9; Presumption in Exec. Branch, *supra* note 1, at 2447 (reading *State Farm* as "the Court again reject[ing] a strong, substantive presumption before adopting a searching form of arbitrariness review designed to promote reasoned and deliberative policymaking"); *accord, e.g.*, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1684 (2019) (Alito, J., concurring) (citing the presumption of regularity in support of an assumption that if an agency declined to

attitude, combined with the substantial presumption of regularity that predated the APA, strongly hints that the APA tolerates the presumption even if the presumption is not codified like judicial deference to agency factual determinations.

Nor is it surprising that the APA's legislative history—a legislative history that the Supreme Court has venerated to an unusual degree[68]—is strikingly silent on the presumption. Neither the Senate Judiciary Committee's Report on the APA[69] that preceded the statute nor the *Attorney General's Manual on the Administrative Procedure Act*[70] that followed the APA addressed the presumption. The *Attorney General's Manual* simply states that "The provisions of section [706] constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions."[71]

This silence perhaps suits the APA's lofty station as an administrative bill of rights.[72] The legislative history described the APA bill not as a "codification of administrative law," but instead "an outline of minimum basic essentials, framed out of long consideration."[73] Indeed, "The legislative history of the APA shows that, in choosing such open-ended language, Congress understood that it was providing the courts with a

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make a certain change, then it was because the agency logically determined that the change was unjustified); Friends of Animals v. Haaland, 997 F.3d 1010, 1016 (9th Cir. 2021) (name-checking the presumption in an appeal to agency deference).

68. The Supreme Court has shown special solicitude toward certain components of the APA's legislative history. *See* Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 19 n.117 (2018). The Supreme Court has deferred to the *Attorney General's Manual on the Administrative Procedure Act* to the extent it does not conflict with the APA. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218 (1988) (Scalia, J., concurring) ("[W]e have repeatedly given great weight" to "the Government's own most authoritative interpretation of the APA, the 1947 Attorney General's Manual on the Administrative Procedure Act."). The Court also has deferred to the Senate Judiciary Committee Report insofar as it is consistent with the APA and the *Attorney General's Manual*. *See Chrysler Corp.*, 441 U.S. at 302 n.31 (citing the Senate Report as an "authoritative source[]" in interpreting the APA); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546 (1978).

69. *See generally* S. REP. NO. 79-752 (1945) (outlining the principal problems of the committee and not addressing the presumption).

70. *See generally* U.S. Dep't of Just., Att'y Gen.'s Manual on the Administrative Procedure Act (1947) (stating its objective to achieve uniformity in the processes of the federal government by reforming the administrative processes).

71. *Id.* at 93; *see id.* at 138 (stating that 5 U.S.C. § 706 "declares the existing law concerning the scope of judicial review").

72. S. DOC. NO. 79-248, at 298 (1946) ("[The APA] is a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government."); *see also id.* at 304 ("[The APA bill is not a] codification of administrative law. It represents, instead, an outline of minimum basic essentials, framed out of long consideration . . . .").

73. *Id.* at 304.

range of interpretive flexibility."[74] The *Attorney General's Manual* states that several parts of the APA, such as the provisions on judicial review, merely incorporate deference rules "as developed by the Congress and the courts," which are "usually applied tacitly and rest[] mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand."[75] One reason for this is that the presumption was not as expansive in 1946 as it is now, though the presumption had already morphed significantly from its common law roots by 1946, as explained above.

Examples of the APA impliedly carrying forward a practice in the absence of text include the courts' power to remand matters to an agency,[76] the presumption favoring judicial review of administration action out of 5 U.S.C. § 701,[77] and the requirement that an agency respond to parties who petition for a rulemaking even though the APA states only that the agency must give individuals a right to petition.[78] Significantly, Justice Antonin Scalia once justified *Chevron* deference by arguing that the APA impliedly required courts to defer to agencies' legal interpretations.[79] Other inferences from the APA, such as the presumption that the proffered administrative record is complete, find grounding in judicial policy and the purpose of the APA but not explicitly in its text.[80]

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74. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 153 (1998); S. REP. NO. 79-752, at 217 (1945) ("It will thus be the duty of reviewing courts . . . to determine the meaning of the words and phrases used."); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1039 (1997) ("The . . . [APA] is a framework statute, not a complete code. Its central provisions are rather sparse, and a number of important questions are not covered at all. It comes as no surprise, therefore, that the judicial gloss on the APA has taken on a large significance over time.").

75. U.S. Dep't of Just., *supra* note 70, at 76.

76. *See* Sec'y of Lab. v. Farino, 490 F.2d 885, 891 (7th Cir. 1973) (alteration in original) (holding that "it is clear" that the APA gives district courts the "implicit" power to remand to an agency for further proceedings, based on the APA's "authorization to 'set aside agency action, findings, and conclusions,'" the APA's statement that "'[t]he form of proceeding for judicial review is . . . any applicable form of legal action,'" and district courts' "inherent power to remand administrative matters to agencies"); Loma Linda Univ. v. Schweiker, 705 F.2d 1123, 1127 (9th Cir. 1983) (explaining district courts' inherent power to remand).

77. Abbott Lab'y v. Gardner, 387 U.S. 136, 140 (1967); *see also* Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984).

78. *See* Aram A. Gavoor & Daniel Miktus, *Public Participation in Nonlegislative Rulemaking*, 61 VILL. L. REV. 759, 783–86 (2016) (citing Wis. Elec. Power Co. v. Costle, 715 F.2d 323, 328 (7th Cir. 1983)); WWHT, Inc. v. FCC, 656 F.2d 807, 813 (D.C. Cir. 1981); 5 U.S.C. § 553(e).

79. Scalia, *supra* note 62, at 512 ("It should not be thought that the *Chevron* doctrine—except in the clarity and the seemingly categorical nature of its expression—is entirely new law. To the contrary, courts have been content to accept 'reasonable' executive interpretations of law for some time.") (citing S. DOC. NO. 8, 90–91 (1941)).

80. *See* 5 U.S.C. § 706.

Besides the APA, Congress has not enacted a general presumption of regularity in government behavior. In certain fields, Congress has conferred upon courts certain presumptions in the law. For example, foreign public documents may be "treated as presumptively authentic" in certain situations for good cause.[81] In certain bankruptcy proceedings, a court may presume that certain foreign documents "are authentic, whether or not they have been legalized."[82] Testimony produced in district court hearings and trials are presumed to be what is in the court reporter's transcript.[83] But there appears to be no single presumption of regularity within the pages of the U.S. Code.

II. THE CONTEMPORARY PRESUMPTION OF REGULARITY

Given its many later cites, *Chemical Foundation* provides an inflection point in the history of the presumption. Modern applications both nod to and significantly diverge from those early precedents.

A. *The Presumption's Imprecision and Delta from* Chemical Foundation

Bearing in mind this variation in the application of the presumption, this Article emphasizes that courts have consistently tolerated and perpetuated imprecision on the domain of the presumption of regularity. For example, some interpret a "presumption of regularity" to mean only a presumption that a public official followed all of the procedures required,[84] and infer a separate "presumption of . . . good faith" in the case law, by which courts presume that a public official acted with lawful motivation.[85] Others consider these all to be part of a singular presumption of regularity.[86]

The Supreme Court today perpetuates its long pedigree of discussing the presumption obliquely and without clarity.[87] Although the Court cites and applies the presumption, "these other cases tend to make only brief reference to the presumption, sometimes including little more than citations to previous cases, which themselves made only brief reference to the presumption."[88] Since the enactment of the APA, the Court first

81. FED. R. EVID. 902(3)(A).

82. 11 U.S.C. § 1516(b).

83. FED. R. CIV. P. 80.

84. *See* Tecom, Inc. v. United States, 66 Fed. Cl. 736, 757 (2005).

85. *Id.* (quoting Pauley Petroleum Inc. v. United States, 591 F.2d 1308 (1979)).

86. Presumption in Exec. Branch, *supra* note 1, at 2433–34 (reading the presumption's "current domain" to cover "two categories of disputes": the *what* and the *why* of government action).

87. *Id.* at 2432 ("The Court often invokes the phrase without elaboration or develops the presumption without invoking the phrase.").

88. Hessick, *supra* note 6.

mentioned the "presumption of regularity" separate and apart from deference in *Citizens to Preserve Overton Park v. Volpe*,[89] a seminal APA case. *Overton Park* only burnished the legend of *Chemical Foundation* by mentioning the presumption of regularity and citing *Chemical Foundation*, but failing to apply the presumption.[90] More recently, Justice Clarence Thomas, joined by Justices Neil Gorsuch and Brett Kavanaugh, emphasized that "courts reviewing agency action owe the executive a 'presumption of regularity,'" and accused the majority opinion of paying "only lipservice to this principle."[91]

Of course, the presumption *has* shifted since *Chemical Foundation*. For instance, regarding the presumption of good faith, in the mid-twentieth century, the Court pronounced one rule in *SEC v. Chenery Corp.*[92]—that it would not entertain post-hoc rationales from agencies[93]—and a complementary one in *United States v. Morgan*[94]—that it would not permit discovery of rationales offered during agencies' internal deliberations.[95] In *Overton Park*, the Court reviewed a Department of Transportation action where the agency offered no contemporaneous rationale.[96] The Court quietly "reshaped the presumption, holding that it would shield agencies from direct discovery only where they have offered contemporaneous explanations for their actions."[97] Otherwise, the presumption of regularity could be rebutted.[98] This development was significant, as it "forced record creation," thereby "facilitat[ing] further developments in judicial review."[99] In *State Farm*, the Court again reduced deference to agencies by imposing a vigorous "hard look" conception of arbitrary and capricious review in 1983.[100] The case made clear that a court could not simply assume that an agency

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89. 401 U.S. 402, 415 (1971).

90. *Id.*

91. Dep't of Com. v. New York, 139 S. Ct. 2551, 2577 (2019) (Thomas, J., concurring in part and dissenting in part).

92. 318 U.S. 80 (1943).

93. *Id.* at 95; *see also* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 302–07 (2017) (explaining that "*Chenery* in the trenches is not as absolute as *Chenery* in the casebooks").

94. 313 U.S. 409, 422 (1941).

95. *Id.* at 422; *see also* Presumption in Exec. Branch, *supra* note 1, at 2446 (explaining *Morgan*'s rule shielding the Department of Transportation's internal deliberations from discovery).

96. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 407–08 (1971).

97. Presumption in Exec. Branch, *supra* note 1, at 2446.

98. *See id.* at 2447.

99. *Id.*

100. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

considered all of the relevant factors.[101] These changes dovetail with the general swings in the degree of judicial scrutiny of agencies.[102]

In other ways, the current application of the presumption has not changed in decades. For instance, courts' presumption of regularity in administrative internal deliberations has largely remained intact since *Morgan* in 1941. Specifically, agency decisionmakers "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."[103] The views espoused in the pre–World War II cases, which shifted from a strict executive presumption to a legislative presumption, returned to the mainstream years later.[104]

B. *Recent Expansions of the Presumption*

Apart from the dimension of how leniently or strictly the Court applies the presumption, the Court has expanded the presumption's scope in recent decades. For example, in *Reno v. American-Arab Anti-Discrimination Committee*,[105] the Court cited the presumption of regularity as the reason for a heightened standard in a malicious prosecution claim.[106] Similarly, the Court applied the presumption of regularity to a disciplinary system within the U.S. Postal Service.[107] The

101. Presumption in Exec. Branch, *supra* note 1, at 2447 (concluding that the Court in *State Farm* "again rejected a strong, substantive presumption," part of an arc of "reshaping" the presumption).

102. Gavoor & Platt, *supra* note 68, at 15–18; Aram A. Gavoor & Steven A. Platt, *Administrative Investigations*, 97 IND. L.J. 421, 423–26 (2022). *But see* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1358–61 (2016) (arguing that at least the Supreme Court, if not the courts of appeals, has "specifically disavow[ed] idealized conceptions of rationality review developed by lower courts," and that "*State Farm* itself . . . is in important respects less demanding than the lawyers' culture of hard look suggests").

103. 313 U.S. 409, 421 (1941); *see* Presumption in Exec. Branch, *supra* note 1, at 2436–38.

104. *See, e.g.*, U.S. Dep't of Lab. v. Triplett, 494 U.S. 715, 723 (1990); Presumption in Exec. Branch, *supra* note 1, at 2441 (summarizing *Triplett* and citing a case on which it relied, Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985), "Congress is presumed to design schemes that are constitutional and, in implementation and operation, agencies are presumed to act regularly—that is, to remain faithful to Congress's design").

105. *See* 525 U.S. 471, 489 (1999).

106. *See also* United States v. Armstrong, 517 U.S. 456, 464 (1996).

107. U.S. Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001) ("If the Board's mechanism for reviewing prior disciplinary actions is itself adequate, the review such an employee receives is fair. Although the fairness of the Board's own procedure is not before us, we note that a presumption of regularity attaches to the actions of government agencies, *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15 (1926), and that some deference to agency disciplinary actions is appropriate.").

Court also applied the presumption of regularity to the maintenance of government records and recordkeeping.[108]

During the Obama Administration, a plurality of the Court applied the presumption of regularity—as it was traditionally understood before the APA—to the decisions of consular officers in *Kerry v. Din*.[109] There, a U.S. citizen claimed a due process violation from consular officers' denial of her foreign national husband's visa application.[110] In a fractured opinion, three Justices wrote that the woman had no such due process right.[111] Justice Anthony Kennedy, joined by Justice Samuel Alito, asserted that even if she did have a due process right, it was satisfied by the government simply citing the statute under which the visa application was denied.[112] Justice Kennedy's controlling opinion expanded on a 1972 case, *Kleindienst v. Mandel*,[113] and operated in large part on the traditional presumption of regularity upon finding that an agency's bare statutory citation proffer for a visa denial was sufficient to survive a due process challenge.[114] The statute at issue included certain factual predicates necessary to invoke a terrorism-related inadmissibility ground.[115] Justice Kennedy used the presumption of regularity to presume that those factual predicates had been found prior to the proffer of the statute by the consular officer.[116] Justice Scalia, joined by Chief Justice John Roberts and Justice Thomas, concluded that the plaintiff did not have a substantive due process right to further information about the denial, thus exhibiting an even greater degree of agency deference.[117] This is the traditional presumption of regularity—likely cited because the decisions of consular officers were not traditionally amenable to judicial review.[118] The presumption of regularity also tends to support the presumption that public officers act in good faith.[119] In contrast, Justice

108. *See* Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 174 (2004) (explaining that "there is a presumption of legitimacy accorded to the Government's official conduct" and a challenger "must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" to overcome the presumption of legitimacy).

109. 576 U.S. 86 (2015) (plurality opinion).

110. *Id.* at 88.

111. *Id.*

112. *Id.* at 102, 104–05 (Kennedy, J., concurring in the judgment).

113. 408 U.S. 753 (1972).

114. *Din*, 576 U.S. at 103–04 (Kennedy, J., concurring in the judgment).

115. *Id.* at 104–06.

116. *Id.* at 105.

117. *Id.* at 92–97 (plurality opinion).

118. *See id.* at 88.

119. *Id.* at 105 (Kennedy, J., concurring) ("Absent an affirmative showing of bad faith on the part of the consular officer who denied Berashk a visa—which Din has not plausibly alleged with sufficient particularity—*Mandel* instructs us not to 'look behind' the Government's

Stephen Breyer, writing for himself, Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor, and Justice Elena Kagan, would have held that the plaintiff had a due process right and that the Department of State failed to provide that due process.[120]

As of this writing, the most recent use of the presumption in the Supreme Court was in 2019 in *Department of Commerce v. New York*.[121] There, the Court held that the government's rationale for adding a U.S. citizenship question to the 2020 census was pretextual and consequently arbitrary or capricious.[122] This was the first time that the Court had used the ground of pretext to hold that an agency action was arbitrary or capricious.[123] Three years later, the Court heard *Biden v. Texas*, a challenge to the U.S. Department of Homeland Security's attempts to end the Migrant Protection Protocols, a program which returned certain non-Mexicans who arrived in the United States by land back to Mexico pending their removal proceedings.[124] The federal government argued that its most recent memorandum ending the program constituted a new agency action, in part due to the presumption of regularity.[125] This mattered because if the reasons given in the most recent memorandum were associated with an existing agency action, then the reasons were impermissibly ad hoc.[126] The Court agreed that a new agency action was undertaken, concluding that the challengers' arguments—including that the government had not timely submitted an administrative record—fell short of the "strong showing of bad faith or improper behavior" found in *Department of Commerce* and so did not rebut the presumption.[127]

C. *Distilling the Presumption's Multiple Incarnations*

Despite these many markers, this Article finds it impossible to discern a unified conception of the presumption across the federal judiciary. The presumption of regularity is a multidimensional deference principle with un-demarcated boundaries. Courts do not always precede extensions of deference by incantation of the term "presumption of regularity,"

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exclusion of Berashk for additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed.").

120. *Id.* at 107 (Breyer, J., dissenting).

121. 139 S. Ct. 2551, 2573 (2019); *see* Aram A. Gavoor & Steven A. Platt, *Administrative Records After* Department of Commerce v. New York, 72 ADMIN. L. REV. 87, 93 (2020) (discussing the most recent use of the presumption of regularity).

122. *Dep't of Com.*, 139 S. Ct. at 2573–76.

123. *Id.* at 2576 (Thomas, J., concurring in part and dissenting in part) ("For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency's otherwise adequate rationale.").

124. 142 S. Ct. 2528, 2535 (2022).

125. *Id.* at 2546.

126. *Id.*

127. *Id.* at 2546–57.

although they often do. This lends credence to the notion that the modern presumption is "simply a baseline presumption of normality accorded all government conduct, absent evidence to the contrary."[128] Despite the presumption's capacious yet vague qualities, at minimum, various iterations of the presumption can be read to include fourteen unique definitions as it regards public officials and public acts.

EXPRESS JUDICIAL RECOGNITIONS OF THE PRESUMPTION OF REGULARITY	
Contemporary Feature of Presumption of Regularity (in order of citation prevalence)	**Case(s) of Origination**
Legal presumption that a public official has the authority to act.	*Martin v. Mott*,[129] *Bank of United States. v. Dandridge*,[130] *United States v. Jonas*[131]
Presumption that a public official performed an official act.	*Nardea v. Sessions*,[132] *St. Paul Fire & Marine Ins. Co. v. United States*[133]
Presumption that a public official performed an official act completely and lawfully.	*United States v. Chemical Foundation, Inc.*[134]
Presumption that an agency acted reasonably.	*Kleindienst v. Mandel*,[135] *FTC v. Cement Institute*,[136] *INS v. Miranda*,[137] *United States v. Chemical Foundation, Inc.*[138]
Presumption that an agency has produced a complete administrative record.	*Department of Commerce v. New York*[139]

128. Brief for Executive Branch Officials, *supra* note 27, at 19.

129. 25 U.S. (12 Wheat.) 19, 32–33 (1827).

130. 25 U.S. (12 Wheat.) 64, 69–70 (1827) (Story, J.).

131. 86 U.S. (19 Wall.) 598, 604–05 (1874).

132. 876 F.3d 675, 680 (4th Cir. 2017) (presuming that a noncitizen entering under the visa waiver program consented to its terms).

133. 6 F.3d 763, 769 (Fed. Cir. 1993) (presuming that an import specialist performed his or her customs duties).

134. 272 U.S. 1, 14–15 (1926).

135. 408 U.S. 753, 770 (1972) (presuming that the government fairly denied a nonimmigrant visa such that a U.S. citizen's First Amendment rights were not violated).

136. 333 U.S. 683, 700–01 (1948) (presuming objectivity).

137. 459 U.S. 14, 18 (1982) (per curiam) (presuming that a government delay was reasonable).

138. 272 U.S. 1, 14–15 (1926) (presuming that an officer acted with full knowledge of the facts).

139. 139 S. Ct. 2551, 2573 (2019).

Presumption that an agency's reasons for action are not post hoc and are associated with the existing administrative record.	*Biden v. Texas*[140]
Presumption on the admission of the government's evidence (*e.g.*, certain intelligence reports are presumed accurate; chain of custody is intact; foreign records are authentic) or on any party's evidence.	*Latif v. Obama*,[141] *United States v. Tatum*,[142] FED. R. EVID. 902(3)(A); *Tibbs v. United States*[143]
Presumption that the President made due inquiry into the facts and formed a reasonable judgment thereupon.	*Martin v. Mott*[144]
Presumption that judicial judgments are accurate.	*Parke v. Raley*,[145] *Johnson v. Zerbst*,[146] *In re Peterson*[147]
Presumption that Congress passed constitutional legislation.	*United States Department of Labor v. Triplett*[148]
Presumption that agencies, in certain contexts, are correctly interpreting the law, as in *Chevron* and *Kisor/Auer* deference.	*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[149] *Kisor v. Wilkie*,[150] *Auer v. Robbins*[151]
Presumption that an agency which has "voluntarily ceased" its challenged conduct will not resume the conduct, and thus has mooted the action.	*People for the Ethical Treatment of Animals v. United States Department of Agriculture*,[152] 13C CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE

140. 142 S. Ct. 2528, 2546–57 (2022) (concluding that alleged litigation misconduct does not constitute the "strong showing of bad faith or improper behavior" necessary to rebut the presumption of regularity such that a court should review agency action on more than the administration record).

141. 77 F.3d 1175, 1182–83 (D.C. Cir. 2012).

142. 548 F.3d 584, 587 (7th Cir. 2008).

143. 459 F.2d 292, 293 (9th Cir. 1972) (per curiam) (invoking the presumption as to "customary practices in the court" where "a great lapse of time occurs before a [federal post-conviction] . . . hearing").

144. 25 U.S. (12 Wheat.) 19, 31 (1827).

145. 506 U.S. 20, 24 (1992).

146. 304 U.S. 458, 468 (1938).

147. 253 U.S. 300, 311 (1920).

148. 494 U.S. 715, 723 (1990).

149. 467 U.S. 837, 844 (1984).

150. 139 S. Ct. 2400, 2408 (2019);

151. 519 U.S. 452, 462 (1997).

152. 918 F.3d 151, 157 (D.C. Cir. 2019) (collecting cases in accord from the Fifth, Sixth, Seventh, and Ninth Circuits).

	§ 3533.7 (3d ed. 2008).
Presumption that a prosecutor is not committing unconstitutional selective prosecution.	*United States v. Armstrong*[153]
There may be a presumption that the government did not act arbitrarily or capriciously (if weight is placed on a *State Farm* footnote, which this Article does not).	*Motor Vehicle Manufacturers. Ass'n of the United States v. State Farm Mutual Auto Ins.*,[154] *Friends of Animals v. Haaland*[155]
There may be a presumption against intrusive discovery into the government's actions.	*Trump v. Hawaii*[156]

Even this expansive body of definitions has its limits in the eyes of courts. For example, a federal district court rejected plaintiffs' attempts to extend the presumption to mean that "courts must presume that an official statement is premised upon documents in the government's possession."[157]

The presumption of regularity is similar to,[158] but distinct from, the presumption of good faith,[159] although the presumption of good faith is also partially supported by *Chemical Foundation*.[160] A prime example of the difference between the presumptions comes from *Din.*[161] Justice Kennedy's opinion concluded that the bare citation of a statute provided due process.[162] The implicit presumption that he applied did not presume that the government had performed any particular act; he instead

153. 517 U.S. 456, 464 (1996).

154. 463 U.S. 29, 43 n.9 (1983).

155. 997 F.3d 1010, 1015 (9th Cir. 2021).

156. 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring).

157. James Madison Project v. Dep't of Justice, 302 F. Supp. 3d 12, 32 (D.D.C. 2018) (rejecting plaintiffs' argument that the court should presume that the President's tweets are based on official information within his possession).

158. Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 174 (2004) (quoting United States v. Chem. Found. Inc., 272 U.S. 1, 14–15 (1926)); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999); United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting *Chem. Found.*, 272 U.S. at 14–15); Sunday Lake Iron Co. v. Twp. Of Wakefield, 247 U.S. 350, 353 (1918); Am. Cargo Transp. V. United States, 625 F.3d 1176, 1180 (9th Cir. 2010) ("[U]nlike in the case of a private party, we presume the government is acting in good faith."); *see* Tecom, Inc. v. United States, 66 Fed. Cl. 736, 761 (2005) (collecting cases that discuss the presumption of good faith).

159. *Tecom*, 66 Fed. Cl. at 761.

160. Nat'l Archives & Recs. Admin., 541 U.S. at 174 (citing *Chem. Found.*, 272 U.S. at 14–15).

161. 576 U.S. 86 (2015).

162. *Id.* at 105 (Kennedy, J., concurring in the judgment).

presumed that the government had innocent motivations for acting—that is, good faith in its actions.[163]

The precise relationship between the two presumptions, including whether the presumption of regularity encompasses a presumption of good faith, could be in doubt after *Department of Commerce*.[164] There, the Supreme Court noted that the district court "prematurely" disregarded the presumption of regularity that attached to the administrative record.[165] However, the Supreme Court excused the error simply because the district court's disregard yielded evidence of bad faith that the district court had suspected.[166] The presumption of regularity was at the center of Justice Thomas's dissent in *Department of Commerce*.[167] "In practice," Justice Thomas wrote, "we give the benefit of the doubt to the agency."[168]

One aspect of the contemporary presumption of regularity is that it tends to apply indiscriminately to governmental actors regardless of their constitutional pedigree. The presumption nominally applies no different to a cabinet secretary[169] than it does to a low-level official[170] or to an administrative agency as a whole.[171] Similarly, the presumption applies indiscriminately to both Article III judges[172] and Article I administrative law judges,[173] and even to foreign governments.[174] At least one court, however, has refrained from extending the presumption from "high-level

163. *Id.*

164. 139 S. Ct. 2551 (2019).

165. *Id.* at 2556.

166. *Id.* at 2574.

167. *Id.* at 2577, 2579–80 (Thomas, J., concurring in part and dissenting in part) ("[W]e have often stated that courts reviewing agency action owe the Executive a 'presumption of regularity' . . . . The Court pays only lipservice to this principle. . . . This presumption reflects respect for a coordinate branch of government whose officers not only take an oath to support the Constitution, as we do, Art. VI, but also are charged with 'faithfully execut[ing]' our laws, Art. II, § 3.").

168. *Id.* at 2580.

169. *See* United States v. Chem. Found. Inc., 272 U.S. 1, 14–15 (1926) (extending the presumption to the counselor for the Department of State); Latif v. Obama, 666 F.3d 746, 750 (D.C. Cir. 2011) (holding that the presumption is appropriately given to "the government official who summarizes (or transcribes) [an intelligence] source's statement"); *see also* United States v. Getz Bros. & Co., 55 C.C.P.A. 90, 93–94 (1968) (extending the presumption to the collector of customs).

170. Kerry v. Din, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring in the judgment).

171. *See* Gov't of Guam v. Guerrero, 11 F.4th 1052, 1061 (9th Cir. 2021) (affording the presumption to the Guam Department of Revenue and Taxation).

172. *See* Michigan v. Doran, 439 U.S. 282, 290 (1978) (applying the presumption to courts' determinations of probable cause to extradite fugitives).

173. *See* Bernklau v. Principi, 291 F.3d 795, 801–02 (Fed. Cir. 2002) (applying the presumption to the Court of Appeals for Veterans Claims); 38 U.S.C. § 7251 (establishing that court under Article I).

174. *See* Riggs Nat'l Corp. v. Comm'r, 295 F.3d 16, 21 (D.C. Cir. 2002) (extending the presumption to "an official tax receipt" of a foreign government).

executive officers" to "street-level police investigations," on the ground that courts routinely examine the motives of the latter set.[175] Otherwise, this widespread availability has not, as of this writing, been justified by courts or in the literature.

D. *Further Applications of the Presumption Outside of Civil Lawsuits Against the Government*

While this Article does not delve deeply into the use of the presumption of regularity attendant to criminal prosecutions, it does provide a concise canvas of the area. The theory behind using the presumption in the criminal context is the same as in civil context: the President designated U.S. Department of Justice officials to faithfully enforce federal criminal law, and most of the time, these officials conduct prosecutions ably and reasonably.[176] Thus, as the Supreme Court held in *United States v. Armstrong*,[177] in defeating a claim that a prosecutor committed unconstitutional selective prosecution, "the presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[178] The Court reasoned that withholding the presumption "threatens to chill law enforcement" and "undermine prosecutorial effectiveness" "by subjecting the prosecutor's motives and decisionmaking to outside inquiry."[179] The reasons are in the same league as the basis for the civil law presumption of regularity. However, the difference between criminal law and civil law might yield a different outlook on the former's brand of presumption of regularity. The key recent case, *Armstrong*, emphasized how prosecutorial discretion—a "core executive constitutional function"[180]—lay in a hallowed zone of judicial deference.[181] Government actors in a criminal case must also contend with the weighty "beyond a reasonable doubt" burden of persuasion required by the Constitution.[182] At the same time, "the guardrails on prosecutorial decisionmaking—in an environment where [ninety]-seven percent of charges are settled through plea agreements—are virtually nonexistent and far looser than those on administrative

175. Conley v. United States, 5 F.4th 781, 790–91 (7th Cir. 2021).

176. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996).

177. *Id.*

178. *Id.* (quoting United States v. Chem. Found. Inc., 272 U.S. 1, 14–15 (1926)).

179. *Id.* at 465 (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)).

180. *Id.*

181. Presumption in Exec. Branch, *supra* note 1, at 2449; *see* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999).

182. *E.g.*, *In re* Winship, 397 U.S. 358, 361–62 (1970).

decisionmaking."[183] This Article relies in good part on the APA, which the government does not apply in charging individuals with violations of criminal law. This Article leaves future scholarship to tug on these threads, while noting that most modern applications of the presumption of regularity manifest in administrative law settings.

Although the presumption typically favors the government, it can be invoked *against* the government. For example, a foreign government may invoke the presumption of regularity in some circumstances concerning the accuracy of tax records against the Internal Revenue Service,[184] to allege that they were charged properly by the federal government and thus funds may not be held by the government as overcharges,[185] or to allege that a letter sent through the U.S. Postal Service reached its addressee.[186] Although this application may seem unusual, it is not conceptually different than the traditional use of the presumption in favor of the government: by and large, the government acts in accordance in law, and courts can assume that absent evidence to the contrary, regardless of which party benefits from that presumption.

E. *The Inability to Empirically Evaluate the Presumption*

That raises a question: just how often do parties rebut the presumption? *Chemical Foundation*,[187] one of the Supreme Court's modern cases referencing the presumption of regularity, contains a headnote—"[o]fficial acts of public officers are presumed regular, in the absence of clear evidence to the contrary"[188]—that has been cited in 813 cases as of August 14, 2021.[189] *Chemical Foundation* is by no means the only presumption of regularity case or one that would be cited in most subsequent cases. A Westlaw search for all instances of "presumption of regularity" occurring within twenty-five words of "rebutted" in the

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183. Presumption in Exec. Branch, *supra* note 1, at 2449 (citing Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/ [https://perma.cc/636N-VL3D]; Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1024–31 (2006)).

184. *See* Riggs Nat'l Corp. & Subsidiaries v. Comm'r, 295 F.3d 16, 21 (D.C. Cir. 2002) (explaining that an official tax receipt of a country is entitled to a presumption of regularity).

185. *See* Alaska Airlines, Inc. v. Johnson, 8 F.3d 791, 796 (Fed. Cir. 1993) (explaining when the presumption of regularity attaches); *see also* James Madison Project v. Dep't of Justice, 302 F. Supp. 3d 12, 32 (D.D.C. 2018) (same).

186. *See* Freeman v. United States, 284 F. Supp. 2d 217, 226 (D. Mass. 2003).

187. 272 U.S. 1 (1926).

188. *Id.* at 14–15.

189. Those cases include cases like *United States v. Armstrong*, 517 U.S. 456 (1996). Prior scholarship noted that as of 2018, "The Supreme Court has only uttered the phrase 'presumption of regularity' in fifty-nine cases since 1900, less than half of which involve the executive branch." Presumption in Exec. Branch, *supra* note 1, at 2431–32 & n.9 (obtaining that figure by "searching Westlaw for all Supreme Court cases mentioning the 'presumption of regularity'").

Supreme Court and all federal courts of appeals and federal district courts at any date until August 14, 2021, returned 120 results.[190] Within these results, ninety-three cases made a ruling as to whether the presumption of regularity was rebutted (some results were excluded as duplicative for belonging to different stages of the same case). Of those ninety-three, twenty-three cases found the presumption was rebutted, and seventy cases found it was not.

The picture painted by these results is imperfect. There is significant uncertainty as to the completeness of these numbers, and the search almost certainly undercounted courts' encounters with the presumption. That said, these results anecdotally suggest that in a sizable number of situations, courts find the presumption intact and unrebutted when they rule on its applicability. Most significantly, these results likely skew toward rebuttals, as plaintiffs will likely decline to press a challenge when the presumption is clearly merited or where they suspect administrative mischief but simply have no rebuttal evidence to adduce. Not all cases addressing the presumption will be on Westlaw because the issue is not always resolved in a judicial opinion, and courts inconsistently provide their unpublished opinions to Westlaw. Courts and opinions use the term "presumption of regularity" in various ways. The rebuttal of the presumption may have been discussed in a manner that eluded the search terms.

There is no perfect empirical way to measure the judiciary's application of the presumption. Nevertheless, this snapshot is a helpful marker to demonstrate that the presumption is a working principle. These cases suggest that the presumption's rebuttal is not an empty gesture to plaintiffs that categorically provides hope in theory but disappointment in practice. Additionally, it is more robust than some commentators' conclusion six weeks into the Trump Administration that "a very large number of judges around the country behaved in a fashion untouched by deference or any kind of presumption of regularity in [President Trump's] behavior," which was based on "at least eight district courts and one circuit court" that had "issued stays or temporary restraining orders against" President Trump's "executive order on visas and refugees."[191] These figures did not include a denominator to determine the rate of success to the ultimate challenges, and regardless, the underlying executive action was upheld by the Supreme Court.

190. See Appendix for Westlaw search results.

191. Wittes & Jurecic, *supra* note 1.

F. *Anecdotal Application of the Presumption and Calls to Limit Its Use by Certain Administrations or Officials*

Notwithstanding the challenge of applying empirics to measure the application and development of the presumption, its application can be measured in certain individual cases. In particular, a debate has flourished about whether the presumption of regularity has been under recent assault during the Trump Administration.[192] Professor Leah Litman has cited several instances in which government officials made factual representations to be used in court, only for the public to discover conflicting stories.[193] Similarly, in a 2020 case, Department of Justice attorneys relied on positions and facts furnished to them by the Department of Homeland Security in defending the agency's decision to exclude New York residents from Trusted Traveler Programs.[194] Department of Justice attorneys wrote to the court "to correct several statements in defendants' briefs and declarations" and to withdraw certain motions.[195] The presumption of regularity was invoked in each instance.

Some commentators have argued that the dispensation of the presumption was not coincidental. Because the presumption of regularity was rebutted in such instances, they suggest that the yielding of the presumption in those cases was tied to that administration in particular.[196] Despite the Trump Administration's representations and its reliance on the presumption, Professor Litman wrote, "courts believed what the facts were telling them, and found that the presumption of regularity had been overcome in the relevant disputes," which was "okay—and indeed, good."[197] Attorneys George Conway and Lawrence Robbins's

192. George T. Conway III & Lawrence S. Robbins, *Opinion: No Serious Lawyer Would Argue What Trump's Justice Department Is Arguing*, WASH. POST (Aug. 18, 2020), https://www.washingtonpost.com/opinions/2020/08/18/justice-departments-extreme-legal-arguments-are-costing-it-court/ [https://perma.cc/WHX8-356H] ("Lawyers have a phrase for the government's saying 'Trust us.' It's called the 'presumption of regularity.' . . . Whether they say so explicitly or not, courts have been dispensing with the presumption of regularity.").

193. Leah Litman, *Revisiting the Presumption of Regularity*, TAKE CARE (Jan. 28, 2019), https://takecareblog.com/blog/revisiting-the-presumption-of-regularity [https://perma.cc/2BF7-QEN6] (citing the Trump Administration's family separation policy and the administration's travel bans).

194. New York v. Wolf, No. 20-CV-1127, 2020 WL 6047817, at *1 (S.D.N.Y. Oct. 13, 2020).

195. *Id.* at *1.

196. Litman, *supra* note 193; Conway & Robbins, *supra* note 192.

197. Litman, *supra* note 193.

Washington Post opinion editorial agreed: "The chickens have now come home to roost."[198]

Yet, the Trump Administration's litigation outcomes involving the presumption are overstated. From January 2017 to January 2021, litigations that involved the presumption had mixed outcomes.[199] The Trump Administration's presumption of regularity litigation outcomes might also be diminished in the near future as with other deference standards that were robustly applied in such administration.[200] This potential behavior was identified by Justice Thomas's partial concurrence and partial dissent in *Department of Commerce*, a case in which the majority introduced the concept of pretext as a basis to set aside agency action under the APA: "[T]oday's decision is a departure from traditional principles of administrative law. Hopefully it comes to be understood as an aberration—a ticket good for this day and this train only."[201] The question of how the Biden Administration fares with the presumption will be answered when there is a sufficient data set to analyze.

198. Conway & Robbins, *supra* note 192. As Professor Steve Vladeck opined following the Administration's disclosure that it had presented incorrect facts in the Trusted Traveler Program case, "Trump lawyers have done so much, so often, to undermine it that it'll be *decades* before courts will be able to trust the government again." Vladeck, *supra* note 12.

199. *See, e.g.*, *In re* United States, 875 F.3d 1200, 1207 (9th Cir.) ("[W]e agree with the district court that 'it strains credulity' to suggest that the Acting Secretary decided to terminate DACA 'without consulting one advisor or subordinate within DHS.'"), *cert. granted*, *judgment vacated on procedural grounds*, 138 S. Ct. 443 (2017); United States v. Flynn, 507 F. Supp. 3d 116, 132, 137 (D.D.C. 2020) (finding the government's "dubious" justifications for reversing its position in a criminal case filed against a former national security advisor had "arguably overcom[e] the strong presumption of regularity that usually attaches to prosecutorial decisions," but holding the case was moot by Presidential pardon); Dep't of Com. v. New York, 139 S. Ct. 2551, 2576 (2019) (deeming the case as arising under "unusual circumstances"). That is not to say that every time the argument is made, it has been successful. *See, e.g.*, United States v. Saipov, No. 17-cr-722, 2019 WL 624176, at *5 (S.D.N.Y. Feb. 14, 2019) ("Defendant Saipov's unsupported allegation that the Attorney General's decision to pursue the death penalty must have been influenced by remarks made by the President on a social media platform nearly a year earlier is insufficient to rebut the presumption of regularity that attaches to the Attorney General's charging decisions.").

200. Justin (Gus) Hurwitz, *Returning to Agency Deference in Communications Law*, REGUL. REV. (July 21, 2021), https://www.theregreview.org/2021/07/21/hurwitz-returning-to-agency-deference-in-communications-law/ [https://perma.cc/7BVX-NYX6]; Josh Blackmun, *Justice Kavanaugh Quietly Rephrased the Arbitrary-and-Capricious Standard in* FCC v. Prometheus, VOLOKH CONSPIRACY (Apr. 1, 2021), https://reason.com/volokh/2021/04/01/justice-kavanaugh-quietly-rephrased-the-arbitrary-and-capricious-standard-in-fcc-v-prometheus/ [https://perma.cc/4AVP-AXLJ].

201. *Dep't of Com.*, 139 S. Ct. at 2584 (Thomas, J., concurring in part and dissenting in part).

III. WHAT COURTS *SHOULD* BE DOING WITH THE PRESUMPTION OF REGULARITY

The presumption of regularity is an under-researched topic.[202] It applies in a number of ways that are not identified by or discussed in the current literature or corpus of judicial opinions. Even if the hazards of the presumption's vagueness are not yet squarely and acutely on the bench and bar's consciousness, the Supreme Court should address the topic and provide clarity to prune further unmanaged proliferation of the presumption, as has been occurring for centuries. Less likely, but equally welcome, would be congressional action to clarify the presumption to ease judicial decisionmaking, reduce any circuit splits, and aid parties in managing expectations outside and inside of federal litigation. The rule those bodies should settle upon is a strict presumption that a government official performed ministerial tasks and set the rebuttal standard for a preponderance of the evidence, not clear evidence.

A. *A Defined and Balanced Presumption Is Desirable*

This Article maintains that the presumption is desirable to retain in a bounded and stabilized format because its core respects the constitutional roles of the separated powers. The presumption respects the oath of office that executive officers take.

> This trust in the president's moral fiber and his (or her) sense of public responsibility derives not from a personal regard for the individual who happens to be president. It derives, rather, from the fact that he or she has been elected by the people, and that the deference is thus to the popular will, and also from the fact that his or her election was—as Story describes—subsequently solemnized by his oath of office.[203]

The Constitution requires executive officers to take oaths to support the Constitution[204]—and requires the President to take an oath more pointedly swearing or affirming to "faithfully execute" his or her

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202. The notable exception in the literature being Presumption in Exec. Branch, *supra* note 1.

203. Wittes & Jurecic, *supra* note 1 (citing Martin v. Mott, 25 U.S. 19, 33 (1827) (Story, J.)).

204. U.S. CONST. art. VI, cl. 3 ("[A]ll executive . . . Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."); *see also* 5 U.S.C. § 3331 (explaining that an oath of office is required of federal civil service employees).

office.[205] The Founders saw oaths as "serious matters,"[206] which oblige the oath taker, in Justice Joseph Story's conception, to reflect on "due execution of the trusts reposed in them, and to support the constitution."[207] The Supreme Court has recognized the importance of executive oaths as well. *Marbury v. Madison* cited Article VI's Oath Clause as justification for the judiciary to interpret the constitutionality of a congressional statute, with dicta appreciating the clause's application to executive officers as well.[208] More recently, Justice Kennedy recognized the connection between the oath and judicial deference doctrines in his concurring opinion in the travel ban case, *Trump v. Hawaii*.[209] He joined the majority's opinion upholding the presidential proclamation and agreed with the substantial deference accorded in light of the foreign affairs context. But he cautioned that the oath of office held power and obliged officials to comply with the Constitution even when judicial review is not available: "The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the judiciary can correct or even comment upon what those officials say or do."[210] Courts can resort to the presumption especially with principal officers of the United States—and among them, senior agency leadership—because "elevated offices" such as the presidency impart upon the actor "the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful [sic] abuse of power as human prudence and foresight could well provide."[211]

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205. U.S. CONST. art. II, § 1, cl. 8 ("Before [the President] enter[s] on the Execution of his Office, he shall take the following Oath or Affirmation:- 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'").

206. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1475 (1990); Note, *An Originalist Analysis of the No Religious Test Clause*, 120 HARV. L. REV. 1649, 1655–56 (2007) (quoting Debate in North Carolina Ratifying Convention (July 30, 1788), *in* 4 THE FOUNDERS' CONSTITUTION 91 (Philip B. Kurland & Ralph Lerner eds., 1987) (statement of James Iredell)) ("According to the modern definition of an oath, it is considered a 'solemn appeal to the Supreme Being, for the truth of what is said, by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments, according to that form which will bind his conscience most.'").

207. Alexander J. Kasner, Note, *National Security Leaks and Constitutional Duty*, 67 STAN. L. REV. 241, 257–58 (2015) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 702 (Boston, Hilliard, Gray & Co. 1833)); *see generally* Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 306–12 (2016).

208. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) ("[A] law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument."); *see also* Kasner, *supra* note 207, at 257.

209. Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring).

210. *Id.*

211. Luther v. Burden, 48 U.S. (7 How.) 1, 44 (1849). *But see* Brief for Executive Branch Officials, *supra* note 27, at 20 ("Holding that the presumption should operate differently

The presumption emanates down the chain of command from such authority.[212]

The presumption is the judicial branch's explicit credit to the institutional role of its coordinate branch of government, the executive branch.[213] The U.S. Court of Appeals for the D.C. Circuit has applied the presumption to an intelligence report of uncertain reliability, noting that the presumption "is founded on inter-branch and inter-governmental comity."[214] Judicial experience in the particular subject-matter area of executive action in question is not necessary,[215] as with any other civil matter.[216] The Biden Administration's Department of Justice recently recognized the presumption in terms of the executive presuming the legislative branch has acted in regular order.[217] To be fair, the conception of the separation of powers may vary between administrations.[218] But in general, a properly scoped presumption of regularity serves to check inappropriate distortion of aggrandizement by the courts at the expense of the executive.

The presumption is also workable, at least at the preponderance standard, because it ensures that courts require the necessary evidence to begin holding unlawful agency conduct or deeming suspect its activities.

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depending on if the government official would introduce a new and unworkable complexity into that doctrine.").

212. *See, e.g.*, Martin v. Mott, 25 U.S. (12 Wheat.) 19, 33 (1827) (Story, J.); *see also* Wittes & Jurecic, *supra* note 1.

213. Isaacs, *supra* note 46, at 787 ("Of course there is a great deal to be said in favor of the respect that the judiciary owes to the co-ordinate branches of the government, and of the public interest in economy of effort and in stability served by the court's refusal to intermeddle with the affairs of public officers except in a very clear case.").

214. Latif v. Obama, 677 F.3d 1175, 1182 (D.C. Cir. 2011).

215. *Id*. ("Courts regularly apply the presumption to government actions and documents that result from processes that are anything but 'transparent,' 'accessible,' and 'familiar.'"). The court did so in the national security context, where courts tend to defer to the executive branch, especially where the mosaic theory of inputs is applied to the intelligence report's assessment. The dissent challenged the majority opinion's application of the presumption accordingly. *Id.* at 1208 (Tatel, J., dissenting) ("Needless to say, this is quite different from assuming the mail is delivered or that a court employee has accurately jotted down minutes from a meeting.").

216. James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENV'T. L. 1301, 1312 (2008).

217. Ways & Means Comm.'s Request for the Former President's Tax Returns & Related Tax Info. Pursuant to 26 U.S.C. S 6103(f)(1), 2021 WL 3418600, at *13–14, *16 (Op. O.L.C. July 30, 2021) ("The Executive Branch should likewise presume that congressional agents are acting pursuant to their constitutional authority and in good faith when evaluating the constitutionality of committee requests for information."); *see also* Barry v. United States, 279 U.S. 597, 619 (1929) ("The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the houses of Congress, when acting upon matters within their constitutional authority.").

218. *Oversight and Executive Privilege in the Context of Separated Powers*, *supra* note 4, at 14.

The presumption of regularity, like any presumption, lies upon the expectation that it is justified in most cases.[219] Relying on that expectation, courts use the presumption to conserve time and resources that would be needed to double-check the government's assertions.[220] As the Supreme Court has noted in the presumption of regularity context, "Allegations of government misconduct are easy to allege and hard to disprove, so courts must insist on a meaningful evidentiary showing."[221] The outgrowths of the presumption that appear to have arisen spontaneously—such as *Chemical Foundation*'s requirement of "clear evidence"—are not workable, given the confusion as to its meaning and the lack of principled origin. Similarly, the presumption of regularity in general is consistent with the APA's limited judicial review model. The APA's judicial review scheme tracks how appellate courts review district courts' findings or conclusions.[222] Specifically, federal district judges generally view a closed administrative record in APA cases instead of finding facts anew.[223] Thus, for the same reasons why an Article III court of appeals does not review every aspect of a lower court's decision de novo,[224] an APA district court can presume regularity when reviewing an agency's actions.[225]

The presumption comports with the spirit of the APA, which is deferential to the executive branch. Agencies often hold specialized expertise in their respective subject matter.[226] The presumption aligns with the judiciary's esteem for this expertise.[227] In many circumstances,

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219. Rozenshtein, *supra* note 1; Angov v. Lynch, 788 F.3d 893, 905 (9th Cir. 2015) (extending the presumption of regularity to a summary of investigation into an asylum applicant's claims and allegations of persecution by the Bulgarian government, prepared by a chain of State Department officers, because "[w]ithout this presumption, country reports would be no more useful than the Farmers' Almanac or Perezhilton.com").

220. Rozenshtein, *supra* note 1.

221. Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 175 (2004) (cleaned up).

222. Gavoor & Platt, *supra* note 68, at 29–30 ("Congress intended the APA to incorporate the traditional appellate model in its judicial-review provisions," notwithstanding the "differences between an Article III appellate court reviewing the record of a lower Article III court as in a typical appeal, and an Article III district court reviewing the record of an Article I agency as in a typical APA case.").

223. *See* 5 U.S.C. § 706.

224. Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 909 (1990) ("[A]ll appellate tribunals must have some set of rules concerning the scope and standard of review and, more generally, the degree of deference and respect to be afforded the lower tribunal.").

225. *Id.* ("[Agency officials] enjoy[] a presumption of regularity not because they work for the executive, but rather because the Supreme Court has, in a way that is entirely consistent with our normal practice, incorporated that presumption into this particular appellate system.").

226. For example, with regard to the sufficiency of an administrative record, "No party can better identify the universe of relevant documents considered by an agency in a given decision than the agency itself." Saul, *supra* note 216, at 1312.

227. *Id.*

the presumption lets courts avoid accusing the executive branch officials of being liars. Of course, if the President and his officials have clearly withheld or misrepresented information, whether willfully or not, courts should not hesitate to expose this failure of duty.[228] But on the margins, the presumption allows courts to err on the side of inter-branch comity, thereby saving the courts' democratic and political capital.[229] Here, the presumption works similarly to the political question doctrine.[230]

That said, some have questioned why private parties do not currently receive a presumption of regularity instead of the government.[231] While both private entities and the government sometimes act irregularly and face high stakes in administrative law litigation, only the former are subject to forces of market competition which incentivize them to act with regularity.[232] The government, in contrast, can succumb to forces of "self-interest, bureaucratic imperatives, or ideological zeal."[233]

Nevertheless, the presumption is appropriately afforded to the government. After all, this deference comes packaged as a *presumption* and not as a legal fiction wholly beyond judicial review or impervious to rebuttal. There will be occasions when government actors do not fulfill their legal duties, and challengers will sometimes be able to prove that. The Supreme Court's 2015 *Mach Mining, LLC v. EEOC*[234] opinion made a similar point in favoring a strong presumption that agency action is judicially reviewable.[235] The Court reasoned that agencies are generally trustworthy and law-abiding, but not in every instance; judicial review helps avoid bad behavior by agencies.[236] Retaining a meaningful presumption of regularity is necessary for the reasons above, but at the same time, defanging the presumption would generate tension with *Mach Mining*.

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228. United States v. Burnett, 476 F.2d 726, 728 (5th Cir. 1973) ("But shield not shroud [the presumption] is. Justice will not permit it to become a cloak to hide all official action from court scrutiny [o]nce the defendant has brought forward the [necessary evidence.]").

229. *Id.* ("The presumption of official regularity is a proper shield against reckless harassment of public servants.").

230. *Cf.* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1699, 1701 (2004) (arguing that the APA in 5 U.S.C. § 701(a) should be read to render political questions nonjusticiable, though "few legal challenges should be construed as raising genuinely political questions").

231. Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 NYU J.L. & LIBERTY 475, 485 (2016).

232. *Id.* at 485–86.

233. *Id.* at 486.

234. 575 U.S. 480 (2015).

235. *Id.* at 488–89.

236. *Id.*

B. *The Court or Congress Should Address the Presumption*

To remedy the consequences of its indeterminacy on the domain of the presumption of the regularity, the Supreme Court should enumerate the contours of the presumption, define the factual predicates of its invocation, and establish limiting principles for its use. In short, the Court should render the principle of the presumption of regularity doctrinal.

The silence of the Supreme Court on this score is certainly understandable. As a staid and unbounded concept quietly growing as it populates volume after volume of case law reporters, the presumption historically garnered little notice until recently. Its many ill-defined iterations make a full account of its many variants nearly impossible.[237] But absent intervention by the Court in an appropriate case or through its rulemaking capacity,[238] the presumption will remain an undifferentiated quagmire for enterprising parties to exploit.[239] The Court could accomplish these guidelines, in part, by looking to pre–*Chemical Foundation* jurisprudence for civil administrative challenges. But the parties should explicitly and self-consciously litigate the presumption's fundaments, which has not happened since the Founding Era.

Most significantly, as explained below,[240] this Article asserts that the courts are applying an awry brand of the doctrine. The current state of the presumption poses a threat with its unduly high rebuttal standard that leaches into the APA statutory arbitrary or capricious and administrative record standards. Its unbounded expansive use amounts to an inappropriate distortion of the separated powers by executive aggrandizement. Not only is the modern multifaceted expression of the presumption inconsistent with the APA but its application in *Chemical Foundation* also did not survive the APA's enactment. The APA did carry forward some existing, uncodified practices with regard to judicial review of agency conduct. The question of whether the APA rendered statutory some manifestations of the presumption of regularity is one that could resonate with the Court, given its textualist statutory interpretation methodology.[241]

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237. *See supra* Part III.

238. This includes, for instance, the Advisory Committee on the Rules of Civil Procedure. *See* 28 U.S.C. §§ 2072, 2073(a)(2).

239. The status quo has been a "needless[] blend[ing of] the presumption of regularity with other rules that serve to heighten deference and grant immunity when appropriate." Brief for Executive Branch Officials, *supra* note 27, at 20.

240. *See infra* Part III.C.

241. *E.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1749 (2020) ("'[I]t is ultimately the provisions of' . . . legislative commands 'rather than the principal concerns of our legislators by which we are governed.'" (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998))).

But the Court should intervene regardless of how it calibrates the presumption. The regulated public and the tripartite branches of the federal government ought to have secure touchstones by which to comport their conduct. Take the example of the presumption that the government has produced the complete administrative record in APA litigation. Administrative agencies should know how carefully their record will be scrutinized and the procedures they need to adopt on the front end, before judicial review, to ensure that the court will find in any litigation that the record is complete. The simple fact of the record's production will suffice, or the government may decide that it must complete a record certification—a procedural requirement absent from the APA—or something altogether more resource-intensive but which compels the conclusion that the record is complete. Relatedly, the establishment of a contemporary and articulated standard could result in a marginal diminution of APA cases filed because decisional quality may increase with heightened predictability of outcome. Courts will be more efficient, while retaining ample discretion, and potentially fewer circuit splits will arise to the extent that circuit courts define the presumption differently or apply its use applications differently.

Though an unlikely actor to remedy the problem of the contemporary presumption, Congress is institutionally the best-suited branch of government to establish the domain of the presumption of regularity. Congress can modify the Article III courts' jurisdiction[242] and so can supersede the common law of the presumption of regularity by legislating a modification to the APA or a freestanding bill.[243] This remedy is especially attractive if courts conclude, contrary to this Article, that the concept of the presumption of regularity has indeed been completely superseded by the APA. Part of the modifications that might be warranted include addressing the fact that presidential action is not subject to APA review.[244]

C. *The Court or Congress Should Expressly Articulate the Presumption and Render Doctrinal a Lawful, Discrete, and Commonsense Standard*

The best version of a doctrinal (or statutory) presumption of regularity is a limited one: a limited presumption that a senior government official performed ministerial tasks and that sets the rebuttal standard at a preponderance of the evidence, not the higher clear-evidence standard.

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242. U.S. CONST., art. III, §§ 1–2; *see, e.g.*, Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

243. Arguably, "Congress rarely amends the APA." Gavoor & Platt, *supra* note 68, at 77.

244. Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (holding that the President's actions may be reviewed for constitutionality, but not otherwise under the APA).

Other than the burden of persuasion, the merits, and the types of individuals eligible for the presumption, substantively, the core of the presumption need not change. It is still, at base, a "judicial mood-setting device[]"[245] that dovetails with the usual burden in a civil case challenging administrative action. The presumption is well used: "[M]any legal challenges to administrative action are quickly dismissed because the courts take the government at its word that it acted for the right reasons."[246] As Professor Litman has written, the presumption is working as intended, and courts are rejecting presumptions that "all is regular and orderly in the executive branch" upon presentation of sufficient evidence to the contrary.[247] Courts do not infrequently find the presumption to be rebutted, although, as discussed earlier, the exact frequency of rebuttals is difficult, if not impossible to accurately measure.[248] Of course, as with any burden of persuasion or legal presumption, "false negatives" may sometimes result—"that is, sometimes the presumption will insulate government action even though it was not in fact properly undertaken."[249] But the presumption appreciates "the realities of imperfect information and an imperfect government"[250] and thus tolerates those impossible-to-track instances in which the government has acted irregularly, but the challengers cannot muster a preponderance of evidence to support the rebuttal of the presumption.[251] This Article cannot say with confidence that courts should set the presumption to require express invocation by (or against) the government as the Supreme Court has recently implied in the context of *Chevron* deference when it declined to apply such framework when the government "expressly waived reliance on [it]."[252]

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245. Peter Shane, *Symposium: The Trump Subpoena Cases and the Search for Normalcy*, SCOTUSBLOG (July 10, 2020, 10:24 AM), https://www.scotusblog.com/2020/07/symposium-the-trump-subpoena-cases-and-the-search-for-normalcy/ [https://perma.cc/MS6M-QUYM].

246. Rozenshtein, *supra* note 1.

247. Litman, *supra* note 193 ("[Courts] found that the presumption of regularity had been overcome in the relevant disputes. Anything else would have been willful blindness.").

248. *See supra* Part III.B.

249. Rozenshtein, *supra* note 1.

250. *Id.*

251. Insofar as that could be called a flaw in the presumption, such a flaw inheres in the general concept of a burden of proof as used throughout our common-law judicial system. *See, e.g.*, Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 417–18 (1997) (discussing that the occurrence of an event does not necessarily correlate to each party's willingness to introduce evidence on that event).

252. The Court seems to imply, by its recent declinations to apply *Chevron* in the face of express government waiver, that the presumption of regularity is something that may need to be invoked for the courts to apply it. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 789–90 (2020) (statement of Gorsuch, J.); *see also* HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2180 (2021) (rejecting the EPA's

1. The Burden of Persuasion Should Not Be Clear Evidence

The Court should clarify the imprecision engendered by *Chemical Foundation* with regard to the "clear evidence" burden of persuasion.[253] Certainly, "[w]ith the APA, Congress established procedures by which the executive branch agencies conduct their business."[254] The APA codified the modes for reviewing agency action in 5 U.S.C. § 706.[255] And neither the APA nor a considered Supreme Court decision have ever imposed "clear evidence" as the standard to rebut the presumption of regularity, much less any one flavor of the presumption.

The Court should clarify the imprecision engendered by *Chemical Foundation* with regard to the APA-inconsistent burden of persuasion. The Court could clarify that only a preponderance of the evidence is required to rebut the presumption, not "clear and convincing evidence," insofar as *Chemical Foundation*'s "clear evidence" standard intends such. The Court should eschew a higher rebuttal standard for want of grounding in common law, statutory, historical, and separation of powers principles. A heightened standard along these lines, or use of the presumption on the merits, is inconsistent under its own common law predicates and likewise would amount to a displacement of statutory APA review standards. This distinction is key to correcting course on the presumption and ensuring it is fairly used. Under a purposivist methodology, the Supreme Court ought to pay this issue attention. At minimum, the Supreme Court should justify the need for a heightened burden.

Rather, the preponderance of the evidence standard, which is "the traditional standard in civil and administrative proceedings," could apply.[256] In other words, the default rule—that a challenger must demonstrate that the government is acting unlawfully—is exactly what the presumption is (or should be doing). The close relationship between general administrative deference as embodied by the APA and the presumption of regularity counsels in favor of this calibration of the standard. Courts' recognition of that fact could mitigate judicial confusion.[257] This is consistent with the fact that the presumption has

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request for the Court to defer to its understanding of the meaning of the word "extension" by applying the *Chevron* doctrine).

253. Brief for Executive Branch Officials, *supra* note 27, at 9–10.

254. Gavoor & Platt, *supra* note 68, at 18.

255. 5 U.S.C. § 706.

256. Sea Island Broad. Corp. of S.C. v. FCC, 627 F.2d 240, 243 (D.C. Cir. 1980).

257. Brief for Executive Branch Officials, *supra* note 27, at 10–14 ("As *Crawford-El* makes plain, the presumption's 'clear evidence' requirement is wholly distinct from the 'clear and convincing evidence' standard—or any other 'heightened standard' of proof." (citations omitted)) (but noting that "there has been some confusion in the lower courts" on the burden).

historically applied to encompass private entities in addition to the executive and judicial branches.

2. The Presumption Should Not Apply Outside of Ministerial Matters

Moreover, the Court should revert to the common law conception of the presumption of regularity and limit its use to technical matters. The historical origins of the presumption discussed above show it was used as a burden assignment, not as a heightened burden of persuasion.[258] For example, courts used the presumption to avoid the tediousness of proving that the executive satisfied certain technical requirements when no serious question was raised as to the satisfaction of those requirements.[259] This Article does not endorse the view that the Justices should extirpate the presumption of regularity but rather that they should cull its variegates so that the presumption applies exclusively in non-merit matters. Doing so would reverse any shift in recent decades "from a functional assessment of the relevant decisionmaking scheme to a categorical conception of executive power."[260] This would cover such issues as the completeness of the administrative record, but would not apply to assist the government in making its defense on the merits, on either the facts or the law.[261] A ministerial-duty limitation would also ensure that the presumption remains focused on the performance of *official* duties, and does not grow to protect officials who act in a manner not required by the law.[262] Examples of acceptable beneficiaries of the presumption include the sorts of duties so recognized in the eighteenth and nineteenth centuries: in the absence of countervailing evidence,[263] whether someone generally known to be the parish constable was duly appointed as such, or whether subpoenas were properly served.[264]

258. *See supra* Part II.B.

259. Brief for Executive Branch Officials, *supra* note 27, at 4.

260. Presumption in Exec. Branch, *supra* note 1, at 2450.

261. Brief for Executive Branch Officials, *supra* note 27, at 20 (arguing that the presumption should apply equally across Executive officers and employees to avoid "needlessly blend[ing] the presumption of regularity with other rules that serve to heighten deference and grant immunity when appropriate" and giving the Executive "more latitude than those carefully calibrated [merits deference] doctrines would otherwise afford").

262. *See* Gov't of Guam v. Guerrero, 11 F.4th 1052, 1062 (9th Cir. 2021) (Bennett, J., dissenting) (citing United States v. Chem. Found. Inc., 272 U.S. 1, 15 (1926) ("[I]f the district court's decision to invoke a presumption of regularity rested on 'longstanding procedures,' which are not required by either statute or regulation, then the district court erred.").

263. *See* R. v. Gordon, 168 E.R. 359 (K.B. 1789).

264. *See* Schell v. Fauche, 138 U.S. 562, 564–65 (1891). *See generally supra* Part I.

3. The Presumption Should Be Available to High-Ranking Agency Officials and Generally Unavailable to Employees Who Are Not Officers of the United States

This Article further contends that the best version of a doctrinal (or statutory) presumption of regularity is limited to not just any government employee but only to a senior government official. As noted, the presumption is currently being applied indiscriminately up and down the organizational chart of an agency.[265] The presumption should instead function as a sliding scale, favoring the President, department heads, principal officers, inferior officers, and employees in descending order, with the conduct of employees earning the least (or no) benefit from the presumption.

This model is justified in part by the responsibility lain upon the highest ranking executive officers and the oaths they take. After all, the more specific Article VI oath must be sworn only by officers of the United States.[266] Courts can resort to the presumption, especially with principal officers of the United States—and among them, senior agency leadership—because "elevated offices" such as the presidency impart upon the actor "the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful [sic] abuse of power as human prudence and foresight could well provide."[267] The presumption emanates down the chain of command from such authority.[268]

Granting a more robust presumption of regularity to cabinet heads than to agency staff is consistent with other forms of judicial deference in the realm of administrative law, particularly ones predicated on respect for the legislative branch. The Supreme Court in *Kisor v. Wilkie*[269] recently retooled its *Auer*[270] framework for deferring to an agency's interpretation of its own regulation.[271] One tenet of the revised framework is that the agency's interpretation "must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views."[272] Although the Court shied away from enforcing "a radical distinction between agency heads and staff" for this purpose,

265. *See supra* Part III.

266. U.S. CONST. art. VI, cl. 3.

267. Luther v. Borden, 48 U.S. (7 How.) 1, 44 (1849). *But see* Brief for Executive Branch Officials, *supra* note 27, at 20 (holding that "the presumption should operate differently depending on the government official would introduce a new and unworkable complexity into that doctrine").

268. *E.g.*, Martin v. Mott, 25 U.S. (12 Wheat.) 19, 33 (1827); *see* Wittes & Jurecic, *supra* note 1.

269. 139 S. Ct. 2400 (2019).

270. Auer v. Robbins, 519 U.S. 452 (1997).

271. *Kisor*, 139 S. Ct. at 2400, 2412, 2414, 2424.

272. *Id.* at 2416.

in recognition of "a reality of bureaucratic life," it did emphasize that a line must be drawn somewhere. In doing so, the Court allowed interpretations that "must at the least emanate from [agency heads], using [official pronouncement] vehicles, understood to make authoritative policy in the relevant context."[273] The source of this limit is Congress, which typically delegates authority not to inferior officers or middle management but to the agency alone.[274]

But increasing deference also springs from common sense: agency heads bear great responsibility and tremendous demands on their time.[275] Thus, for example, the Supreme Court has suggested, and courts of appeals have held, that "[h]eads of government agencies are not normally subject to deposition,"[276] absent "exceptional circumstances."[277] One court has reasoned that without this limitation, "such officials would spend 'an inordinate amount of time tending to pending litigation.'"[278] That reasoning holds for deference in the regularity space: higher ranking government officials' calendars would be full if they constantly had to furnish evidence that they complied with various legal requirements in fulfilling their duties—when there is no evidence to the contrary, and despite the great multitude of duties attendant to such officials. That said, cabinet heads and principal officers do not work in a vacuum. Comparative time resource and expertise advantages compel agency heads to take the authority delegated to them and their agency and to subdelegate that authority down the line.[279] This Article thus suggests a sliding scale for the presumption's applicability to the chain of command instead of rigidly advocating that the presumption apply exclusively to agency heads.

On a separate plane, this sliding scale model would favor clearly constitutional offices over those that might be constitutionally novel and disputed—or at least cabinet agencies over independent agencies. The idealized presumption could be conditioned on agencies or offices that are "settled" in their constitutional validity. The reason for this distinction is that cabinet agencies and officers lie closer to political accountability

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273. *Id.* at 2416–17 (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 n.9 (1980)).

274. *Id.* at 2416.

275. *In re* United States, 985 F.2d 510, 512 (11th Cir. 1993) (holding that high-ranking government officials are generally not subject to depositions because they have "greater duties and time constraints than other witnesses").

276. Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979); *see* United States v. Morgan, 313 U.S. 409, 422 (1941).

277. *See, e.g.*, Lederman v. N.Y.C. Dep't of Parks & Recreation, 731 F.3d 199, 203 (2d Cir. 2013) (collecting cases); *see also supra* note 95 and accompanying text.

278. *Lederman*, 731 F.3d at 203 (quoting Bogan v. City of Boston, 489 F.3d 417, 423 (1st Cir. 2007)).

279. Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 441 (2015).

than do independent agencies. Moreover, this distinction helps police institutional biases. Consider, for example, an administrative law judge within the Securities and Exchange Commission. Their decisions are finalized or reviewable by the commissioners. The administrative law judge holds some institutional bias, as they must always try to anticipate whether their decision will be upheld at the commission level. The same could hold for certain independent agencies, the structure of which the Supreme Court in recent years has begun examining more closely.[280] This suggests a shrunken foundation for enjoying a presumption of regularity.

One corollary question is whether artificial intelligence-assisted or responsible actions should be presumed regularly. The answer is no, for two reasons. First, government-use examples of artificial intelligence have a major deficit of accountability, which counsels against trusting that artificial intelligence performs these actions in a regular manner.[281] Second, the presumption should benefit only natural persons, as only natural persons take oaths, receive appointments to agency positions, or are indirectly democratically accountable, as described above. Artificial intelligence simply cannot be found anywhere along the sliding scale running from the President to cabinet heads to principal officers to inferior officers to employees.

4. The Presumption Should Not Vary Based on the Presidential Administration or Past Agency Action Within That Administration

In confronting the presumption afresh, courts might consider how robustly they should apply the presumption to particular executive officials or administrations, a question that is in academic vogue.[282] One scholar argued that the judicial deference wholesale should not apply to actors like President Trump,[283] but such an argument, which does not extend to the presumption of regularity specifically, could run afoul of

280. *See, e.g.*, Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020).

281. ADMIN. CONF. OF THE UNITED STATES, ARTIFICIAL INTELLIGENCE IN FEDERAL AGENCIES 7, 20 fig. 7 (2020), https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf (describing the "deep accountability challenges" inherent in artificial intelligence and describing use cases with insufficient detail).

282. *E.g.*, Rozenshtein, *supra* note 1 ("Just how much courts should apply the presumption to the Trump administration is a matter of ongoing debate."); Johnsen, *supra* note 2; Vladeck, *supra* note 12.

283. Johnsen, *supra* note 2 ("I do think we need to take seriously the possibility that Trump has sacrificed his claim to traditional deference, not only in particular cases where litigants make a special case, but as a general matter across contexts and issues. Given what is known, to do otherwise risks wrong and arbitrary outcomes that, for example, depend excessively on whether Trump and his officials have been unusually circumspect and careful to hide in a particular instance (for a particular policy) what we know to be a general problem.").

democratic theory and separation of powers principles.[284] As that line of reasoning goes, such actors would begin defending a lawsuit without the "head start" provided by the presumption, but they could eventually earn back the right to assert the presumption over an unarticulated time period based on an unarticulated showing.[285] Courts should sharply refrain from imposing such a deference detention box because there is no limiting principle for its use that would not politicize the judiciary and reduce its legitimacy.[286] Holding that "the presumption should operate differently depending on the government official would introduce a new and unworkable complexity into that doctrine."[287] Untangling the presumption of regularity knot will not likely require the Court to disturb a great number of cases that had cited or relied on the presumption. The Court would only be examining dicta, which substantially eases its path.[288] The Court can readily fashion an appropriate solution without contravening stare decisis principles.

More concerning, it is unclear how this weighing of the evidence—like the strength of evidence showing agencies may be acting duplicitously or on pretext—differs at all from the ordinary transactional case-by-case weighing of evidence that federal judges perform every day.[289] Further, evidence of an administration acting irregularly should simply be a merits question that does not extend to cases going forward. Courts may wrestle with the point that the presumption is rebutted, but that is not the same thing as operating without the presumption at all. Such a cross-case penalty for any individual would require the courts to drift into an inappropriate public rights model for the federal judiciary that strains the "Cases" or "Controversies" limitation.[290] The successful

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284. *See* Josh Blackman, *The Legal Resistance*, 9 FAULKNER L. REV. 45, 55 (2017) ("It is not for judges to decide, from their cloistered chambers, based on circumstances irrelevant to the case at hand, whether to put a heavier thumb on the scale.").

285. Johnsen, *supra* note 2 ("This is not to say Trump is powerless to earn back traditional judicial deference, only that he already has dug himself a special hole.").

286. Blackman, *supra* note 284, at 55 ("I can't imagine five Justices assessing the necessary level of 'Russian interference in our democracy' before jettisoning the 'presumption of regularity' as applied to President Trump's executive actions.").

287. Brief for Executive Branch Officials, *supra* note 27, at 20.

288. *Cf.* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 917 (2020) ("[T]he effects of departing from stare decisis in the statutory context here are less dramatic than an originalist rejection of large portions of the administrative state.").

289. Johnsen, *supra* note 2 ("[C]ourts should take care not to downplay or sanitize facts peculiar to Trump that specially shift burdens and diminish the deference due."). The only difference here may be that federal district judges view a closed administrative record in APA cases instead of finding facts anew. But that sort of task is wholly unremarkable for federal appellate judges viewing a closed record from a lower court. Cases also might give rise to constitutional claims for which there is sometimes traditional discovery.

290. U.S. CONST. art. III, §§ 1–2; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights on individuals.").

rebuttal of the presumption is not rare. And even where the Supreme Court has recently afforded the executive branch the presumption of regularity, it has come at least once in the context of review of a preliminary injunction[291]—meaning the plaintiffs could, in theory, continue gathering evidence to rebut the presumption.[292] Thus, this Article disagrees with the notion that the presumption should toggle on and off for administrative actors or presidential administrations.[293]

In this vein, Professor Stephen Vladeck's alternative account of some courts' adverse reactions to administrative actions during the Trump Administration is more satisfying. Judges found the presumption of regularity had been rebutted in certain cases not because of "personal bias against President Trump" or anything other than "faithful interpretation and application of the relevant legal standards and rules," but because courts are reversing a forty-year trend of overly deferring to the federal government.[294] Citing "comparably hostile lower-court rulings during (and against) the Obama administration," Professor Vladeck argued that the correction to skeptical judging, and thus a receptiveness to finding the presumption rebutted, will always have a "political (albeit not necessarily *partisan*) valence."[295] This theory reinforces the view that courts should continue to test each case on its own merits, though it needs to be tested with a multi-year dataset from the Biden Administration.

CONCLUSION

The presumption of regularity exists for a good reason: it supposes that executive branch officials discharge their duties in a lawful and regular manner. However, the modern presumption of regularity has over a dozen unique forms that have quietly developed over the decades in a decentralized fashion within the federal judiciary. On account of some forms of the presumption violating separation of powers principles and statutory standards alike, the Supreme Court should articulate and render doctrinal a lawful, discrete, and commonsense standard for the presumption of regularity to the benefit of all. Despite the urgency of bounding and stabilizing the presumption of regularity, judicial or congressional inaction will simply allow the presumption to remain undefined and facilitate the bench, bar, executive branch, and congressional investigators to apply the presumption inconsistently and expansively into new contexts, perhaps without realizing it.

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291. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

292. Blackman, *supra* note 284, at 55–58.

293. *See also id.* at 55.

294. Stephen I. Vladeck, *The Aggressive Virtues*, 93 N.Y.U. L. REV. ONLINE 66, 66, 68 (2018).

295. *Id.* at 68.

Appendix

#	Case name*	Year
	Cases In Which The Presumption Of Regularity Is Described As Being Rebutted (to any degree)	
1	Taylor Energy Co. LLC v. United States by & through United States Coast Guard Nat'l Pollution Funds Ctr., No. CV 20-1086 (JDB), 2021 WL 538052, at *11 (D.D.C. Feb. 15, 2021)	2021
2	Bretagne, LLC v. Multi-Cty. Recreational Bd., Inc., 467 F. Supp. 3d 501, 506 (E.D. Ky. 2020)	2020
3	Nat'l Tr. for Historic Pres. v. Bernhardt, No. CV 19-05008-PHX-MHB, 2020 WL 5221647, at *4 (D. Ariz. Aug. 5, 2020)	2020
4	United States v. Komlo, 313 F. Supp. 3d 638, 646 (E.D. Pa. 2018), aff'd, 802 F. App'x 676 (3d Cir. 2020)	2020
5	United States v. Miller, No. 1:17-CV-02891-ELR, 2019 WL 10837769, at *6 (N.D. Ga. Feb. 22, 2019)	2019
6	New York v. United States Dep't of Com., 351 F. Supp. 3d 502, 662 (S.D.N.Y.), cert. granted before judgment sub nom. Dep't of Com. v. New York, 139 S. Ct. 953, 203 L. Ed. 2d 146 (2019), and aff'd in part, rev'd in part and remanded sub nom. Dep't of Com. v. New York, 139 S. Ct. 2551, 204 L. Ed. 2d 978 (2019), and appeal dismissed, No. 19-212, 2019 WL 7668098 (2d Cir. Aug. 7, 2019)	2019
7	Palantir USG, Inc. v. United States, 904 F.3d 980, 995 (Fed. Cir. 2018)	2018
8	Mallak v. City of Brainerd, No. CV 13-2119 (DWF/LIB), 2017 WL 440249, at *14 (D. Minn. Feb. 1, 2017)	2017
9	Dobruck v. Borders, No. 16-cv-1869, 2016 WL 7157557 (D. Minn. Dec. 8, 2016)	2016
10	W&T Offshore, Inc. v. Jewell, No. 2:14-CV-02449, 2016 WL 8260549, at *3 (W.D. La. Feb. 23, 2016)	2016
11	State of Maine v. McCarthy, No. 1:14-CV-00264-JDL, 2016 WL 6838221, at *11 (D. Me. Nov. 18, 2016)	2016
12	McDonough v. Anoka Cty., 799 F.3d 931, 948 (8th Cir. 2015)	2015
13	Banner Health v. Sebelius, 945 F. Supp. 2d 1, 18 (D.D.C. 2013), decision vacated in part on reconsideration, No. CV 10-01638 (CKK), 2013 WL 11241368 (D.D.C. July 30, 2013	2013
14	Styrene Info. & Rsch. Ctr., Inc. v. Sebelius, 851 F. Supp. 2d 57, 65 (D.D.C. 2012)	2012
15	Am. Wild Horse Pres. Campaign v. Salazar, 859 F. Supp. 2d 33, 44 (D.D.C. 2012)	2012
16	Wilderness Soc'y v. U.S. Forest Serv., No. 1:11-CV-00246-AP, 2012 WL 1079169, at *4 (D. Colo. Mar. 30, 2012)	2012
17	Forest Guardians v. Kempthorne, No. CIV 06CV2560-L(LSP), 2008 WL 4492635, at *2 (S.D. Cal. Sept. 29, 2008)	2008
18	Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1338 (Fed. Cir. 2001)	2001
19	United States v. New Orleans Pub. Serv., Inc., 723 F.2d 422, 429 (5th Cir. 1984)	1984
20	Land O'Lakes, Inc. v. United States, 470 F. Supp. 238, 241 (D. Minn. 1979), aff'd in part, rev'd in part, 675 F.2d 988 (8th Cir. 1982)	1982
21	Shuk Yee Chan v. Reg'l Manpower Adm'r of U. S. Dep't of Lab., 521 F.2d 592, 595 (7th Cir. 1975)	1975
22	United States v. Shermeister, 425 F.2d 1362, 1365 (7th Cir. 1970)	1970
23	Hunter Glover Co. v. Harvey Steel Prod. Corp., 3 F.2d 634, 639 (W.D. Tenn. 1924)	1924

Cases In Which The Presumption Of Regularity Was Not Rebutted		
1	Ctr. for Food Safety v. Perdue, No. 20-CV-01537-RS, 2021 WL 1220949, at *3 (N.D. Cal. Mar. 19, 2021)	2021
2	Ohio v. Raimondo, No. 3:21-CV-064, 2021 WL 1118049, at *8 (S.D. Ohio Mar. 24, 2021), rev'd and remanded, 848 F. App'x 187 (6th Cir. 2021)	2021
3	Paracha v. Trump, 453 F. Supp. 3d 168, 186 (D.D.C. 2020)	2020
4	Arriva Med. LLC v. Sec'y of United States Dep't of Health & Hum. Servs., No. 9:19-CV-80685, 2020 WL 5032978, at *6 (S.D. Fla. Aug. 25, 2020), report and recommendation adopted, No. 19-80685-CIV, 2020 WL 5757084 (S.D. Fla. Sept. 28, 2020)	2020
5	Johnson v. Mnuchin, No. 17-CV-01541 (TSC), 2019 WL 4601971, at *5 (D.D.C. Sept. 23, 2019)	2019
6	Voyageur Outward Bound Sch. v. United States, No. 1:18-CV-01463 (TNM), 2019 WL 11584988, at *2 (D.D.C. Apr. 8, 2019)	2019
7	Hammett v. Mnuchin, No. CV 17-00481 KBJ/DAR, 2019 WL 1011841, at *5 (D.D.C. Feb. 26, 2019)	2019
8	United States v. Meyer, No. CV 16-774 ADM/LIB, 2017 WL 3016761, at *5 (D. Minn. July 14, 2017), aff'd, 914 F.3d 592 (8th Cir. 2019)	2019
9	Santos-Santos v. Barr, 917 F.3d 486, 493 (6th Cir. 2019)	2019
10	Nw. Env't Advocs. v. United States Fish & Wildlife Serv., No. 3:18-CV-01420-AC, 2019 WL 6977406, at *14 (D. Or. Dec. 20, 2019)	2019
11	Sterling v. Shulkin, 712 F. App'x 1001, 1002 (Fed. Cir. 2018)	2018
12	In re United States, 875 F.3d 1200 (9th Cir.), cert. granted, judgment vacated, 138 S. Ct. 443 (2017)	2017
13	Houston v. Dir., TDCJ-CID, No. 6:14CV231, 2017 WL 11606755, at *2 (E.D. Tex. Mar. 27, 2017)	2017
14	Conservation Cong. v. United States Forest Serv., No. 213CV01922TLNCMK, 2016 WL 10637090, at *4 (E.D. Cal. Oct. 12, 2016)	2016
15	Dist. Hosp. Partners, L.P. v. Sebelius, 971 F. Supp. 2d 15, 23 (D.D.C. 2013), aff'd sub nom. Dist. Hosp. Partners, L.P. v. Burwell, 786 F.3d 46 (D.C. Cir. 2015)	2015
16	Gupta v. U.S. Atty. Gen., No. 6:13-CV-1027-ORL-40, 2015 WL 5687829, at *4 (M.D. Fla. Sept. 25, 2015)	2015
17	Valencia v. Davey, No. 1:11-CV-01066-AWI-SK, 2015 WL 3402946, at *15 (E.D. Cal. May 27, 2015)	2015
18	Toomer v. McDonald, 783 F.3d 1229, 1234 (Fed. Cir. 2015)	2015
19	Veloxis Pharms., Inc. v. United States Food & Drug Admin., 109 F. Supp. 3d 104, 125 (D.D.C. 2015)	2015
20	Berry v. McDonald, No. 1:12-CV-00901-BAM-HC, 2015 WL 1404985, at *6 (E.D. Cal. Mar. 26, 2015)	2015
21	Pub. Emps. for Env't Resp. v. Cruickshank, No. CV 10-1073, 2014 WL 12677059, at *5 (D.D.C. Sept. 12, 2014)	2014
22	Kuzma v. U.S. Dep't of Just., No. 12-CV-807S, 2014 WL 4829315, at *6 (W.D.N.Y. Sept. 29, 2014)	2014
23	California v. U.S. Dep't of Lab., No. 2:13-CV-02069-KJM, 2014 WL 1665290, at *15 (E.D. Cal. Apr. 24, 2014)	2014
24	Stand Up for California! v. United States Dep't of Interior, 71 F. Supp. 3d 109, 124 (D.D.C. 2014)	2014
25	Rayford v. Stephens, No. 06-cv-978, 2014 WL 4744632 (N.D. Tex. Sept. 22 2014)	2014
26	United States v. Morad, No. 13-cr-101, 2014 WL 68704 (E.D. La. Jan. 8, 2014)	2014
27	Alston v. Lew, 950 F. Supp. 2d 140, 145 (D.D.C. 2013)	2013
28	Brown v. Gray, No. 09-3002-RDR, 2011 WL 3611454, at *6 (D. Kan. Aug. 16, 2011), aff'd, 483 F. App'x 502 (10th Cir. 2012)	2012
29	Wadhwa v. Aurora Loan Servs., LLC, No. CIV. S-11-1784 KJM K, 2012 WL 762020, at *9 (E.D. Cal. Mar. 8, 2012)	2012
30	Rock Creek All. v. U.S. Fish & Wildlife Serv., 663 F.3d 439, 443 (9th Cir. 2011)	2011
31	Rock Creek All. v. U.S. Forest Serv., 703 F. Supp. 2d 1152, 1194 (D. Mont. 2010), aff'd in part sub nom. Rock Creek All. v. U.S. Fish & Wildlife Serv., 663 F.3d 439 (9th Cir. 2011)	2011
32	United States v. Dean, No. 2:09-CR-00222-37, 2010 WL 2598231, at *7 (S.D. W. Va. June 25, 2010)	2010
33	Matos v. Ercole, No. 08 CIV. 8814 (LBS), 2010 WL 2720001, at *9 (S.D.N.Y. June 28, 2010)	2010
34	United States v. Arita-Campos, No. 2:05 CR 48, 2009 WL 306394, at *3 (N.D. Ind. Feb. 6, 2009), aff'd, 607 F.3d 487 (7th Cir. 2010)	2010
35	United States v. Tran, No. 1:08-CR-66-LG-JMR-3, 2009 WL 4723278, at *2 (S.D. Miss. Dec. 8, 2009)	2009
36	Jackson v. Morrisey, No. 08-CV-0298, 2009 WL 3300259, at *8 (W.D.N.Y. Sept. 27, 2009)	2009
37	Kyle v. Quarterman, No. SA06CA0346OGNN, 2006 WL 8437442, at *2 (W.D. Tex. Nov. 22, 2006), aff'd sub nom. Kyle v. Thaler, 354 F. App'x 103 (5th Cir. 2009)	2009
38	Calloway v. Harvey, 590 F. Supp. 2d 29, 38 (D.D.C. 2008)	2008
39	Cochrane v. Wynne, 541 F. Supp. 2d 267, 272 (D.D.C. 2008)	2008
40	United States v. Luevano-Mayorga, No. CR01-3062-MWB, 2007 WL 869216, at *7 (N.D. Iowa Mar. 20, 2007)	2007
41	Kohli v. Gonzales, 473 F.3d 1061, 1068 (9th Cir. 2007)	2007
42	Aoraha v. Gonzales, 209 F. App'x 473, 476-77 (6th Cir. 2006)	2006
43	Cutrer v. Cockrell, No. 301CV0841D, 2002 WL 1398558, at *13-14 (N.D. Tex. June 26, 2002), abrogated by Caldwell v. Dretke, 429 F.3d 521 (5th Cir. 2005)	2005
44	Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1074 (9th Cir.), amended, 387 F.3d 968 (9th Cir. 2004)	2004
45	United States v. Laxey, 91 F. App'x 939, 941 (5th Cir. 2004)	2004
46	Freeman v. United States, 284 F. Supp. 2d 217, 226 (D. Mass. 2003)	2003
47	Richey v. United States, 322 F.3d 1317, 1327 (Fed. Cir. 2003)	2003
48	Soto v. Greiner, No. 02 CIV.2129 SHS AJP, 2002 WL 1678641, at *12 n.26 (S.D.N.Y. July 24, 2002)	2002
49	Riggs Nat. Corp. & Subsidiaries v. Comm'r, 295 F.3d 16, 22 (D.C. Cir. 2002)	2002
50	Labee v. Principi, 25 F. App'x 992, 994 (Fed. Cir. 2001)	2001
51	Whitworth v. Johnson, No. 3-00-CV-1249-G, 2001 WL 1631506, at *3 (N.D. Tex. Dec. 17, 2001)	2001
52	Cone v. Caldera, 46 F. Supp. 2d 3, 7 (D.D.C. 1999), rev'd, 223 F.3d 789 (D.C. Cir. 2000)	2000
53	United States v. Fletchall, 19 F. Supp. 2d 932, 943 (N.D. Iowa 1997)	1997
54	Henry v. Dep't of Navy, Bd. for Correction of Naval Recs., 755 F. Supp. 1442, 1447 (E.D. Ark. 1991), rev'd sub nom. Henry v. Dep't of Navy, 985 F.2d 569 (8th Cir. 1992)	1992
55	Beale v. United States, 853 F.2d 926 (6th Cir. 1988)	1988
56	United States v. Stonehill, 702 F.2d 1288, 1296 (9th Cir. 1983)	1983
57	In re Grand Jury Matter Impounded, 703 F.2d 56, 57 (3d Cir. 1983)	1983
58	United States v. Greater Syracuse Bd. of Realtors, Inc., 449 F. Supp. 887, 900 (N.D.N.Y. 1978)	1978
59	Philadelphia Welfare Rts. Org. v. Embry, 438 F. Supp. 434, 440 (E.D. Pa. 1977)	1977
60	United States v. Ahrens, 530 F.2d 781, 786 (8th Cir. 1976)	1976
61	United States v. McIntire, 365 F. Supp. 618, 622 (D.N.J. 1973)	1973
62	United States v. Bulger, 338 F. Supp. 629, 633 (N.D. Cal. 1972)	1972
63	United States v. Trager, 53 F.R.D. 654, 656 (E.D. Mo. 1971)	1971
64	United States v. Goodman, 435 F.2d 306, 312 (7th Cir. 1970)	1970
65	U.S. ex rel. Darrah v. Brierley, 290 F. Supp. 960, 963 (E.D. Pa. 1968), aff'd, 415 F.2d 9 (3d Cir. 1969)	1969
66	Fusco for & on Behalf of N. L. R. B. v. Richard W. Kaase Baking Co., 205 F. Supp. 465, 474 (N.D. Ohio 1962)	1962
67	Fletcher v. Jones, 105 F.2d 58, 61 (D.C. Cir. 1939)	1939
68	R.H. Stearns Co. of Bos., Mass. v. United States, 291 U.S. 54 (1934)	1934
69	Boydston v. Cont'l & Com. Tr. & Sav. Bank, 298 F. 31, 35 (8th Cir. 1924)	1924
70	Lanckton v. United States, 18 App. D.C. 348, 362 (D.C. Cir. 1901)	1901

	Cases In Which The Court Takes No Position Or Only Describes The Presumption Of Regularity	
1	Cones v. Wilkie, 825 F. App'x 841 (2d Cir. 2020)	2020
2	Paracha v. Trump, No. CV 04-2022 (PLF), 2019 WL 5296839, at *2 (D.D.C. Oct. 18, 2019)	2019
3	Garcia v. Lee, No. 11-cv-1803, 2018 WL 2268129 (S.D.N.Y. May 17, 2018)	2018
4	Jenkins v. Speer, 258 F. Supp. 3d 115, 127 (D.D.C. 2017)	2017
5	United States v. HSBC Bank USA, N.A., 863 F.3d 125, 129 (2d Cir. 2017)	2017
7	Tichich v. City of Bloomington, 835 F.3d 856 (8th Cir. 2016)	2016
8	Kost v. Hunt, No. 13-cv-583, 2016 WL 5539768 (D. Minn. Aug. 11, 2016)	2016
9	Sapp v. City of Baudette, No. 15-cv-1589, 2016 WL 1258735 (D. Minn. Mar. 28, 2016)	2016
10	Toomer v. Shinseki, 524 F. App'x 666, 670 (Fed. Cir. 2013)	2013
11	Knapp v. Armstrong, No. 1:11-CV-00307-BLW, 2012 WL 640890, at *5 (D. Idaho Feb. 26, 2012)	2012
12	Latif v. Obama, 666 F.3d 746, 764 (D.C. Cir. 2011)	2011
13	Chrysler Corp. v. United States, 604 F.3d 1378 (Fed. Cir. 2010)	2010
14	Chamber of Com. of U.S. v. S.E.C., 443 F.3d 890, 909 (D.C. Cir. 2006)	2006
15	Turner v. Greiner, No. 98 CV 491 (RR), 2000 WL 516509, at *3 (E.D.N.Y. Mar. 24, 2000)	2000
16	Atchison, Topeka & Santa Fe Ry. Co. v. Lennen, 552 F. Supp. 1031, 1042 (D. Kan. 1982), aff'd in part, rev'd in part, 732 F.2d 1495 (10th Cir. 1984)	1984
17	Clinchfield R. Co. v. Lynch, 527 F. Supp. 784, 788 (E.D.N.C. 1981), aff'd, 700 F.2d 126 (4th Cir. 1983)	1983
18	Schutz v. United States, 422 F.2d 991, 999 (5th Cir. 1970)	1970
19	United States v. Washington, 251 F. Supp. 359, 361 (E.D. Va. 1966), aff'd in part, rev'd in part, 402 F.2d 3 (4th Cir. 1968)	1968
20	Frederick v. United States, 386 F.2d 481, 495 (5th Cir. 1967)	1967
21	U.S. ex rel. Johnson v. Shaughnessy, 336 U.S. 806 (1949)	1949
22	Von Moltke v. Gillies, 332 U.S. 708 (1948)	1948
23	Miami Valley Fruit Co. v. United States, 45 F.2d 303, 305 (5th Cir. 1930)	1930
	*Westlaw search for all instances of "presumption of regularity" occurring within 25 words of "rebutted," in the U.S. Supreme Court and all federal courts of appeals and federal district courts at any date until August 14, 202.That search returned 120 results, within which 93 cases made a ruling as to whether the presumption of regularity was rebutted. (Some results were excluded as duplicative for belonging to different stages of the same case.) Of those, 23 cases found the presumption was rebutted, and 70 cases found the presumption was not rebutted.	