

NATIONAL SECURITY RULEMAKING

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ABSTRACT

Agencies performing national security functions regulate citizens' lives in increasingly intimate ways. Yet national security rulemaking is a mystery to most Americans. Many rules—like those implementing the National Security Agency's vast surveillance schemes—remain secret. Others are published, but the deliberations that led to them and the legal justifications for them remain hidden.

Ordinarily, these rules would undergo the Administrative Procedure Act's notice-and-comment process, which has earned wide, if not universal, praise for advancing democratic values and enhancing agency effectiveness. But a national security exception from notice-and-comment in the APA itself, along with the overuse of classification authority, combine to insulate most national security rulemaking from public scrutiny and meaningful judicial review. The result is a national security administrative state that is insular and unaccountable to the public.

Some scholars find this exceptional treatment inevitable, while others have proposed reforms. But no one has sought to provide a full accounting of national security rulemaking's scope and historical origins. By doing so, this Article demonstrates that the APA exception is historically contingent—a response to the rise of totalitarian states and the Second World War. As a product of its time rather than an essential attribute of all administrative law systems, it is a relic in a globalized world in which the foreign and the domestic are increasingly intertwined, and the line between national security and ordinary rulemaking therefore begins to fade entirely.

This Article suggests reforms that would increase public deliberation in national security rulemaking, while accounting for the importance of secret-keeping when truly necessary. Among these proposed reforms is a change to the current practice allowing national security agencies to invoke the security exception to notice-and-comment after a rule is challenged in court, rather than at the notice-and-comment stage itself. These reforms would improve the current rulemaking practice, which undermines the transparency necessary for effective democratic participation.

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*"There are exceptions. If they cannot be explained, then the universal cannot be explained, either."*¹

I. INTRODUCTION

In 2013, a series of leaks and disclosures revealed that the National Security Agency (NSA) conducts mass surveillance of Americans' private electronic information on an unprecedented scale.² The content of e-mails, web searches, and phone calls of millions are regularly stored in databases, along with the metadata³ for such communications of hundreds of millions.⁴ Under certain rules—many still secret—agencies such as the FBI and DOJ may access these records to investigate unlawful activity by foreigners.⁵ But the difference between "foreign" and "American" often hangs on low-level NSA analysts' judgment calls or search algorithms.⁶ And if these investigations

1. SØREN KIERKEGAARD, *FEAR AND TREMBLING/REPETITION* 227 (Howard V. Hong & Edna H. Hong trans., Princeton University Press 1983) (1843).

2. The legal authorization for much of this surveillance was obtained by the FBI and the Department of Justice. See Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html.

3. Metadata is not the content of a record or communication but the information about it, such as the time, date, and parties involved. See Jane Mayer, *What's the Matter with Metadata?*, NEW YORKER (June 6, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/06/verizon-nsa-metadata-surveillance-problem.html>. However, metadata is often more useful for information-gathering than the content itself. See *id.*

4. See James Bamford, *They Know Much More Than You Think*, N.Y. REV. BOOKS (Aug. 15, 2013), <http://www.nybooks.com/articles/archives/2013/aug/15/nsa-they-know-much-more-you-think/?pagination=false> (observing that metadata of telephone communications of "hundreds of millions of Americans" had been collected); Barton Gellman, *U.S. Surveillance Architecture Includes Collection of Revealing Internet, Phone Metadata*, WASH. POST (June 15, 2013), http://articles.washingtonpost.com/2013-06-15/news/39993852_1_comey-national-intelligence-intelligence-collection (describing the PRISM and NUCLEON Programs, which collect Internet and phone call content, respectively); Siobhan Gorman, Evan Perez & Janet Hook, *U.S. Collects Vast Data Trove*, WALL ST. J. (June 7, 2013), <http://online.wsj.com/news/articles/SB10001424127887324299104578529112289298922> (describing the collection of phone and credit card transaction metadata); Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (London) (June 5, 2013), <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> (same); Glenn Greenwald & Spencer Ackerman, *How the NSA is Still Harvesting Your Online Data*, GUARDIAN (London) (June 27, 2013), <http://www.theguardian.com/world/2013/jun/27/nsa-online-metadata-collection> (describing the collection of Internet metadata).

5. See Gellman & Poitras, *supra* note 2.

6. See William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 TEX. L. REV. 1633, 1634 (2010) ("Instead of building toward an individual FISA application by developing leads on individuals with some connection to an international terrorist organization . . . officials now develop algorithms that search thousands or even millions of collected e-mail messages and telephone calls for indications of suspicious activities."); Glenn Greenwald & James Ball, *The Top Secret Rules That Allow NSA to Use US*

uncover illegal activity by Americans—even inadvertently—the information is passed to other agencies for investigation and prosecution.⁷

This surveillance is far broader and deeper than previously understood.⁸ But it is also, to the surprise of many, arguably lawful.⁹ The USA PATRIOT Act¹⁰ and the updated Foreign Intelligence Surveillance Act (FISA)¹¹ give agencies wide discretion to obtain and search private electronic files.¹² The government claims that publicly availa-

Data Without a Warrant, GUARDIAN (London) (June 20, 2013), <http://www.theguardian.com/world/2013/jun/20/fisa-court-nsa-without-warrant>.

7. See Greenwald & Ball, *supra* note 6. The DEA has a secretive Special Operations Unit (SOP) that funnels information from intelligence databases to law enforcement agencies, which use it to launch investigations but do not disclose how these investigations begin. See John Shiffman & Kristina Cooke, *Exclusive: U.S. Directs Agents to Cover Up Program Used to Investigate Americans*, REUTERS (Aug. 5, 2013), <http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805>.

8. For a history of the NSA's surveillance of Americans in the first decade after the September 11 attacks, see generally JAMES BAMFORD, *THE SHADOW FACTORY: THE ULTRA-SECRET NSA FROM 9/11 TO THE EAVESDROPPING ON AMERICA* (2008).

9. See, e.g., OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, DNI STATEMENT ON RECENT UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION (2013), *available at* <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information> (defending the leaked surveillance program as having “been authorized by all three branches of the Government”).

10. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

11. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1855 (2006). FISA was amended in 2008 to update and expand legal authority to search electronic information. FISA Amendments Act of 2008, Pub. L. No. 110-261, § 102, 122 Stat. 2436, 2459-60 (codified at 50 U.S.C. § 1812).

12. The government has not disclosed its complete legal justification for the NSA's programs, but some of the provisions that have been or may be relied on include USA PATRIOT Act § 216, 18 U.S.C. § 3127(3) (2012) (expanding the availability of “pen register” devices to encompass interception of internet metadata); USA PATRIOT Act § 214, 50 U.S.C. § 1842(c) (2006) (lowering the standard for obtaining internet metadata so that the FBI need only certify to the Foreign Intelligence Surveillance Court (FISC) that the information likely to be obtained is “relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities”); USA PATRIOT Act § 21, 50 U.S.C. § 1861 (2006) (the so-called “business records” provision, apparently interpreted by the FISC, in a secret opinion, to authorize the FBI to obtain all of a carrier's phone metadata, see David Cole, *Can Privacy Be Saved?*, N.Y. REV. BOOKS (Mar. 6, 2014), <http://www.nybooks.com/articles/archives/2014/mar/06/can-privacy-be-saved/?pagination=false>); and FISA Amendments Act § 702, 50 U.S.C. § 1881a (2006) (allowing the government to acquire foreign intelligence by obtaining the content of communications by non-U.S. persons “reasonably believed” to be outside U.S. borders, and interpreted to authorize the collection of phone and Internet content of Americans in the process).

ble regulations¹³ and executive orders¹⁴ authorize parts of the controversial program. The Foreign Intelligence Surveillance Court (FISC), through secret orders, approved some aspects.¹⁵ But most rules implementing the program were developed and approved internally by agencies through secret rulemaking. Leaks or public pressure eventually forced disclosure of many rules, but secrecy still enshrouds the processes that led to them and even the legal authority for them.¹⁶

Secret rulemaking makes up a growing portion of the federal government's "legislative" rules—those that, among other things, prescribe rights or duties and fill statutory gaps—which have the force of law.¹⁷ Yet under fundamental administrative law principles enu-

13. See NSA, UNITED STATES SIGNALS INTELLIGENCE DIRECTIVE 18: LEGAL COMPLIANCE AND MINIMIZATION PROCEDURES (1993), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/07-01.htm> (prescribing NSA safeguards for protecting constitutional rights of U.S. persons and regulating the collection, processing, and dissemination of information concerning U.S. persons); U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 16 (2008), *available at* <http://www.justice.gov/ag/readingroom/guidelines.pdf> (authorizing agents to engage in proactive intelligence gathering in a manner "not limited to 'investigation' in a narrow sense"); U.S. DEP'T OF DEF., DIRECTIVE 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (1982), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/524001r.pdf> (regulating the role of DoD personnel and resources in the NSA programs).

14. Executive Order 12,333 authorizes the NSA to collect "foreign intelligence or counterintelligence" information while not "acquiring information concerning the domestic activities of United States persons." Exec. Order No. 12,333, 3 C.F.R. 200, 211 (1981). This executive order was most recently amended by Executive Order 13,470, 3 C.F.R. 218, 229 (2008), which authorizes the NSA to "[p]rescribe . . . security regulations" consistent with its authority.

15. See Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES (July 6, 2013), http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html?pagewanted=all&_r=0. FISA created the FISC to oversee requests for surveillance warrants against suspected foreign intelligence agents inside the United States by federal law enforcement agencies. See *id.* The FISC has been widely criticized for its extreme deference to agencies and overly broad interpretations of statutory authority. See, e.g., Letter from F. James Sensenbrenner, Jr., Congressman, U.S. House of Representatives, to Eric Holder, Attorney Gen., U.S. Dep't of Justice (Sept. 6, 2013), *available at* http://sensenbrenner.house.gov/uploadedfiles/sensenbrenner_letter_to_attorney_general_eric_holder.pdf (noting objections by the Patriot Act's principal author to overly broad interpretations used to justify the NSA programs); *infra* Part II.C.

16. See, e.g., Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 632 (2010) (noting that the Attorney General Guidelines regulating domestic intelligence-gathering by the FBI were traditionally kept secret but are now available online); Gellman & Poitras, *supra* note 2 (describing secret rules instructing NSA analysts to enter search terms "that are designed to produce at least 51 percent confidence in a target's 'foreignness'"); Shiffman & Cooke, *supra* note 7 (describing secret documents regulating the DEA's Special Operations Division's use of electronic information).

17. See Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 475 (2013); see also *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) ("Legislative rules . . . create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress."); *United Techs. Corp. v. EPA*, 821 F.2d 714, 719 (D.C. Cir. 1987) (describing legislative rules as those "in which the agency sought to fill gaps and inconsistencies left by the statutory scheme"); Jacob E. Gersen, *Legislative Rules Revisited*,

merated in the Administrative Procedure Act (APA),¹⁸ these legislative rules must ordinarily be published and undergo the notice-and-comment process before they take effect.¹⁹ Notice-and-comment—through which the public engages in dialogue with agencies, requiring them to respond to its concerns—safeguards democratic values and enhances the quality of rulemaking.²⁰ A prominent scholar in the field called it “[o]ne of the [g]reatest [i]nventions of [m]odern [g]overnment.”²¹

Quite often, however, notice-and-comment is missing from national security rulemaking. Classification authority trumps other publication requirements,²² making notice-and-comment impossible.²³ A massive amount of government activity takes place entirely in secret. By 2009, 1074 federal government organizations worked on programs

74 U. CHI. L. REV. 1705, 1708-09 (2007) (describing the difficulty courts sometimes encounter distinguishing legislative or “substantive” rules from merely “interpretive” rules).

18. 5 U.S.C. §§ 500–596 (2012); *see also infra* Part II.A (describing the APA’s fundamental importance in American law).

19. *See* 5 U.S.C. § 553(b) (This provision states that “[g]eneral notice of proposed rule making shall be published in the Federal Register” unless there is “actual notice,” and requires that the notice include “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.”); *id.* § 553(c) (requiring that agencies provide opportunity for public and interested parties to respond to the agency notice of rulemaking by tendering written opinions, information, or statements); *id.* § 553(d) (requiring a minimum thirty-day grace period between the announcement of a rule and its effective date); Gersen, *supra* note 17, at 1709-11 (explaining that legislative rules, also known as “substantive” rules, may only be promulgated through notice and comment unless a statutory exception applies).

20. *See infra* Part II.A.

21. Kenneth Culp Davis, *Administrative Law Treatise* § 6.15, at 283 (Supp. 1970).

22. *See* Arthur Earl Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 221, 238-40 (1972). The APA’s publication requirements originally included an exception for “any function of the United States requiring secrecy in the public interest.” Administrative Procedure Act, Pub. L. No. 79-404, § 3, 60 Stat. 237, 238 (1946). When the APA was amended by the Freedom of Information Act (FOIA), Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552), Congress included two exceptions related to national security—Exception 1, which authorizes withholding information classified “by an Executive order to be kept secret in the interest of national defense or foreign policy,” 5 U.S.C. § 552(b)(1), and Exception 3, which authorizes withholding information “exempted from disclosure by statute,” *id.* § 552(b)(3).

23. Because the existence of many national security-related agencies and programs is secret, it is impossible to know how many legislative rules are developed in secret. *See infra* Part II.C. Examples of statutes that authorize secret rulemaking include 50 U.S.C.A. §§ 831–832 (West 2012) (providing limitations and guidelines on who has access to classified information at the NSA); *id.* § 3024(g) (holding the Director of National Intelligence accountable for safeguarding intelligence information from disclosure); *id.* § 3161 (governing the process of classifying information and accessing classified information); *id.* § 3365 (limiting the dissemination of privileged information); *id.* § 3121 (punishing individuals who reveal the identity of undercover agents and classified information); and *id.* § 3142 (allowing operational files of the National Geospatial-Intelligence Agency to be kept secret from the public). *See also* Sudha Setty, *The Rise of National Security Secrets*, 44 CONN. L. REV. 1563, 1583 (2012) (discussing the dangers of allowing “invocations of secrecy to go unchecked”).

at the top-secret level alone.²⁴ The number of agencies and employees working on merely “secret” level programs is surely much larger.²⁵ Amid these agencies’ secret rulemaking lie the great “unknown unknowns” of the administrative state.²⁶

We can learn a great deal about dysfunctions in national security rulemaking when leaks reveal programs like the NSA’s. But we can learn even more from national security rulemaking that the public knows about but cannot participate in. I call this *opaque* rulemaking.²⁷ It accounts for a larger share of national security rulemaking than secret rulemaking and is much broader in scope. It includes, for example, regulations implementing treaties²⁸ and altering the legal rights of immigrants.²⁹

Opaque rulemaking occurs when an agency makes legislative rules available to the public through some means, but refuses to conduct notice-and-comment or explain why.³⁰ The authority to bypass notice-and-comment this way comes from a little-understood but broadly interpreted exception in the APA for “foreign affairs or military functions.”³¹ I call this the national security exception.³²

24. See Dana Priest & William M. Arkin, *Top Secret America: The Rise of the New American Security State* 86 (2011).

25. See *id.* at 86-87.

26. See Donald H. Rumsfeld, Sec’y of Def., Department of Defense News Briefing (Feb. 12, 2002), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>. As David Posen has explained, Rumsfeld’s (infamous) taxonomy aptly describes “deep secrets”—those about which Americans “are in the dark about the fact that they are being kept in the dark.” David E. Posen, *Deep Secrecy*, 62 STAN. L. REV. 257, 260 (2010).

27. Opaque rulemaking creates what David Posen calls “shallow” secrets: the public knows about the secret’s existence only from the publicly available final rule. See Posen, *supra* note 26, at 260.

28. See *Int’l Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1486-87 (D.C. Cir. 1994) (holding that regulations made pursuant to NAFTA exempting Mexican truck drivers from Federal Highway Administration (FHWA) licensing guidelines could be promulgated without notice-and-comment).

29. See *Rajah v. Mukasey*, 544 F.3d 427, 436-38 (2d Cir. 2008) (upholding, under the APA exception, the DOJ’s failure to use notice-and-comment to determine the countries whose citizens would be required to report to the FBI under a post-September 11 registration program, and who could be detained or deported in secret for immigration law violations).

30. Such rules can be published in the Code of Federal Regulations, the Federal Register, or simply online. Secret rulemaking becomes opaque when the content of the rules is made available, through leaks or deliberate disclosure, to the public.

31. See 5 U.S.C. § 553(a)(1) (2012) (stating that notice-and-comment requirements apply “except to the extent that there is involved a military or foreign affairs function of the United States”).

32. See *infra* Part II.C. The term “national security” lacks a precise definition, but it seems to be an ever-expanding concept. The Department of Defense recently defined it as “[a] collective term encompassing both national defense and foreign relations of the United States.” DEP’T OF DEF., JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 182 (2010) (as amended through Jan. 15, 2014). I use the term here in an even broader sense—to include these subjects and any action that may fall under the exception in 5 U.S.C. § 553(a)(1).

While some scholars regard the exception as inevitable,³³ and others have proposed reforms to increase transparency,³⁴ the full scope and historical origins of national security rulemaking—both secret and opaque—remain largely unexplored. Secrecy makes a complete accounting impossible, but this Article uncovers two unique features that expose the constitutionally problematic way this rulemaking is conducted and point the way toward necessary reforms.

First, this Article considers the entire corpus of cases discussing the APA exception, concluding that courts generally apply it even when it was not invoked by the agency until the rule was challenged in court.³⁵ This makes it difficult to estimate how often agencies actually rely on the exception to avoid notice-and-comment.³⁶ It also makes court oversight of national security rulemaking far weaker. Under the *Chenery* rule, courts will uphold agency rules only on the grounds articulated by the agency when the rule was developed.³⁷ *Chenery I* enables courts to perform their constitutionally critical role of ensuring that agencies do not exceed their delegated authority.³⁸

33. See Major Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL. L. REV. 135, 142 (1985) (observing with approval that “[s]everal court decisions have . . . given the term ‘military function’ its broadest possible definition”); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) (briefly discussing the exception as one of many “black holes” in U.S. administrative law and noting that courts have generally construed it broadly).

34. Bonfield, *supra* note 22, at 238 (conceding that, while a narrow construction would be preferable, the language of the “military or foreign affairs function” exception is nevertheless “very broad”); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 192-93, 204 (2011) (proposing that the exception be eliminated and that agencies use the APA’s “good cause” exception when notice-and-comment is inappropriate); Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 223-24, 262-63 (2009) (noting that the exception relieves the President of the responsibility for conducting notice-and-comment for international agreements, and proposing reforms); C. Jeffrey Tibbels, *Delineating the Foreign Affairs Function in the Age of Globalization*, 23 SUFFOLK TRANSNAT’L L. REV. 389 (1999) (contending that agencies use the exception too often for economic regulation, and proposing that the courts rein in its use); see also William D. Araiza, Note, *Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response*, 99 YALE L.J. 669, 671 (1989) (proposing a statutory grant of notice-and-comment for rulemaking on the classification of imported goods, which is subject to the exception).

35. See *infra* notes 161-56 and accompanying text.

36. Over the decades, the exception has been invoked by agencies across the government—including the Departments of Defense, Homeland Security, State, Commerce, Treasury, Energy, Transportation, and Agriculture; the Federal Communications Commission; the Food and Drug Administration; the Nuclear Regulatory Commission; and even the Postal Service. See Bonfield, *supra* note 22, at 232 n.38; see also *id.* at 232-34 (describing various agencies’ responses to a survey, stating they had relied on the exception and concluding that “[i]n practice . . . most agencies do not usually exercise their discretion to follow the [notice-and-comment] requirements . . . when they are not bound to do so because” the exception applies); *infra* Part II.C.

37. See *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 94-95 (1943); *infra* Part II.B.

38. See, e.g., Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 958-59 (2007); *infra* Part II.B.

When the agency does not use notice-and-comment, however—or offer any justification for departing from it—there are no legal or factual justifications for the court to review.

Second, this Article examines, for the first time, the exception's development through numerous drafts of APA predecessor legislation over eighteen years and its historical and political context.³⁹ This analysis reveals that the national security exception was not a simple inevitability; instead, it emerged from a fierce debate during the 1930s and 1940s about how the United States could best compete with fascist states without succumbing to fascism itself.⁴⁰ When the APA exception is seen as a product of its time rather than an essential attribute of all administrative law systems, its purpose becomes clearer.

The Article proceeds in four parts. I focus on the national security exception in Part II, revealing the general operation of the national security administrative state. Notice-and-comment rulemaking is “the dominant mode of administrative action.”⁴¹ Because notice-and-comment rulemaking is such an important means by which agencies create rules with the force of law, exceptions from it deserve special attention. By carving out the exception, the APA creates a distinct and constitutionally suspect administrative law regime for national security rulemaking.

As Part III explains, the limited scholarly debate over the APA exception has occurred without exploring its origins. Professor Adrian Vermeule, adopting the theories of German political theorist Carl Schmitt, labeled the exception one of the “black holes” permitting untrammelled executive discretion, which are “integral” and “inevitable” in “a massive and massively diverse administrative state.”⁴² Vermeule's critics have argued that such black holes are not necessary and have proposed eliminating them.⁴³ But Vermeule's invocation of the APA exception fits neatly into discussion about emergency governance—quite often grappling with Schmitt's perspective—that has dominated national security law scholarship at least since September

39. See *infra* Part IV. Scholars discussing the exception have examined the legislative history of the bill that became the APA, but not the rich history of earlier reform proposals or the historical context. See, e.g., Tibbels, *supra* note 34, at 395-96 (discussing the APA legislative history and noting its sparseness on the subject of the national security exception).

40. See *infra* Part IV. For a history of the New Deal in the context of the rise of totalitarian states around the world, see IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013).

41. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343 (2011).

42. Vermeule, *supra* note 33, at 1149.

43. For criticism of Vermeule's observations, see, for example, Criddle, *supra* note 34, at 192, 193, 204. See also *infra* Part III.

11, 2001.⁴⁴ This Article, in Part IV, re-orientes that discussion by focusing on the specific geopolitical concerns and theories of governmental organization animating the exception's inclusion in the APA.

In Part V, this Article explores why national security rulemaking must be reformed and how to do so. Quite simply, the world has changed in fundamental ways since the APA was enacted. The distinction between the foreign and the domestic—and between what is and is not “national security”—has faded. Because people and products cross boundaries as never before, national security concerns continue to expand to new areas of government policymaking.⁴⁵ And the threats America faces have changed dramatically as well. Our most dangerous enemies are no longer nation states, but terrorist organizations or lone wolves.⁴⁶ And in an era of high-tech global surveillance where a mere search algorithm can determine the difference between what is foreign and domestic, the legitimating and deliberation-enhancing qualities of notice-and-comment rulemaking are as necessary for national security agency action as for any other.⁴⁷

Part V concludes by proposing reforms to an area of regulation badly in need of a balance between secrecy and greater scrutiny and public participation. If eliminating the APA exception entirely is not feasible, the President should issue an executive order requiring agencies to use notice-and-comment whenever possible. In addition, the courts should be directed to impose a *Chenery*-type rule requiring agencies to invoke the exception specifically when they issue a rule without notice-and-comment and to specifically articulate their reasons for relying on the exception.⁴⁸ Even if these justifications cannot be disclosed to the public for some time, or ever, the requirement will nonetheless discipline and improve agency decisionmaking.

44. See MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 115-16 (2012) (discussing the surge of interest in, and citation to, Schmitt following September 11). Even before September 11, scholarly attention to the jurisprudence of emergency and exception—and the work of German political scientist Carl Schmitt in particular—was steadily increasing. See Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1825-26 (2000) (noting the revival of interest in Schmitt's work in the late 1990s).

45. See, e.g., William C. Banks, *Programmatic Surveillance and FISA: Of Needles in Haystacks*, 88 TEX. L. REV. 1633, 1634 (2010) (“[M]ore Americans than ever are engaged in international communications, and there is far greater intelligence interest in communications to and from Americans. Both circumstances increase the likelihood that the government will be intercepting communications of innocent Americans . . .”).

46. See *infra* note 315 and accompanying text.

47. See *infra* note 314 and accompanying text.

48. See *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 94-95 (1943); *infra* notes 109-115 and accompanying text.

II. OUR BIFURCATED ADMINISTRATIVE STATE

The United States government has a bifurcated administrative state. There is an ordinary administrative state, in which agencies must solicit and consider public comments before issuing rules with the force of law. And there is a national security administrative state, in which agencies may choose to issue the same sort of rules without first publishing them and without soliciting or receiving public comments, while some rules may be kept entirely secret. The two administrative states co-exist within most agencies, but the national security administrative state is more pervasive in the Departments of State and Defense and in the array of intelligence agencies that operate largely away from the public eye.⁴⁹

Sometimes the two administrative states will co-exist within the same rulemaking process. Inevitably, however, in these instances it is the national security administrative state that governs the most important aspects of the rulemaking. After the September 11 attacks, the Department of Justice (DOJ) established a Special Call-In Registration Program “requir[ing] non-immigrant alien males over the age of 16 from designated countries to appear for registration and fingerprinting.”⁵⁰ The DOJ followed the APA’s notice-and-comment requirements by publishing the proposed rule establishing the program and accepting public comments before issuing the final rule two months later.⁵¹ But the DOJ did not publish for public comment a crucial portion of the rule, which designates the countries whose citizens must report.⁵² Nor did the DOJ explain why it had decided not to consider comments on this portion.⁵³

49. Secret rulemaking also accounts for a significant, and troubling, portion of the national security administrative state. *See* PRIEST & ARKIN, *supra* note 24, at 86-87; *supra* notes 22-26 and accompanying text.

50. *Rajah v. Mukasey*, 544 F.3d 427, 432 (2d Cir. 2008).

51. *See* Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 40,581 (proposed June 13, 2002) (to be codified at 8 C.F.R. pts. 214, 264). The proposed rule received only fourteen comments, many of which were similar. *See* Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264).

52. *See* Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. at 40,581 (stating that the selected countries whose citizens must report will be specified separately in notices published in the Federal Register); Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. at 52,584 (affirming this procedure in the final rule).

53. *See* Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584, 52,589 (Aug. 12, 2002) (stating, in response to a comment that the future designation of countries “would be antithetical to the relationship between the United States and that country and its citizens,” that “[t]he listing of countries from which nonimmigrant aliens will be subject to special registration is determined by the Attorney General in consultation with the Secretary of State, thereby ensuring that foreign policy implications will be considered when evaluating the possible designation of any specific country” and that the “comment is outside the scope of this final rule”).

Three months later, the DOJ began publishing a series of notices in the Federal Register announcing the twenty-five designated countries—which included almost exclusively Muslim-majority nations such as Morocco, Iran, Iraq, Libya, Bahrain, and Tunisia.⁵⁴ Thousands of nonimmigrant alien visitors who reported to the FBI under this program were interrogated and deported, many of them in secret, and hundreds were detained for significant periods of time.⁵⁵

The Second Circuit upheld the program as lawful and explained why the DOJ was justified in invoking the national security exception. Providing justification where the DOJ had offered almost none,⁵⁶ the court explained that, in the process of responding to comments, the DOJ might have been required to reveal sensitive national security information in justifying its choice of countries, which would damage relations with those countries, slow down the designation process, and diminish the nation's ability to collect intelligence and prevent terrorist attacks.⁵⁷

These were legitimate concerns—at least in the abstract. But in practice, the registration program is widely considered to have been a failure.⁵⁸ Like many of the post-September 11 detention and removal policies, it had troubling implications for due process and equal protection.⁵⁹ Moreover, in targeting particular religious and ethnic com-

54. *E.g., id.* (designating Iran, Iraq, Libya, Sudan, and Syria as countries whose citizens meeting the conditions must report); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,526 (Nov. 22, 2002) (designating Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen). In a yet later notice, three more countries—Armenia, Pakistan, and Saudi Arabia—were added. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,136 (Dec. 16, 2002). A subsequent notice removed Armenia from the list and modified the registration requirements. *See* Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,642 (Dec. 18, 2002).

55. *See, e.g.,* Kevin R. Johnson & Bernard Trujillo, Immigration Reform, National Security After September 11, and the Future of North American Integration, 91 MINN. L. REV. 1369, 1383-84 (2007); Sadiq Reza, A Trap for Middle Eastern Visitors, WASH. POST, Jan. 10, 2003, at A21. The program was only part of the constitutionally questionable detention of thousands of Muslims in the United States following the September 11 attacks. *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 22-46(2003); Johnson & Trujillo, *supra*, at 1382-84.

56. When publishing the notice listing designated countries, the DOJ stated that these determinations were justified “[i]n light of recent events, and based on intelligence information available to the Attorney General.” Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. at 67,766. On appeal, the DOJ argued that “[p]ublic commentary . . . would serve no other purpose, and achieve no other end, than potentially inflaming relations” with the designated countries. Brief for Respondents at 37, *Rajah v. Mukasey*, 544 F.3d 449 (2d Cir. 2008) (No. 06-3493), 2007 WL 6449014.

57. *Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008).

58. Johnson & Trujillo, *supra* note 55, at 1384.

59. *See, e.g.,* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (2002); *cf.* Hiroshi Motomura, *Immigration and We the People After September 11*, 66 ALB. L. REV. 413, 420-21 (2003) (disagreeing with Cole's substantive arguments but agreeing that there are due process and equal protection concerns); *see also* Ty S. Wahab Twibell, *The Road to Intern-*

munities and casting too broad a net, such policies alienated the very people who were most likely to provide the government with useful information for preventing future terrorist attacks.⁶⁰ The resulting arrests, detentions, and deportations prompted protests.⁶¹ The DOJ never claimed that the program thwarted any terrorist activity, and it was abandoned a year later.⁶²

The DOJ's detention program demonstrates why the failure to involve the public in rulemaking through notice-and-comment increases the likelihood of impracticable, ill-conceived agency action that results in inefficiency, abuses, and backlash. Notice-and-comment was designed to avoid such harmful effects and to root policy-making in the constitutional values of public participation, transparency, legitimacy, and governmental effectiveness.

A. *The Importance of Notice-and-Comment Rulemaking*

The difference between our two administrative regimes in the way they are permitted to undertake rulemaking is not merely procedural; it is fundamental. Notice-and-comment rulemaking is a pillar of the administrative law regime that arose after World War II. The APA, the "constitution of the administrative state," established and codified the notice-and-comment procedure for "legislative" or "substantive" rules—those that are legally binding on agencies and the public.⁶³ With the explosive growth of the federal government during the 1930s and 1940s, lawmakers realized that "Congress cannot

ment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States, 29 VT. L. REV. 407, 411-19 (2005).

60. Cf. Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365 (2010) (examining social science data regarding the Muslim community in New York City and concluding that perceptions of governmental legitimacy are the most important incentive to cooperate with counterterrorism efforts).

61. Johnson & Trujillo, *supra* note 55, at 1384 (citing Emily Bazar, *New Battle on Civil Rights Front—The Registration of Some Immigrants Is Denounced as Racial Profiling*, SACRAMENTO BEE, Jan. 20, 2003, at A1; Wyatt Buchanan, *Hundreds Protest INS Registration/Men from 13 Countries Sign In*, S.F. CHRON., Jan. 11, 2003, at A13).

62. *Id.*; see Suspending the 30-Day and Annual Interview Requirements from the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67,578 (Dec. 2, 2003); see also Removing Designated Countries from the National Security Entry-Exit Registration System (NSEERS), 76 Fed. Reg. 23,830 (Apr. 28, 2011) (formally finalizing the abandonment of the program). Under US-VISIT, most visitors are subject to the collection of biometric data upon entry at air- and seaports. See Implementation of the United States Visitor and Immigrant Status Indicator Technology Program ("US-VISIT"); Biometric Requirements, 69 Fed. Reg. 468 (Jan. 5, 2004).

63. See Hickman, *supra* note 17, at 481-82 (discussing the factors courts use to determine whether a rule is legislative). Because agencies have incentives to avoid notice-and-comment by labeling rules as merely "interpretive," even if they really are legislative, many courts do not accept agencies' characterizations at face value. See *id.*; William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1029-30 (2004).

manage the regulatory demands of the modern [administrative] state on its own.”⁶⁴ Notice-and-comment rulemaking was one compromise under which Congress could delegate to agencies the power to issue legally binding rules without abandoning oversight of those agencies. The APA also technically requires more robust, “formal,” trial-like rulemaking procedures in some circumstances when the agency’s enabling act or another statute requires rulemaking “to be made on the record after opportunity for an agency hearing.”⁶⁵ However, courts have generally given agencies broad discretion in their choice of procedures and have rarely interpreted statutes as requiring agencies to engage in formal rulemaking.⁶⁶ By the 1970s, with the courts’ blessing, notice-and-comment became the norm for agency rulemaking.⁶⁷ In the twenty-first century, it remains the primary means for the resolution of policy matters by agencies and continues to enjoy the strong endorsement of administrative law scholars.⁶⁸

Under its notice-and-comment procedures, the APA requires agencies to publish a proposed rule in the Federal Register and provide the public with an opportunity to respond during a fixed period, which may be as long as 180 days, depending on the rule’s complexity.⁶⁹ When issuing a final rule that implements a congressional mandate, agencies must provide “a concise general statement” of the proposed regulation’s “basis and purpose.”⁷⁰ The process requires agencies to “specifically explain their policy choices, their consideration of important aspects of the problem, and their reasons for not pursuing viable alternatives.”⁷¹

Publication of a proposed rule begins a dialogue between policy-makers and those affected by a regulation; interested parties must

64. See Hathaway, *supra* note 34, at 243.

65. 5 U.S.C. § 553(c) (2012).

66. SEC v. *Chenery Corp. (Chenery II)*, 332 U.S. 194, 203 (1947) (“The choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”); Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 107 (2003) (“Because the impracticalities of formal rulemaking are well known, Congress rarely requires this technique, and courts avoid interpreting statutes to require it, even in the rare cases where the statute seems to do so.”).

67. See Hickman, *supra* note 17, at 476-77; Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 546-59 (2002).

68. See Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 428-29 (2005) (“Notice and comment deserves close attention in a study of regulatory democracy because the bulk of regulation is crafted through that procedure today”); Mendelson, *supra* note 41, at 1380. *But see, e.g.*, Richard J. Pierce, Jr., Response, *Presidential Control Is Better Than the Alternatives*, 88 TEX. L. REV. SEE ALSO 113, 116-17 (2010) (describing notice-and-comment as too burdensome).

69. 5 U.S.C. § 553(b).

70. *Id.* § 553(c).

71. Stack, *supra* note 38, at 972.

have the opportunity to comment on the proposed regulation, and the agency must respond to the comments.⁷² Courts enforce these requirements through “hard look” review, invalidating regulations that they find to be “arbitrary and capricious,” and upholding regulations that are well reasoned and well supported by facts.⁷³

The notice-and-comment process has been widely praised for improving agency decisionmaking from a number of different perspectives, many of which are staples of administrative law. No matter which of the major theories of agency decisionmaking one adopts, the notice-and-comment process arguably adds value. Even from a purely “expertocratic” perspective,⁷⁴ in which the public’s contribution to decisionmaking is considered less important, the notice requirement arguably results in better policy because it disciplines agency decisionmaking from the very beginning. It provides incentives for agency employees to create an accurate record, to communicate with one another clearly, to involve the entire agency in the process, and to identify and attempt to resolve critical issues before issuing notice of the proposed rule.⁷⁵

For those who believe that the involvement of the public is crucial for rulemaking to result in good policies, the benefits of notice-and-comment are more obvious. A public choice or pluralist view regards

72. See 5 U.S.C. § 553(c) (enumerating the notice-and-comment requirements); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977) (requiring response to significant comments); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 392-93 (D.C. Cir. 1973) (requiring disclosure of “technical data or studies” in time to allow for meaningful comment).

73. Judicial review of agency action is a cornerstone of the APA and necessary to enforce the notice-and-comment requirements. The APA requires reviewing courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). The Supreme Court has interpreted “arbitrary and capricious” review as requiring courts to review the record and “satisfy[] themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of . . . information.” *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). “Hard look” review describes the way the courts enforce the “arbitrary and capricious” standard, so the terms are usually considered interchangeable. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5 (2009).

74. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 179 (1997) (“Expertocratic models view the decision process primarily as an exercise in scientific validation by virtue of the method and culture of the agency experts’ profession.”).

75. See William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59-60 (1975); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 506-10 (1997); Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 755 (2006) (contending that judicial review of agency action disciplines and improves the rulemaking process because “the expert government decisionmaker’s willingness to produce a high-quality explanation” for a rule “signals that the government believes the benefits of the proposed policy are high,” making judicial approval more likely).

regulation as the resolution of conflicts among competing interests, while a public interest view holds that regulators can discern and pursue the general good.⁷⁶ But from either view, active participation of the public matters immensely because rulemaking is an important means by which the government resolves not just “technical” or “scientific” questions, but also questions of values.⁷⁷ Selecting among different potential gains is a value judgment, as Cass Sunstein observed, and one that should be “made publicly and exposed to democratic view.”⁷⁸ Moreover, public deliberation and participation can be regarded as irreducible democratic values in themselves.⁷⁹

Notice-and-comment rulemaking also strengthens legitimacy. Agencies must be held accountable if their actions are to be seen as legitimate. Accountability flows from meaningful constraints on agency authority.⁸⁰ Notice-and-comment is a powerful constraint: it ensures that agency action is seen as legitimate because it provides direct accountability to the public, which means that its choices will more closely reflect the popular will. This can be true whether or not the process is viewed from a public choice or public interest perspective. For public choice theorists, if the agency hears from and considers a wide range of interests, its decisions will be seen as more democratic: the agency serves as a broker among interest groups, just as Congress serves as a broker for interest groups during the enactment of legislation.⁸¹ From the (more optimistic) public interest perspec-

76. See Rossi, *supra* note 74, at 198-99.

77. See Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 735-36 (2011) (contending that “agency science . . . is laced with policy decisions at numerous levels” and that “interested parties and agencies alike are incentivized to cloak their policy choices in the seemingly unassailable mantle of science”).

78. Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 364 (1999).

79. See Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMMENT. 481, 481-82 (1997) (advancing a “conversational” model of democracy, “under which the citizenry is engaged by ongoing public conversation about public policy,” and arguing that “it is this engagement that is the stabilizing force in the system”); Rossi, *supra* note 74, at 179.

80. See Criddle, *supra* note 34, at 159 (“[W]hen Congress delegates lawmaking authority to administrative agencies, structural due process requires that agency lawmakers be subject to meaningful political accountability and that persons adversely affected by agency action have an opportunity to test the constitutional adequacy of Congress’s delegation through judicial review.”); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075 (2005) (“[T]rue accountability, in the realm of law and politics, involves many of the features that are central to the administrative state and that people find so unattractive about it—hierarchy, monitoring, reporting, internal rules, investigations, and job evaluations.”).

81. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683 (1975); *id.* at 1670 (“Increasingly, the function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.”).

tive, the agency rulemaking process is a forum for democratic deliberation, in which agencies and citizens alike will change their views in response to reasoning of others.⁸² During the notice-and-comment rulemaking process, both citizens (including interest groups) and the agency engage in dialogue. Even if the dialogue is limited by the brevity of the comment period, the agency staff can act as agents of constituent stakeholders.⁸³

In addition to its role in facilitating direct accountability to the public, notice-and-comment rulemaking can support and enhance congressional oversight of agency action. It is true that, if an agency thwarts the public interest, the public can contact their congressional representatives and exert pressure through the vote. But this process is a lengthy and frustrating one: Congress's attention span is notoriously short, and ordinary congressional oversight through hearings, confirmation decisions, and appropriations is limited, infrequent, and ad hoc.⁸⁴ This sort of congressional "walking the beat" is labeled "police-patrol" oversight by Mathew McCubbins and Thomas Schwartz, who criticize it as overlooking many important agency problems.⁸⁵

Notice-and-comment rulemaking can help address this gap by enabling other informal, but complementary, oversight processes. If a proposed regulation provokes significant controversy, Congress is likely to re-examine the delegation of authority to the agency and intervene in a more timely fashion. In other words, notice-and-comment rulemaking permits the public to engage in what McCubbins and Schwartz call "fire alarm" oversight.⁸⁶ Notice-and-comment rulemaking—and subsequent judicial enforcement—"allows Congress to harness the power of private actors to enhance its oversight capacity."⁸⁷

82. Mark Seidenfeld, *The Quixotic Quest for a "Unified" Theory of the Administrative State*, ISSUES IN LEGAL SCHOLARSHIP, Mar. 2005, at 1, 4-5, available at <http://www.degruyter.com/view/j/ils.2005.5.issue-1/ils.2005.5.1.1056/ils.2005.5.1.1056.xml?format=INT>.

83. See *id.*

84. See, e.g., THOMAS MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 170 (2006) (lamenting the infrequency of congressional oversight); Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences and Congressional Monitoring of the Administrative State*, 8 J.L. ECON. & POL'Y 23, 40-41 (2011) (concluding that members of Congress generally assign a low value to service on oversight subcommittees); David E. Lewis & Terry M. Moe, *The Presidency and the Bureaucracy: The Levers of Presidential Control*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 374, 382-85 (Michael Nelson ed., 10th ed. 2014) (arguing that reelection-oriented legislators have scant incentive to participate in oversight activities).

85. See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

86. See *id.*

87. Hathaway, *supra* note 34, at 247 n.320; see also Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 399-408 (2006) (discussing the "administrative accountability paradigm"); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107

Although it enjoys broad support, notice-and-comment is certainly not without its critics. Notice-and-comment is a time and resource-intensive process. Indeed, the substantial literature on “agency ossification” largely blames notice-and-comment requirements for agency sluggishness and resistance to change.⁸⁸ Richard Pierce summarizes this critique:

[I]t takes a long time to issue a rule; agencies never issue many of the rules that would be beneficial to the public; agencies maximize their use of procedural alternatives that are inferior to rulemaking to avoid the delay and cost of the notice-and-comment process; and agencies often decline to amend or to rescind rules that have become obsolete.⁸⁹

These problems may account for a noticeable trend by Congress toward forcing agencies to act without notice-and-comment, either by mandating the issuance of particular rules or by imposing deadlines that make the procedure impossible.⁹⁰

Nonetheless, notice-and-comment remains the benchmark. And despite its drawbacks, it is the least-worst means for achieving better policy outcomes and keeping agencies accountable.

B. *The Constitutional Dimension of Notice-and-Comment*

The benefits of notice-and-comment rulemaking in advancing democratic values are often celebrated. But it has a constitutional dimension as well. Congress designed it to be a means through which agencies are constrained from exceeding their delegated authority and thereby violating separation of powers principles or individual rights.

The Constitution, by vesting “[a]ll legislative [p]owers herein granted” in Congress, limits Congress’s ability to delegate that power to the executive branch or independent agencies.⁹¹ The non-delegation doctrine requires Congress to “‘lay down by legislative act an intelligible principle to which the [agency] is directed to conform.’”⁹²

COLUM. L. REV. 1749, 1770 (2007) (“[C]ourts force agencies to comply with the procedures that facilitate fire-alarm oversight.”).

88. See Pierce, *supra* note 68, at 116-17 (summarizing the literature on ossification in agency rulemaking); see also STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 49 (1993); Thomas O. McGarity, Response, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 525-29 (1997).

89. Pierce, *supra* note 68, at 117.

90. See *infra* notes 151-153 and accompanying text (discussing use of the “good cause” exception).

91. U.S. CONST. art. I, § 1.

92. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). Under the Supreme Court’s current approach to the non-delegation doctrine, Congress cannot delegate *any* amount of its own actual legislative power but may nonetheless delegate vast “rulemaking” authority to

Failure to do so violates constitutional separation of powers principles. In addition, the agency itself lacks the power to create an “intelligible principle” when Congress has failed to provide one.⁹³

It is extremely rare for courts to invoke the non-delegation doctrine to strike down legislation as unconstitutional.⁹⁴ Since 1935, courts have bowed to the exigencies of the massive modern administrative state by permitting Congress to assign vast rulemaking authority to agencies.⁹⁵ Instead, the courts have trod a different path toward regularly enforcing constitutional separation of powers principles in administrative law. Through judicial review of agency action, courts play a critical role in ensuring that agencies act only within the bounds of their constitutionally-valid delegated authority.⁹⁶

In the APA, Congress codified this role for courts, and scholars have come to recognize that role’s constitutional dimensions.⁹⁷ But it is a role that courts have been playing for as long as the administrative state has existed.⁹⁸ The APA empowers courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁹⁹ Courts have further underscored the fundamental importance, if not explicitly the constitutional dimensions of, APA review by gradually developing more stringent standards for reviewing agency action than for review of most statutes.¹⁰⁰ Congress originally understood the APA’s arbitrary and ca-

agencies. *See id.* at 488-89 (Stevens, J., concurring) (disagreeing with the majority that the properly delegated authority is not “legislative”).

93. *Id.* at 472 (majority opinion).

94. *See, e.g.*, *United States v. Whaley*, 577 F.3d 254, 263 (5th Cir. 2009) (observing that “the limits on delegation are frequently stated, but rarely invoked,” and that “the Supreme Court has not struck down a statute on nondelegation grounds since 1935” (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935))).

95. *See* Stack, *supra* note 38, at 956.

96. *See id.* at 958-59; *see also* Criddle, *supra* note 34, at 132. *But cf.* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721 (2002) (“A statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power.”).

97. *See generally* Metzger, *supra* note 100 (describing the “deeply embedded practice” of judges’ infus[ing] constitutional values into their development of administrative law doctrines or readings of ordinary administrative requirements.”); Stack, *supra* note 38.

98. *See, e.g.*, *Mahler v. Eby*, 264 U.S. 32, 44-45 (1924) (citing precedent that, if not presented on the record, express findings by an agency could not “be supplied by implication” or by reference to litigation documents before the agency and concluding that such a defect “goes to the existence of the power on which the proceeding rests” (citing *Wichita R.R. & Light Co. v. Pub. Utils. Comm’n*, 260 U.S. 48, 59 (1922)); *see also* Stack, *supra* note 38, at 983-89 (discussing *Mahler*, *Wichita Railroad*, and similar contemporaneous decisions holding that the limitation derived from constitutional concerns).

99. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)(A)).

100. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 491 (2010).

precious standard as equivalent to the “minimal scrutiny [of] constitutional rationality review.”¹⁰¹ Over the years, however, the courts’ interpretations of agency action have diverged from their interpretation of statutes. The APA’s arbitrary and capricious standard became gradually more rigorous, evolving into today’s “hard look” review.¹⁰² As Gillian Metzger has recounted, this divergence was driven largely by constitutional concerns raised by the expansion of regulatory authority during the 1960s and 1970s with fears of agency capture by industry.¹⁰³ With separation of powers principles at stake, courts came to view agency action with a more skeptical eye.

Of course, some may reject the idea that hard look review is a full-blown constitutional requirement.¹⁰⁴ It may be merely a prudential doctrine or occupy some quasi-constitutional twilight zone.¹⁰⁵ But it is difficult to imagine that our massive modern administrative state could function in a constitutionally sound manner without the sort of judicial scrutiny that hard look review provides. As courts have come to interpret it, the APA is, therefore, not merely a constitution for the administrative state;¹⁰⁶ it provides essential constitutional validity for the administrative state.

However, unless an agency is required to state its reasoning for acting while it takes action, and unless it actually does so, reviewing courts cannot perform their constitutionally critical duty to discern whether the agency acted for lawful reasons.¹⁰⁷ If hard look review has constitutional dimensions, the requirement of contemporaneous

101. *Id.*

102. *Id.*; Watts, *supra* note 73, at 15-16.

103. Metzger, *supra* note 100, at 491.

104. See, e.g., Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1921 (2009) (arguing that eliminating the *Chenery* rule and permitting courts to consider post-hoc rationales for agency action would be constitutional and would help ameliorate ossification of agency decisionmaking).

105. Scholars and jurists have not only likened the APA to a constitution, but they also see it as having quasi-constitutional status within the framework of American law. See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1077 (2004) (“Although it is packaged as a statute, the APA is the product of constitutional thought, and the courts have given quasi-constitutional status to its provisions.”); Metzger, *supra* note 100, at 484-85 (describing judicial review of administrative action as a form of constitutional common law subject to congressional revision).

106. Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L.J. AM. U. 35, 35 (1996) (describing the APA as “the constitution of the modern regulatory state”); see also *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (characterizing the APA as a “seminal act” governing the relationship between courts and agencies).

107. See, e.g., *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1565 (10th Cir. 1994) (setting aside an agency decision because the court could not “ascertain” from a thorough review of the administrative record the basis and support for the decision). The court explained that “the grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record,” and that “[t]he agency must make plain its course of inquiry, its analysis and its reasoning.” *Id.* at 1575 (citation omitted).

reason-giving by the agency would therefore have constitutional dimensions as well.¹⁰⁸

Recognizing the fundamental importance of this requirement even prior to the APA's enactment, the Supreme Court established the *Chenery* rule to test the validity of any agency's exercise of discretion.¹⁰⁹ In *Chenery I*, the Court held that discretionary administrative action will only be upheld on grounds articulated by the agency in the record.¹¹⁰ This is in marked contrast to judicial review of statutes: unless strict scrutiny is required, courts may uphold legislation on any constitutional basis—even one Congress never articulated.¹¹¹ In establishing the *Chenery* rule, therefore, the Court identified a key difference between the way courts should evaluate legislation and the way they should evaluate agency action.

The *Chenery* rule delimits the responsibilities and powers of agencies and courts in the judicial review process in a manner animated by, and sensitive to, separation of powers concerns.¹¹² It preserves in agencies the formal authority to exercise the discretion delegated by Congress, preventing courts from substituting their own policy for that of the agency. At the same time, however, the rule limits agency power to make policy away from public scrutiny.

The *Chenery* rule also helps promote integrated and cohesive decisionmaking within agencies. Knowing that courts will privilege those agency rationales proffered at the time of the agency decision and in the record—rather than often ad-hoc justifications by staff or counsel off the record, before the agency process officially begins, or during judicial review—senior agency officials have incentives to exercise control over staff and counsel, focusing the agency's attention on the most persuasive, rational, and legally supportable justifications for the action. *Chenery I* has helped make "explicit reason-giving a major part of the industry of the administrative state."¹¹³

For courts, in turn, "an agency's contemporaneous explanation for its decisions remains one of the most common grounds for judicial reversal and remand."¹¹⁴ As Kevin Stack has observed, courts treat an agency's failure to articulate the right reasons for its decision as a

108. Metzger, *supra* note 100, at 491-93; Stack, *supra* note 38, at 1003-04. *But see* Note, *Rationalizing Hard Look Review After the Fact*, *supra* note 104, at 1921.

109. See SEC v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80 (1943).

110. *Id.* at 87-88.

111. See, e.g., *id.* at 88; *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (stating the well-settled principle that "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason").

112. Stack, *supra* note 38, at 957-58.

113. *Id.* at 957.

114. *Id.*

constitutional error.¹¹⁵ The *Chenery* rule helps enforce the non-delegation doctrine.

The notice-and-comment requirements work hand-in-hand with *Chenery I* to ensure that agency rulemaking remains within constitutionally permissible bounds. That is why exceptions to notice-and-comment requirements are constitutionally problematic. Without a requirement that agencies articulate and test their rationales during the decisionmaking process, the courts may have difficulty discerning which rationales the agency actually relied upon in making its decision. This significantly weakens the courts' ability to enforce the *Chenery* rule and with it, the non-delegation doctrine. Just as the notice-and-comment procedures have constitutional roots and a constitutional dimension, the exceptions to those procedures, too, must have some other constitutional justification.

C. Secrecy and the National Security Exception

As I will discuss further below, the APA provides several exceptions enabling agencies to disregard the notice-and-comment requirements, despite their importance. But the APA establishes only two *substantive* exceptions from notice-and-comment requirements.¹¹⁶ The first is an exception for "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."¹¹⁷ The first portion of this exception, respecting internal agency matters, is relatively easy to justify because these matters affect the public only indirectly.¹¹⁸ But the second portion is controversial in its own right: rules regarding public property, loans, grants, benefits, and contracts undoubtedly have the potential to substantially affect millions of Americans directly. Courts and com-

115. *Id.* at 983-84.

116. Not all departures from, or additions to, notice-and-comment rulemaking standards are found in the APA. An agency's organic statute or other procedural statute may provide for more or fewer requirements. See, e.g., National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370h (2006) (mandating thorough scientific and systematic analysis of environmental problems in rulemaking and imposing procedural requirements to generate information for the agency and the public).

117. 5 U.S.C. § 553(a)(2) (2012).

118. *Compare* *Tunik v. Merit Sys. Prot. Bd.*, 407 F.3d 1326, 1343-44 (Fed. Cir. 2005) (holding that the exception did not apply to the purported repeal by Merit Systems Protection Board (MSPB) of a regulation governing removal of administrative law judges because the rule implicated a broader interest of the public in having private rights adjudicated by persons who had some independence from the agency that opposed them), *with* *Favreau v. United States*, 317 F.3d 1346, 1359 (Fed. Cir. 2002) (holding that the exception applied to memoranda detailing when the United States could seek recoupment of prepaid bonuses from armed forces personnel).

mentators expressed puzzlement,¹¹⁹ and the Administrative Conference of the United States recommended that this portion of the exception be eliminated.¹²⁰ Subsequent agency-specific statutes and regulations have considerably constrained its scope.¹²¹

The second substantive exception is the national security exception, which, unlike its ill-fated twin, is alive and well. It is an expression of, if not the foundation of, the national security administrative state. If the proposed rule involves a “foreign affairs” or “military” function of the United States, the agency may disregard the APA’s requirements for notice, comment, and delay in rule implementation.¹²²

This is not the only way in which the framework of U.S. administrative law provides national security exceptions. Classification authority enables agencies to avoid notice-and-comment by keeping a portion, or the entire existence, of rulemaking secret.¹²³ And the APA itself includes other exceptions for national security agency action. Importantly, agencies are also exempt from the adjudication requirements when conducting a foreign affairs or military function.¹²⁴ And although the APA usually applies to military departments and agencies, it does not apply at all to military commissions, courts martial, or to “military authority exercised in the field in time of war or in occupied territory.”¹²⁵

Moreover, Executive Order 12,866, which establishes, over all U.S. government agency rulemaking, centralized review by the Office of

119. *Nat'l Wildlife Fed'n v. Snow*, 561 F.2d 227, 231 (D.C. Cir. 1976) (“[T]he APA [contracts exception] does create a serious gap in the procedural protections the APA was enacted to provide.”).

120. Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 611 (1970).

121. *See, e.g.*, *Elimination of Certain Exceptions from the APA Rulemaking Requirements*, 1 C.F.R. § 305.69-8 (1974) (detailing 5 U.S.C. § 553(a)(2) rules pertaining to “public property, loans, grants, benefits, or contracts”); *see also* *United States v. AEY, Inc.*, 603 F. Supp. 2d 1363, 1376 (S.D. Fla. 2009); *Pierce*, *supra* note 68, at 116. The exception is still invoked, however, for a small percentage of rules. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, *FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS* 8, 15 (2012) [hereinafter GAO REPORT].

122. 5 U.S.C. § 553(a)(1).

123. For a list of the key statutes providing authority to classify information, *see supra* note 12. The President also engages in national security rulemaking directly through a variety of different types of executive orders, which are usually published in the Federal Register, and National Security Decision Directives (which go by many different names), which are usually not. *See* STEPHEN DYCUS, ET. AL, *NATIONAL SECURITY LAW* 40-41 (5th ed. 2011).

124. *See* 5 U.S.C. § 554(a)(4). Discussion of the adjudication exception is beyond the scope of this Article, but it raises many, if not most, of the same problems as the rulemaking exception.

125. 5 U.S.C. § 551(1)(F)–(G). For an analysis of the military authority exception and a compelling argument that it should be narrowly construed, *see* Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673 (2010).

Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), echoes the APA by exempting “[r]egulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services.”¹²⁶ By virtue of the exceptions in the APA and Executive Order 12,866, national security rulemaking is not subject to other statutory and regulatory requirements, the goal of which is to keep agencies accountable to the public and policymakers. For example, many national security rules are not included in the publication of the “Unified Agenda,” which is intended to be a central database of current agency rulemaking throughout the U.S. government.¹²⁷ Nor are agencies required to conduct periodic review of existing national security regulations under the Regulatory Flexibility Act or conduct cost-benefit analyses when they engage in national security rulemaking.¹²⁸

But in our administrative law’s web of national security exceptionalism, the APA’s notice-and-comment rulemaking exception stands out because it applies to every agency, in times of war and peace. And it does the most work to strip national security rulemaking of the key features that are believed to ensure democratic accountability, transparency, and legitimacy.

A lack of available data makes it difficult to establish how often the national security exception has actually been used by agencies to disregard the notice-and-comment rulemaking requirements. A 1969 survey of agencies by the Administrative Conference of the United States revealed that “[i]n practice, . . . most agencies do not usually exercise their discretion to follow the [notice-and-comment] requirements . . . when they are not bound to do so because the rule-making involves a ‘military or foreign affairs function.’ ”¹²⁹ Most revealing was the response by the Department of Defense (DoD), which seemed

126. Exec. Order No. 12,866, 3 C.F.R. § 638 (1993), *reprinted as amended in* 5 U.S.C. § 601. The OIRA review process was established by this Executive Order under the Clinton Administration. The Order was revised under the Bush Administration, but the Obama Administration restored the original language. Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

127. The Unified Agenda is maintained by the Regulatory Information Center in the OIRA. See Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 77 Fed. Reg. 7664, 7665 (Feb. 13, 2012) (“Executive Order 12866 does not require agencies to include [in the Unified Agenda] regulations concerning military or foreign affairs functions or regulations related to agency organization, management, or personnel matters.”). The Unified Agenda is available at <http://www.reginfo.gov/public/do/eAgendaMain>.

128. These requirements are only triggered by the notice-and-comment process. See, e.g., *Airports of Entry or Departure for Flights to and from Cuba*, CUSTOMS BULL. & DECISIONS, Feb. 2011, at 1, 5 (observing that, because the national security exception relieved the Commerce Department from conducting notice-and-comment, the “Department does not consider this document to be subject to the provisions of the Regulatory Flexibility Act”).

129. Bonfield, *supra* note 22, at 232.

to have concluded that it was exempt entirely from notice-and-comment rulemaking requirements. When asked how often it relied on the specific exception for “military functions,” and how often it relied on the other substantive exceptions for “foreign affairs,” “agency management or personnel,” “public property,” or “contracts,” the Department replied that “[i]n a fundamental sense all regulations and directives of the Department are incident to its essentially military function of national defense.”¹³⁰ The State Department estimated that forty percent of its rules fit within the exception.¹³¹

However, during the mid-1970s, following the Vietnam War and Watergate, when Congress and the public heavily scrutinized the activities of military and intelligence agencies and proposals for sweeping legislative reform were in the air, DoD changed its tune.¹³² In response to proposals by the Administrative Conference of the United States that the national security exception be eliminated,¹³³ DoD in 1975 issued regulations to “voluntarily adopt procedures for public participation in rulemaking having direct and substantial public impact.”¹³⁴ Through 2005, the announced Department policy was to use notice-and-comment procedures for such rules “unless it [was] determined by the DoD Component as a matter within its sole and exclusive prerogative that the employment of the exception or exemption [was] appropriate to satisfy a significant and legitimate interest of the DoD Component or the public.”¹³⁵ This language, which was published in the *Code of Federal Regulations*, obviously still left the Department plenty of flexibility to avoid notice-and-comment.

In 2006, the Department undertook further reforms designed to regularize the use of notice-and-comment. It removed the rule from the *Code of Federal Regulations* and adopted a new Administrative Instruction (AI 102) generally requiring the Department “Components” to comply with all rulemaking requirements that would apply

130. *Id.* at 239 (quoting House Comm. on Gov’t Operations, 85th Cong., Survey and Study of Administration, Organization, Procedure and Practice in the Federal Agencies 278 (Comm. Print 1957)).

131. *See id.* at 261.

132. *See* Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 59, 78, available at <http://digitalcommons.law.msu.edu/lr/vol2014/iss1/3> (observing that revelations in the early 1970s about widespread national security-related abuses of power forced the nation “into a national dialogue about the constitutional boundaries of executive power . . . and the appropriateness of domestic intelligence gathering”).

133. Elimination of the “Military or Foreign Affairs Function” Exemption from APA Rulemaking Requirements, 1 C.F.R. § 305.73-5 (1975).

134. 40 Fed. Reg. 4911 (Feb. 3, 1975). The most recent version of this rule, valid through 2005, is codified at 32 C.F.R. § 336.3.

135. 32 C.F.R. § 336.3. The regulation was superseded by U.S. Dep’t of Defense Administrative Instruction 102 and removed from the Federal Register in 2006. *See* Removal of Parts, 71 Fed. Reg. 12,280, 12,281 (Mar. 10, 2006).

to non-military or foreign affairs functions when the rules would have an impact on the public in certain ways.¹³⁶ Specifically, AI 102 requires the Department to follow notice-and-comment procedures when a rule “[i]s presently in the CFR”; “[g]rants a right or privilege to the public or has a direct or substantial impact on any significant portion of the public (e.g., visitors allowed to tour the Pentagon)”; “[p]rescribes a course of conduct that must be followed by persons outside the Government to avoid a penalty or secure a right or privilege (e.g., behavior when visiting the Pentagon)”; “[c]onstitutes authority for persons outside the Government to act or secure immunity from the consequence of not acting (e.g., security officers)”; “[i]mposes an obligation on the general public or members of a class of persons outside the Government (e.g., charges to reside at a dwelling owned by DoD)”; “[d]escribes where the public may obtain information, instructions, and forms; make submittals or requests; take examinations; or obtain decisions (e.g., Web site information)”; or “[d]escribes procedures by which a DoD Component conducts its business with the public (e.g., financial institutions on DoD installations).”¹³⁷

These changes reduced the need for DoD to rely on the national security exception. But they did not necessarily make DoD more transparent. In imposing these requirements, DoD was careful to exclude rules that “pertain[] to a military or foreign affairs function of the United States determined to require a security classification in the interests of national defense or foreign policy under the criteria of an E.O. or statute (e.g., foreign military sales).”¹³⁸

Even though DoD’s changes increased transparency with respect to certain types of rulemaking, the trend toward increased secrecy pushed other types of rulemaking further into the shadows. Overclassification of national security information has been a serious problem for decades, despite attempts at reform. In the decade after September 11, the number of government employees and contractors with security clearances and the number of documents—including agency rules—that were subject to some form of classification grew dramatically.¹³⁹ Moreover, similar voluntary notice-and-comment procedures were not adopted by other agencies, such as the National Security Agency or the Departments of State, Treasury, or Homeland Security, that engage in a significant amount of national security rulemaking directly affecting American citizens.

136. WASH. HEADQUARTERS SERVS., U.S. DEP’T OF DEF., Administrative Instruction 102 (2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/a102p.pdf>.

137. *Id.* §§ E3.2.1–E.3.2.1.7.

138. *Id.* § E3.2.2.4.

139. See PRIEST & ARKIN, *supra* note 24, at 86–87.

In fact, the Federal Register contains relatively few specific invocations of the national security exception by agencies.¹⁴⁰ The most commonly found examples are from the Commerce and Treasury Departments, which seem to invoke the exception rather regularly when issuing regulations regarding trade matters.¹⁴¹ For reasons I discuss below, however, agencies often rely on the exception without indicating that they are doing so.

It is not uncommon for agencies to issue rules without notice-and-comment for a number of reasons. For one thing, the rules may be merely interpretive and non-legally binding “policy statements.”¹⁴² The APA also exempts “rules of agency organization, procedure, or practice.”¹⁴³ Even for substantive rules, moreover, the APA contains a key exception from notice-and-comment requirements for when there is “good cause” on the ground that such requirements would be “impracticable, unnecessary, or contrary to the public interest.”¹⁴⁴ The “good cause” exception is by far the one most commonly invoked by agencies during the rulemaking process to justify disregarding the notice-and-comment procedures for legislative rules.¹⁴⁵

A dearth of accessible data or empirical studies makes it difficult to get an accurate picture of agency rulemaking in general.¹⁴⁶ But secrecy and opacity make national security rulemaking especially tricky to track. Anne Joseph O’Connell constructed the first extensive database of rulemaking activities reported by agencies between 1983 and 2003.¹⁴⁷ Analyzing this data, O’Connell concluded that the agen-

140. A search of the Federal Register yielded 2370 results suggesting an explicit invocation of the national security exception by agencies during the rulemaking process since 1981. The following query was used: (((“military” /6 “function”) or (“foreign affairs” /6 “function”))) /p (“rulemaking” or “rule”)). However, this is a very rough measure of the number of rules for which the exception was invoked. The number may be much lower because agencies typically issue more than one publication regarding the same rule. See Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 925 n.104 (2008).

141. See, e.g., Amendments to the Export Administration Regulations: Implementation of Limited Syria Waiver for Reconstruction Assistance, 78 Fed. Reg. 43,972 (July 23, 2013) (to be codified at 15 C.F.R. pts. 736, 746).

142. See, e.g., Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec., 653 F.3d 1, 7 (D.C. Cir. 2011).

143. 5 U.S.C. § 553(b)(3)(A) (2012).

144. *Id.* § 553(b)(3)(B).

145. See GAO REPORT, *supra* note 121, at 19.

146. For key exceptions, see generally Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1730 (2007) (reporting results by the author of the first empirical study of Treasury’s APA compliance); O’Connell, *supra* note 140, at 895 (analyzing trends using the first extensive database on agency rulemaking activities between 1983–2003, constructed by the author from agencies’ semi-annual reports).

147. The construction of this database was a major accomplishment because it required identifying and consolidating numerous agency documents concerning each rule.

cies issuing the greatest percentage of their rules without notice-and-comment were, in order, the Department of State (49.4%), the Department of Homeland Security (46.2%), the Office of Personnel Management (OPM) (42.3%), the Department of Defense (37.6%), NASA (36.5%), and the Department of Justice (34.2%).¹⁴⁸ With the exception of the OPM (whose rules are likely to fall under other APA exceptions), these agencies happen to be the most likely to engage in opaque national security rulemaking.¹⁴⁹

In December 2012, the General Accounting Office (GAO) reported that it had examined a sample of published rules issued by agencies between 2003 and 2010, and that “agencies published about 35 percent of major rules and about 44 percent of nonmajor rules” without the Notice of Proposed Rulemaking (NPRM) required by the APA.¹⁵⁰ The lack of an NPRM generally indicates that the agency issued the rule without following the notice-and-comment requirements, either by failing to solicit or consider comments at all or by soliciting comments only after the rule had taken effect (an “interim-final” rule). Approximately seventy-seven percent of the time this happened for major rules, the GAO reported, the agency relied on the “good cause” exception.¹⁵¹

The frequency with which the good cause exception is used may seem to suggest that agencies need not rely on the national security exception if they wish to avoid notice-and-comment. Indeed, observing recent use of the “good cause” exception, one scholar has argued that it is being exercised by agencies “with increasing and troubling frequency that indicates a casual disregard of public participation.”¹⁵²

However, the GAO report demonstrates that something else is at work. In fact, by far the most common reason why agencies rely on the “good cause” exception is because they have no choice: Congress has either mandated issuance of the rule or imposed a strict deadline that does not give the agency enough time to conduct notice-and-comment rulemaking. The most common reasons cited by agencies for invoking this exception were that (1) another statute or court order required the agency to act before it had time to conduct the notice-and-comment procedure; (2) another statute directly prescribed the content of the rule; or (3) the agency was responding to an emer-

148. O’Connell, *supra* note 121, at 934.

149. Many other agencies, like the NSA, will have a larger percentage of their rules falling into the national security exception, but most such rules remain secret and would not be reflected in O’Connell’s study results. See *supra* notes 2-17 and accompanying text.

150. See GAO REPORT, *supra* note 121, at 8. A “major” rule is “one that, among other things, has resulted in or is likely to result in an annual effect on the economy of \$100 million or more.” See *id.* at 7.

151. See *id.* at 15.

152. Babette E.L. Boliek, Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers, 81 FORDHAM L. REV. 3339, 3343 (2013).

gency.¹⁵³ In contrast, of the 123 rules issued without an NPRM that the GAO Report examined, only two, by the Departments of Homeland Security and Commerce, specifically invoked the national security exception.¹⁵⁴

While the GAO Report provides a useful overall picture of the frequency with which agencies avoid notice-and-comment rulemaking for many types of rules, it is much less useful for revealing how often agencies avoid the procedures on the ground that the rules substantively fall within the national security exception. For one thing, given the vast number of agencies that conduct national security-related regulation, it is quite probable that a great deal of substantive rulemaking by federal agencies happens in secret, justified on legal grounds that never see the light of day or by the statutes that permit important government information—even rulemaking—to be kept secret.¹⁵⁵ Therefore, with the explosion in the use of this classification by agencies in the past decade, there could be thousands of unpublished rules—which still have the force of law—that will not turn up in a search of the Federal Register and would not have been captured in the GAO Report.¹⁵⁶

One prominent example of secret substantive rulemaking is the development and implementation of Standard Operating Procedures (SOPs) for airport passenger screening by the Transportation Security Administration (TSA), an agency in the Department of Homeland Security. Although most members of the public are directly affected by these rules, and they implicate constitutional rights, they are generally not available to the public.¹⁵⁷ After significant public criticism and a lawsuit by privacy advocates, the D.C. Circuit held in 2011 that the TSA must use notice-and-comment rulemaking in promulgating rules for the use of advanced imaging technology (AIT) at air-

153. GAO REPORT, *supra* note 121, at 16.

154. Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization (ESTA) Program, 73 Fed. Reg. 32,440, 32,444 (June 9, 2008); Revisions and Technical Correction to the Export Administration Regulations, 72 Fed. Reg. 20,221, 20,222 (Apr. 24, 2007) (making several corrections to the Export Administration Regulations regarding Libya and terrorist-supporting countries).

155. For examples of statutes that authorize secret rulemaking, see *supra* note 23.

156. See *supra* notes 23-26 and accompanying text (discussing the problem of rampant over-classification). “Unpublished” rules are not necessarily secret or unavailable to the public. They are often a form of opaque rulemaking signaled in various forms in agency communications, such as policy manuals, that may eventually be released.

157. Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec., 653 F.3d 1, 3 (D.C. Cir. 2011) (“Congress generally has left it to the agency to prescribe the details of the screening process, which the TSA has documented in a set of Standard Operating Procedures not available to the public.”). Some of the SOPs were inadvertently published online in 2009. See OFFICE OF INSPECTOR GEN., U.S. DEPT OF HOMELAND SEC., OIG-10-37, TSA’S BREACH OF SENSITIVE SECURITY INFORMATION (2010), available at http://www.oig.dhs.gov/assets/Mgmt/OIG_10-37_Jan10.pdf.

ports, although it permitted the current rules to remain in place.¹⁵⁸ Although the D.C. Circuit rejected the TSA's arguments that the rules were exempt, the agency did not rely on the national security exception.¹⁵⁹ In March 2013, the TSA issued a Notice of Proposed Rulemaking on AIT, beginning the notice-and-comment process.¹⁶⁰

But the most important factor that makes national security rulemaking difficult to track is that the APA's national security exception is a unique card that can be played by an agency at any point. In stark contrast to the use of the "good cause" exception, courts simply have not required agencies eschewing the notice-and-comment process to invoke the national security exception as their reason for doing so *contemporaneously* with the issuance of the rule. In other words, an agency may fail to follow notice-and-comment rulemaking procedures without explaining why, but it may subsequently rely on the national security exception when the rule is challenged in court.¹⁶¹ Even when agencies do invoke the exception when issuing a rule, they have not been required by courts to provide any justification for why the exception applies.¹⁶²

Since the APA was enacted, federal courts have discussed the national security exception in approximately one hundred cases.¹⁶³ In approximately seventy-six of those cases, the court weighed the applicability of the exception, even though the agency had not invoked the exception during the rulemaking process and was apparently relying on the exception for the first time. In about sixty-two of those cases, the court concluded that the exception applied; in about fourteen cases, the court held that the exception did not apply and that the agency had therefore violated the APA. In stark contrast, if an agency does not invoke the "good cause" exception during the rule-

158. *Elec. Privacy Info. Ctr.*, 653 F.3d at 6 (holding that, because an AIT scanner produces "an image of the unclothed passenger," it "intrudes upon his or her personal privacy in a way a magnetometer does not," and that this "change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking").

159. *See id.* at 5.

160. *See* Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287 (Mar. 26, 2013).

161. *See, e.g.,* City of New York v. Permanent Mission of India to United Nations, 618 F.3d 172, 175 (2d Cir. 2010) (holding that the exception applied to the State Department's regulation, despite the Department's failure to invoke the exception during rulemaking or in the final rule); Designation and Determination Under the Foreign Missions Act, 74 Fed. Reg. 31,788 (July 2, 2009).

162. *See, e.g.,* Rajah v. Mukasey, 544 F.3d 427, 437 (2d Cir. 2008) (rejecting petitioners' assertion that "the foreign affairs exception is inapplicable because the regulation itself did not contain a statement of the undesirable international consequences flowing from the application of notice and comment review" and concluding that there is "no requirement that the rule itself state the undesirable consequences").

163. These numbers, calculated from my searches on Westlaw and Lexis, are approximate because it is not always clear whether the national security exception was necessary for the court's decision in a particular case.

making process and provide justification for invoking it, in most cases the agency will not be permitted to rely on the "good cause" exception in court.¹⁶⁴ The courts' practice of permitting agencies to rely on the national security exception in this manner is plainly inconsistent with the *Chenery* rule, under which courts will uphold agency action only on the grounds upon which the agency relied when it acted.¹⁶⁵

Given that much of national security rulemaking happens "in the shadows" and that the agencies themselves are not normally providing contemporaneous reasons why the national security exception applies, courts have failed to offer clear guidance about the appropriate scope of the exception.¹⁶⁶ Anything beyond a superficial discussion can be found in just a handful of cases.

What is most well established is that the exception applies to international executive agreements that have the force of law.¹⁶⁷ Similarly, regulations implementing treaties are almost always regarded as falling within the exception.¹⁶⁸ In one of the earliest cases applying it, the Second Circuit determined that the FCC acted lawfully when it eschewed notice-and-comment procedure in promulgating, pursuant to a treaty with Canada, a regulation that reduced the rights of U.S. AM radio broadcasters.¹⁶⁹ In 1994, the Department of Transportation relied on the national security exception to defeat a legal challenge by the Teamsters Union to a rule, enacted pursuant to the North American Free Trade Agreement (NAFTA) without notice-and-comment, exempting Mexican truckers operating in the United States from complying with U.S. motor vehicle laws.¹⁷⁰

In the 1980s, the Court of International Trade attempted to discern the limits of the exception by analyzing the APA's legislative history and the AG Manual.¹⁷¹ Looking to the purpose of the rules under review rather than the agency issuing them, the court concluded that the exception applied to rules "clearly and directly in-

164. See, e.g., *Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States*, 10 Ct. Int'l Trade 301, 306 (1986).

165. See *supra* notes 109-115 and accompanying text.

166. See Vermeule, *supra* note 33, at 1112.

167. Hathaway, *supra* note 34, at 221 (noting that, because of the national security exception, "international agreements are not subject to the same notice and comment rule-making procedures that apply to nearly every other administrative rule and regulation issued by the U.S. government" and that "no alternative oversight mechanism stands in its place").

168. See, e.g., *Int'l Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1486 (D.C. Cir. 1994); *Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985); *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 574 (Ct. Int'l Trade 1995); *Am. Inst. for Imp. Steel, Inc. v. United States*, 600 F. Supp. 204, 211 (Ct. Int'l Trade 1984).

169. See *WBEN, Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968).

170. See *Int'l Bhd. of Teamsters*, 17 F.3d at 1486.

171. *Mast Indus., Inc. v. Regan*, 8 Ct. Int'l Trade 214, 229-32 (1984) (noting that courts in prior cases had not attempted to identify a limiting principle for the exception).

volved' in a 'foreign affairs function,' " ¹⁷² which extended to rules by the U.S. Customs Service negotiated with foreign governments, ¹⁷³ but not to rules by the Commerce Department establishing when a dumping margin was regarded as "de minimis" for determining countervailing duties in dumping investigations. ¹⁷⁴

But it has not been necessary for the agency to be regulating pursuant to an international agreement for the exception to apply. Instead, it has been enough that a court perceive that the rulemaking process would interfere with international negotiations or result in retaliation against the United States by other countries. For example, the Second Circuit held in 2010 that the exception applied to a State Department decision to abruptly cut short a long-running dispute between New York City and two nations' foreign missions to the United Nations. ¹⁷⁵ The city had maintained that, while the mission offices were not taxable, the adjacent residences of mission employees were. ¹⁷⁶ When two of the missions brought suit to challenge the tax, the federal district court had agreed that, under relevant treaty provisions, the residences were taxable. ¹⁷⁷ While the missions appealed, the State Department acted swiftly, issuing a regulation, without notice or comment, declaring that such residences were not taxable and preempting all local and state laws. ¹⁷⁸ The Second Circuit upheld the regulation and agreed that the national security exception applied, even though the State Department had not invoked it when issuing the rule. ¹⁷⁹

Apart from the context of international agreements, courts are more likely to hold that the national security exception applies when the court perceives that notice-and-comment would cause "definitely undesirable international consequences," ¹⁸⁰ the rulemaking is a response to a crisis with foreign affairs implications, or military operations are involved. None of these factors were present when a court held that the exception did not apply to Energy Department regulations governing civilian contractors at facilities where nuclear explosives were manufactured. ¹⁸¹ Similarly, some courts have rejected the

172. *Id.* at 231 (quoting H.R. REP. NO. 79-1980, at 257 (1946)).

173. *Id.* at 228.

174. *See* *Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States*, 10 Ct. Int'l Trade 301, 305-06 (1986).

175. *See* *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 201 (2d Cir. 2010).

176. *Id.* at 174-75.

177. *Id.* at 176.

178. *Id.* at 178.

179. *Id.* at 201.

180. *See* *Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008).

181. *Indep. Guard Ass'n, Local No. 1 v. O'Leary*, 57 F.3d 766, 770 (9th Cir. 1995).

applicability of the exception in a few immigration contexts. For example, one court held that rulemaking regarding administrative detention of Haitian refugees did not fall within the exception, although the INS was responding to a crisis, because nothing in the record supported a finding that notice-and-comment rulemaking would have resulted in “undesirable international consequences.”¹⁸² However, multiple courts held that the national security exception applied to rules tightening restrictions on Iranian nationals in the wake of the Iranian Hostage Crisis in 1980.¹⁸³ And courts have held that the exception applies to the designation by the military of “temporary security zone[s]” such as the weapons testing site near Vieques in Puerto Rico.¹⁸⁴

Although the cases addressing the exception are rare, they do suggest that its applicability, if not always its application, is broad. Due to the secrecy and opacity of agency decisionmaking in these areas, it is difficult to tell whether agencies are, *sub silentio*, relying on the exception, or whether they are simply following a past practice of failing to comply with the APA. Either way, national security rulemaking takes place within an administrative culture that eschews notice-and-comment and does not value public participation or accountability. In the remainder of this Article, I discuss whether national security rulemaking should be different and why.

III. THE SCHMITTIAN VIEW OF NATIONAL SECURITY RULEMAKING

As Part II explained, the national security exception is not the only way in which agencies are authorized—by the APA itself or other statutes—to depart from notice-and-comment procedures when issuing rules that have the force of law. What is special about the exception is the way in which it categorically separates one substantive area of rulemaking from all others.¹⁸⁵ If one examined only the legislative history of the bill that became the APA, one could conclude that the decision to carve out this exception was simply based on accepted, if unexpressed, assumptions about the exceptional nature of national security rulemaking.¹⁸⁶

182. *Jean v. Nelson*, 711 F.2d 1455, 1477-78 (11th Cir. 1983), *vacated and rev'd on other grounds en banc*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

183. *See Nademi v. INS*, 679 F.2d 811, 814 (10th Cir. 1982); *Malek-Marzban v. INS*, 653 F.2d 113, 115-16 (4th Cir. 1981); *Yassini v. Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980).

184. *United States v. Ventura-Melendez*, 321 F.3d 230, 232 (1st Cir. 2003).

185. The other substantive exception is for government grants and contracts, and it has been narrowed significantly by subsequent statutes and regulations. *See supra* notes 119-121 and accompanying text.

186. *See, e.g.,* STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG. (Comm. Print 1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONGRESS, 1944-46, at 15, 17 (1946) (referring to the exception as “self-explanatory”); *infra* notes 218-224 and accompanying text.

Indeed, this is probably the accepted view. Professor Adrian Vermeule has recently argued that the entire corpus of American administrative law, from authorizing statutes to court decisions, allows agencies to transcend the bounds of administrative procedure and meaningful judicial review in emergencies.¹⁸⁷ Vermeule identifies the national security exception as one example of a number of such “black holes” created by the APA and other statutes—areas where the executive may operate free of legal constraints.¹⁸⁸ In addition, Vermeule contends that administrative law contains numerous “grey holes”—ambiguous legal provisions that provide courts opportunities to indulge their natural tendency to give heightened deference to agencies during national crises.¹⁸⁹ Within these grey holes, courts can preserve the pretense of the rule of law while deferring entirely to the executive.¹⁹⁰

In articulating this thesis, Vermeule embraced the controversial theories of German political scientist Carl Schmitt, “‘the outstanding legal theorist of the . . . exception.’”¹⁹¹ Schmitt’s theories have descriptive and normative aspects. He is well known for his assertion that the “[s]overeign is he who decides on the exception.”¹⁹² However, Schmitt not only argued that this phenomenon is inevitable; he concluded that it is necessary for the state’s survival.¹⁹³ Moreover, as Schmitt developed his theories, the exception took on greater and greater importance, and Schmitt ultimately argued against limiting the sovereign’s discretion at all.¹⁹⁴ Because “[t]he precise details of an emergency cannot be anticipated” in advance, Schmitt argued, the “sovereign” must enjoy absolute freedom both to determine “whether there is an . . . emergency” and “what must be done to eliminate it.”¹⁹⁵

Vermeule takes from Schmitt that an administrative legal regime replete with black and grey holes is inevitable. It is “hopelessly utopian,” Vermeule argues, to attempt to apply meaningful administra-

187. Vermeule, *supra* note 33, at 1096-97; *see also* Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. 1271, 1271 (2010).

188. Vermeule, *supra* note 33, at 1096.

189. *Id.*

190. *See id.* at 1114. Vermeule was using and responding to the concept of grey holes and black holes used by David Dyzenhaus. *See* DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 3 (2006).

191. Gross, *supra* note 44, at 1826 (emphasis omitted) (quoting HANS Kelsen & CARL SCHMITT, *A JUXTAPOSITION* 10 (Dan Diner & Michael Stolleis eds., 1999)).

192. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* 5 (George Schwab trans., MIT Press 1985) (1922).

193. *See* CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 12 (Ellen Kennedy trans., MIT Press 1985) (1923); David Dyzenhaus, *Emergency, Liberalism, and the State*, 9 PERSP. ON POL. 69, 72 (2011).

194. *See* Gross, *supra* note 44, at 1841.

195. SCHMITT, *supra* note 192, at 6-7.

tive law constraints during emergencies: “The exception cannot, realistically, be banished from administrative law; exceptions are necessarily built into its fabric.”¹⁹⁶ Vermeule is less clear about whether this state of affairs is a desirable one.¹⁹⁷

While Vermeule is almost certainly correct that exceptions cannot be banished entirely from administrative law, critics have disagreed with his contention that courts in fact do practice the sort of absolute deference he identifies.¹⁹⁸ They have also argued that administrative law can be reformed to reduce the ability of the executive to act without constraint during emergencies—for example, by altering the nature of the exceptions,¹⁹⁹ changing the culture of agencies and courts to encourage consideration of “public-regarding factors,”²⁰⁰ or creating a more detailed legal framework for emergency administration.²⁰¹

It is no coincidence that interest in Schmitt, on the part of legal scholars, has exploded in the decade following the September 11 attacks and the resulting global war against Al Qaeda and the Taliban.²⁰² Schmitt’s core observation that states of exception must exist in liberal democracies is an intuitively powerful one. Although Schmitt’s views have recently found more sympathy among conservative scholars, their influence—even if Schmitt himself is not mentioned—is something to be reckoned with. Nearly every theorist seriously addressing emergency or war governance after September 11 has found it necessary to grapple with the Schmittian perspective.²⁰³

It is also no coincidence that Schmitt developed his theories during a period of acute crisis in his native Germany during the 1920s

196. Vermeule, *supra* note 33, at 1097, 1104.

197. Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT’L SECURITY J. 283, 429 (2011) (observing that a “problem with Vermeule’s approach is the extent to which it blurs empirical conclusions with normative arguments”).

198. See, e.g., Criddle, *supra* note 187, at 1274, 1275 & n.20.

199. See *id.* at 1272; David Dyzenhaus, *Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2026 (2006).

200. Criddle, *supra* note 187, at 1272.

201. See Ackerman, *supra* note 105, at 1030-31, 1044 (proposing “a newly fashioned emergency regime” that permits “short-term emergency measures but draws the line against permanent restrictions” to “rescue the concept” of emergency power “from fascist thinkers like Carl Schmitt, who used it as a battering ram against liberal democracy”).

202. See DUDZIAK, *supra* note 44, at 116 (observing that “[c]itations to Schmitt in legal scholarship steadily increased” after September 11, with “twenty-four citations to Schmitt in 2001, twenty-nine in 2002, fifty-one in 2003, and eighty-six in 2009”); David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT’L L. 457, 463 (2010). Interest in Schmitt had already been gaining steam prior to September 11. See D.A. Jeremy Telman, *Should We Read Carl Schmitt Today?*, 19 BERKELEY J. INT’L L. 127, 129 (2001) (book review).

203. See DUDZIAK, *supra* note 44, at 116-18 (discussing responses to Schmitt among legal scholars).

and 1930s.²⁰⁴ Schmitt witnessed the perceived weakness of the democratic Weimar government and saw it collapse with Hitler's rise to power.²⁰⁵ Schmitt himself became a Nazi Party member, and the extent to which he justified the exploitation of legal loopholes that enabled the rise of the Third Reich is the subject of intense debate.²⁰⁶ For many contemporary American legal scholars like Vermeule, however, the history is beside the point; what is important is not the historical context in which Schmitt arrived at his understanding of governance, but what he understood and explained about the essential nature of administration during war and emergency, which is true for every democratic government in every era.²⁰⁷

This elevation of theory over context is problematic. It is entirely possible that rules created in times of emergency and war are intended to address the current emergency and were never intended to be appropriate for future wars or emergencies. Yet path dependency and legislative and regulatory ossification leave legal frameworks in place long after the problems they were intended to address no longer exist.²⁰⁸

Moreover, where Vermeule's description of black holes in American administrative law fits uneasily with Schmitt's approach is in the concept of emergency. Although the core of Schmitt's work explored states of "exception" (*Ausnahmezustand*), his later writings made clear that he meant for the term to encompass much more than what we commonly understand to be emergencies—temporary periods of extreme peril, such as war or natural disasters.²⁰⁹ In fact, Schmitt ultimately concluded that, to limit the exception to emergencies—or to impose *any* limitations at all on the breadth of the concept—would

204. See Telman, *supra* note 202, at 130-32 (discussing the influence of World War I and the collapse of the pre-war order on Schmitt's philosophy). For biographical information about Schmitt, see, for example, JOSEPH W. BENDERSKY, *CARL SCHMITT: THEORIST FOR THE REICH* (1983).

205. See Telman, *supra* note 202, at 136 ("Having struggled, along with others, to provide the fledgling Weimar Republic with a legal theory that could guarantee its stability, Schmitt arrived at the conclusion that the Sovereign needed, in certain situations, to become the exception that cannot be bound by law.").

206. Ellen Kennedy, *Carl Schmitt and the Frankfurt School*, *TELOS*, Fall 1987, at 37, 37-39; Telman, *supra* note 202, at 131-32.

207. Writing with Eric Posner, Vermeule described his approach as "extract[ing] the marrow from Schmitt and then throw[ing] away the bones for the professional exegetes to gnaw." ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 38 (2007).

208. Kim Lane Scheppele, *Exceptions That Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 124, 124-34 (Jeffrey K. Tulis & Stephen Macedo eds., Princeton University Press 2010) (detailing examples of foreign and domestic legislative acts that tend to "constitutionalize emergency exceptions to normal government" (emphasis omitted)); cf. GIORGIO AGAMBEN, *STATE OF EXCEPTION* 2 (Kevin Attell trans., Univ. of Chi. Press 2005) (contending that states of emergency tend to become permanent).

209. See Gross, *supra* note 44, at 1826-28.

endanger the state by constraining the executive's ability to determine when a state of exception exists and to respond appropriately.²¹⁰

Therefore, our administrative law is both more and less Schmittian than Vermeule describes. It is more Schmittian because many of the black holes that he identifies are regularly used by agencies in times of peace and non-emergency. This is especially true of the national security exception. There was, for example, no war or emergency concerning Canada that required the FCC to issue regulations limiting the power of AM radio stations without notice-and-comment.²¹¹ The same could be said of most regulations to which the courts have concluded the exception applies.²¹² At the same time, the national security exception is perhaps less Schmittian because, although it may be broadly construed, it is arguable whether it truly constitutes a "suspension of the entire existing order."²¹³ The only way to make the actual operation of the exception fit with Vermeule's use of the word "emergency" would be to acknowledge that we live in a permanent state of emergency.²¹⁴

The problem with Vermeule's Schmittian approach to our administrative law, then, is that, like Schmitt's own theories, it has little to offer concerning the limits of the state of exception. A Schmittian/Vermeulian approach to the national security exception would be an acknowledgement that it has no practical limits. The exception is capable of swallowing the general rule.

Yet if we wish to impose some limits on the exception, how can we do so? Although there are many ways to approach this question, the historical context in which the APA's national security exception was created reveals a great deal about why the exception was believed to be necessary at the time and whether it continues to be necessary today. The next Part offers the first explanation for the exception based on this historical context.

210. See William E. Scheuerman, *Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt*, 17 HIST. POL. THOUGHT 571, 589 (1996) ("If legal indeterminacy is a truly ubiquitous facet of legal experience, then dictatorship similarly must take something close to an omnipresent, even permanent form.").

211. See *WBEN, Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968).

212. See *supra* notes 166-184 and accompanying text.

213. SCHMITT, *supra* note 192, at 12.

214. This is in fact exactly what Italian political theorist Giorgio Agamben has argued, using Schmitt's theories and the Guantánamo Bay detention camp as points of departure. See AGAMBEN, *supra* note 208, at 2 ("[T]he voluntary creation of a permanent state of emergency . . . has become one of the essential practices of contemporary states, including so-called democratic ones.").

IV. THE HISTORICAL ROOTS OF NATIONAL SECURITY RULEMAKING

The conventional wisdom assumes that the fundamental exigencies driving national security rulemaking are basically static.²¹⁵ Defenders of national security exceptionalism argue that the nature of national security policymaking is fundamentally different from ordinary policymaking, while critics argue that exceptional treatment of national security policymaking threatens democratic values.²¹⁶ The debate is an essentialist one. However, it is entirely possible that, as the world changes and threats to America's security change with it, the architecture of the administrative state ought to change in response. If this is so, it is vitally important to understand the historical context in which current administrative law doctrine was developed.

This Part departs from the conventional wisdom and advances an alternative interpretation of the APA's national security exception that is rooted in the history surrounding its enactment. Despite the dearth of specific legislative history explaining the exception with respect to the final APA itself, it is possible to reconstruct the exception's purpose by reference to the historical context, the debates surrounding the predecessor legislation to the APA, and influential conceptions of organizational theory at the time of the APA's enactment.²¹⁷

An examination of this context reveals the striking degree to which the national security exceptionalism embedded in our current administrative law regime was a creature of the unique geopolitical and domestic political concerns of the 1930s and 1940s. Pearl Harbor, the rise of fascism, and the war-related failures of federal govern-

215. See *supra* Part III. For an argument that, although the conventional wisdom assumes that national security considerations are timeless, they are in fact rooted in outdated views of international relations theory, see Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 93 (2009).

216. Compare Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 943-44 (2004) (arguing that foreign affairs (and national security) matters deserve unique treatment by courts and in constitutional law), and *supra* notes 197-201, with Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191, 206 (2003) ("We have to worry that the very means given to the government to combat our enemies will be used by the government against *its* enemies . . .").

217. The following is drawn from primary sources and invaluable historians' and political scientists' accounts of the APA and its era—in particular, those that describe the deep connection between New Deal politics and international relations and those addressing specifically the debate surrounding administrative law reform. Especially helpful were DUDZIAK, *supra* note 44; KATZNELSON, *supra* note 40; IDO OREN, *OUR ENEMIES AND US: AMERICA'S RIVALRIES AND THE MAKING OF POLITICAL SCIENCE* (2003); DOUGLAS T. STUART, *CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA* (2008) (offering a definitive history of the National Security Act); Kovacs, *supra* note 125; McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999); Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in *TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II* 185 (Daniel R. Ernst & Victor Jew eds., Praeger Publishers 2002); and George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

ment agencies were constantly on the minds of those contemplating and constructing the modern administrative state.

These contemporaneous concerns infused, even distorted, the debate concerning administrative law reform to such a degree that there is, ironically, very little discussion of national security rule-making, as such, in the legislative history of the bill that became the APA.²¹⁸ Nonetheless, through a decades-long, often-vitriolic debate on reforming the administrative state that culminated in the APA, a story emerges about the origins of national security rulemaking: against the backdrop of a world in crisis, with the rise of fascist powers—and eventually, a world war against those powers—Congress decided to carve out greater and greater space for a distinct regime of national security rulemaking, even as it created a regime for ordinary rulemaking intended to rein in the excesses of the administrative state.

The APA emerged as the ultimate compromise after a long struggle during the 1930s and '40s by New Deal opponents to tame the growing administrative state.²¹⁹ With respect to core administrative law issues such as judicial review of agency action, it reflected the settlement of “‘long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest.’”²²⁰

Yet by the time Congress debated the bill that became the APA, the question of how to treat national security rulemaking appears to have been largely settled. The presence of the national security exception was little remarked upon,²²¹ and it was often referred to as “self-explanatory.”²²² The explanations that were offered seem to suggest that some in Congress believed it should be narrowly construed. One Congressman, in reference to the exception, said the following: “The exemption of military and naval functions needs no explanation here. The exempted foreign affairs are those diplomatic functions of high importance which do not lend themselves to public procedures and with which the general public is ordinarily not directly concerned.”²²³ The House and Senate Report cautioned against overbroad interpretation:

218. See Tibbels, *supra* note 34, at 395 n.27 (noting that the legislative history on the exception is limited to a paragraph).

219. See generally Shepherd, *supra* note 217.

220. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)).

221. Hathaway, *supra* note 34, at 243 n.312.

222. See, e.g., STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG. (Comm. Print 1945), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONGRESS, 1944–46, at 15, 17 (1946); see also Hathaway, *supra* note 34, at 171–72.

223. 92 CONG. REC. 5650 (1946) (statement of Rep. Walter).

The phrase “foreign affairs functions,” used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those “affairs” which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences.²²⁴

Although some in Congress apparently believed that the national security administrative state should be small, the Executive Branch, after the APA became law, seized on the provision’s language to imagine a vast regime of national security rulemaking. Indeed, as the first scholar to analyze the exception observed, “the language of the . . . exemption is very broad” and the “functions excluded are written in terms easily susceptible to wide application.”²²⁵ The influential 1947 Interpretive Guide to the APA issued by the office of the Attorney General and future Supreme Court Justice Tom Clark took what one commentator has called an “exceptionally sweeping” view of the national security exception’s scope.²²⁶ The Attorney General’s Manual is, for courts, a “key document” for interpreting the APA, contains the “most authoritative account” of the history of its passage,²²⁷ and has been “given some deference . . . because of the role played by the Department of Justice in drafting the legislation.”²²⁸

The reference to “military and naval functions” in the national security exception, the Manual concluded, was “not limited to activities of the War and Navy Departments but covers all military and naval functions exercised by any agency.”²²⁹ For example, the Manual offered, “the exemption applies to the defense functions of the Coast Guard and to the function of the Federal Power Commission under section 202(c) of the Federal Power Act.”²³⁰ By referring to “foreign affairs functions,” according to the Manual, the provision was “applicable to most functions of the State Department and to the foreign affairs functions of any other agency.”²³¹

The Manual’s broad interpretation of the national security exception was the culmination of a trend that began with that era’s first

224. S. REP. NO. 79-752, at 13, 16 (1945); *see also* H.R. REP. NO. 79-1980, at 2-3, 23, 27 (1946).

225. Bonfield, *supra* note 22, at 238.

226. Tibbels, *supra* note 34, at 396; *see generally* U.S. DEPT OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26-27 (1947) [hereinafter MANUAL].

227. Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 362 (1st Cir. 2004) (citations and internal quotation marks omitted).

228. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 546 (1978).

229. MANUAL, *supra* note 226, at 26.

230. *Id.*

231. *Id.* at 27.

efforts at administrative law reform. From the first proposed legislation intended to restrain administrative agencies in 1929, to the final passage of the APA in 1946, with some exceptions, each subsequent draft of legislation recognized a broader national security administrative state than the one before it. The earliest proposals, which saw no action in Congress, did not mention the military or foreign affairs at all.²³² By 1937, however, the world had changed and domestic politics along with it. Much of the public had begun to perceive agencies in the Roosevelt Administration as overreaching. Amid a recession and backlash against Roosevelt's court-packing plan, and with a newly-quiescent Supreme Court no longer willing to strike down New Deal programs, support for administrative reform as a counterbalance to the New Deal grew.²³³ The anti-New Deal "conservative coalition" of Republicans and mostly-Southern Democrats took effective control in Congress.²³⁴

Fears of federal agencies run amuck became intertwined with increasing awareness by Americans of totalitarianism in Europe and Asia. Through the 1930s, the United States had closer ties with Fascist Italy than the Communist USSR, Nazi Germany, or Imperial Japan.²³⁵ For many Americans, however, the entanglement of business and government in fascist states bore a disturbing similarity to the way U.S. government agencies were closely involved with businesses in controlling wages and prices and the detailed regulation of industries.²³⁶ The floor debates on APA predecessor legislation during the 1930s and '40s reflect these concerns: they are " 'riddled with comparisons of the administrative state to fascist and communist govern-

232. These early proposals, which began before FDR took office, sought simply to vest review of administrative decisions in the courts, which were considered conservative and skeptical of regulation. See Kovacs, *supra* note 125, at 681-83; Shepherd, *supra* note 217, at 1566-67. The first proposal introduced by Senator George Norris in 1929, see S. 5154, 70th Cong. (1929), went nowhere because even conservatives thought it unnecessary. See Kovacs, *supra* note 125, at 682-83.

233. See KATZNELSON, *supra* note 40, at 256-75 (describing the court-packing plan and recession); Shepherd, *supra* note 217, at 1586-93 (describing gathering momentum for administrative reform).

234. See McNollgast, *supra* note 217, at 204.

235. See KATZNELSON, *supra* note 40, at 92-93 ("[C]ore policymakers . . . were drawn to Mussolini's Italy, which self-identified as a country that had saved capitalism."); *id.* at 63-68 (describing the rapturous public reception Fascist Italy's Air Force Marshall and Mussolini heir-apparent Italo Balbo received during a visit to the United States).

236. See, e.g., James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747, 748 (1991) ("To supporters and critics alike, [the National Recovery Act], a vast scheme for delegating governmental authority to private cartels, seemed akin to the 'corporativism' of Italian Fascism."); *Hoover Warns New Deal Leads U.S. to Fascism*, WASH. POST, May 6, 1938, at X2 (summarizing and quoting a speech by FDR's defeated predecessor, Herbert Hoover, broadcast to millions on the radio). For a recent revisionist history echoing these criticisms and roundly condemning the New Deal's economic reforms and alleged autocratic tendencies, see AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* (2007).

ments’ ” and accusations that administrative agencies were being used to advance FDR’s totalitarian ambitions.²³⁷

In 1937, the influential (and decidedly anti-New Deal) ABA Special Committee on Administrative Law, led by the “dyspeptic” former Harvard Law Dean, Roscoe Pound,²³⁸ drafted legislation that would have imposed tighter control on agencies than earlier proposals. It required notice and public hearings prior to regulation, formal administrative hearings, and judicial review.²³⁹ At the same time, however, perhaps recognizing the increasing instability in geopolitics, the Committee proposed to exempt from the bill “foreign affairs” and “the conduct of military or naval operations in time of war or civil insurrection.”²⁴⁰

Two years later, after Hitler had invaded Poland and World War II had begun,²⁴¹ a bill similar to the APA’s proposal was introduced in Congress as the Walter-Logan Bill.²⁴² The national security exception now was slightly broader: it excluded altogether “any matter concerning or relating to the conduct of foreign affairs” and “the conduct of military or naval operations in time of war or civil insurrection.”²⁴³ Despite the presence of these exceptions, they were strongly criticized as too narrow. As the nation sought to absorb the news of the devastating strength of Hitler’s military and the relative weakness of America’s,²⁴⁴ the War Department savaged the Walter-Logan bill, arguing that it would be “gravely subversive of military discipline in all components of the Army, destructive of efficiency in the performance

237. See Kovacs, *supra* note 125, at 685 (quoting Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 86 (2000)).

238. Schiller, *supra* note 217, at 197 (describing Pound as “dyspeptic”).

239. Shepherd, *supra* note 217, at 1582-83; *Report of the Special Committee on Administrative Law*, 62 A.B.A. ANN. REP. 846-50 (1937) [hereinafter *Special Committee*].

240. *Special Committee*, *supra* note 239, at 789. For various reasons—having mostly to do with pre-existing judicial review provisions—the Committee also exempted the Federal Reserve Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, in addition to exempting “any case arising under the internal revenue, customs, patent . . . or Longshoremen’s & Harbor Workers’ Laws; or any case in which the aggrieved person was denied a loan or is dissatisfied with a grading service rendered by the United States in connection with the purchase or sale of agricultural products.” *Id.* at 850; see also Shepherd, *supra* note 217, at 1600.

241. See KATZNELSON, *supra* note 40, at 302 (concluding that “Germany’s lightning attack on Poland transformed legislative possibilities” for ending the embargo on arms sales to Britain and France).

242. S. 915, 76th Cong. (1939); H.R. 4236, 76th Cong. (1939); H.R. 6324, 76th Cong. (1939); Schiller, *supra* note 217, at 197.

243. S. 915, 76th Cong. § 6(b) (1939).

244. See KATZNELSON, *supra* note 40, at 306-08; GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900–1950*, at 66 (1951) (observing that, in 1939, “the overwhelming portion of the world’s armed strength in land forces and air forces” belonged to Germany, Japan, and the USSR, and that Western democracies “had become militarily outclassed”).

of the functions of the War Department, both military and non-military, obstructive to progress in preparedness for national defense, and generally disastrous from the viewpoint of the public interest.”²⁴⁵ The bill would, according to the Department, enable military personnel to challenge orders “on any occasion except in time of war or insurrection.”²⁴⁶ The Department suggested that “all matters concerning or relating to the operations of the War Department and the Army” be exempted.²⁴⁷

In response to these objections, one of the bill’s co-sponsors, Senator M.M. Logan, amended the bill in a draft that defined “agency” for the first time, and he broadened the military exception so that it applied “to the conduct of military or naval operations” at all times.²⁴⁸ However, the new draft did not include an exception for foreign affairs. Although the House Judiciary Committee reported a similar bill favorably, an influential critique emerged from Congressman Cellar, a co-sponsor of the earlier, even more restrictive ABA bill. Congressman Cellar, who had a change of heart, now argued that “it would be manifestly inappropriate to require the War Department to conduct hearings on Army regulations.”²⁴⁹ As the House debated the bill just days after Hitler invaded Denmark, other congressmen also complained that the military exception was too narrow.²⁵⁰ A last-minute amendment by Congressman Walter purported to further expand the exception, re-defining “military ‘operations’ to include ‘strictly military and naval activities of the War and Navy Departments.’”²⁵¹

The Senate grappled with similar concerns. Two months later, in summer 1940, Hitler’s armies marched into Paris and the Luftwaffe

245. Letter from Harry H. Woodring, Sec’y of War, U.S. War Dep’t, to Rep. Hatton W. Sumners, Chairman, Judiciary Comm., U.S. House of Representatives (May 6, 1939), reprinted in *Bills to Provide for the More Expeditious Settlement of Disputes with the United States, and for Other Purposes: Hearings on H.R. 4236, H.R. 6198, and H.R. 6324 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 76th Cong. 102 (1939).

246. *Id.* at 103.

247. *Id.*

248. S. REP. NO. 76-442, at 1, 5 (1939).

249. H.R. REP. NO. 76-1149, pt. 2, at 6 (1940) (Minority Rep.); see also *id.* at 5 (contending that the exception should encompass “other activities” of the Departments of War and the Navy “which highly affect public interest and the national defense, such as river and harbor improvements, and purchase of munitions and supplies”).

250. *Id.* at 688; see 86 CONG. REC. 4653 (1940) (statement of Rep. McGranery) (contending that the exemption would enable military personnel to challenge promotion decisions in the courts of appeals and substitute the court’s judgment for that of armed services). But see *id.* at 4649 (statement of Rep. Gwynne) (arguing, in defense of the existing language, that “the actual conduct of the armies and the navies is an executive function and Congress and the courts have very little, if anything, to do with it”).

251. Kovacs, *supra* note 125, at 688 (quoting 86 CONG. REC. 4725 (1940) (statement of Rep. Walter)). Congressmen disagreed about whether this actually narrowed or broadened the national security exception, but the language was added and the bill passed. See *id.* at 689.

began the London Blitz while “[a] remarkable national consensus developed among political leaders and the mass populace to build American strength,”²⁵² and Congress was debating what would become the first peacetime conscription bill in U.S. history.²⁵³ The Senate Judiciary Committee, working from the same language as the House, expanded the exception further, omitting the word “conduct” and adding the phrase “any other agency or authority hereafter created to expedite military and naval defense.”²⁵⁴ Congressman Sumners, a proponent of the bill, concluded that this language “covers everything that may be done by any agency concerning or relating to the Military and Naval Establishments.”²⁵⁵ Congressman Cochran thought the language was still not broad enough and would not cover civilian agencies “performing functions which are indispensable to the workings of our defense program.”²⁵⁶ In any event, the full Senate adopted this language, and the House concurred in December 1940.²⁵⁷

Yet despite the support of large majorities from both parties in Congress, the Walter-Logan bill would not become law. President Roosevelt vetoed it on December 18, 1940, unhappy with the constraints it imposed on administrative agencies, but also concerned about its effect on preparations for war.²⁵⁸ In his veto statement, Roosevelt articulated the need for a broader national security administrative state. He noted that Walter-Logan would impose new regulatory burdens on agencies, such as the Maritime Commission and the Departments of Commerce and Treasury, “whose activities have an important collateral effect on the defense program,” and which had “pointed out serious delays and uncertainties which would be caused by the present bill.”²⁵⁹ An attempted veto override in the House failed that same day.²⁶⁰

Although his veto was sustained, Roosevelt had recognized the momentum behind the reformers and already ordered the creation of

252. KATZNELSON, *supra* note 40, at 307.

253. See 86 CONG. REC. 11,489 (1940); KATZNELSON, *supra* note 40, at 312-13 (describing the conscription bill as “revolutionary”).

254. The language read as follows: “Nothing contained in this act shall apply to or affect any matter concerning or relating to the Military or Naval Establishments . . . and any other agency or authority hereafter created to expedite military and naval defense.” 86 CONG. REC. 13,746-47 (1940).

255. 86 CONG. REC. 13,811 (1940) (statement of Rep. Sumners).

256. *Id.* at 13,810 (statement of Rep. Cochran).

257. *Id.* at 13,815-16; Shepherd, *supra* note 217, at 1625.

258. *Id.* at 13,942-43; Kovacs, *supra* note 125, at 690.

259. Franklin D. Roosevelt, U.S. President, The President Vetoes the Bill Regulating Administrative Agencies (Dec. 18, 1940), in 1940 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 616, 620 (Samuel I. Rosenman ed., 1941).

260. 86 CONG. REC. 13,953 (1940).

an Attorney General's Committee on Administrative Procedure, which submitted a report on January 22, 1941.²⁶¹ The report contained two proposals for legislation—one from the liberal majority and one from the conservative minority.²⁶² Both bills gave more flexibility to agencies than had the ill-fated Walter-Logan bill, but their approaches varied on both ordinary rulemaking and national security rulemaking. The liberal bill “imposed little restraint on agencies,” while the conservative bill “would have controlled agencies substantially.”²⁶³ The liberal bill, however, did not exempt national security rulemaking at all, while the conservative bill carved out national security exceptions that began to closely resemble those that would be in the APA. The conservative bill authorized the President to temporarily suspend any of the act's provisions under certain circumstances.²⁶⁴ And with respect to notice-and-comment rulemaking, it provided that “[w]henever expressly found by an agency to be contrary to the public interest, the provisions of this title, in whole or part, shall not apply to . . . the conduct of military, naval, or national-defense functions, or the selection or procurement of men or materials for the armed forces of the United States”²⁶⁵

Both bills were introduced in Congress, which debated them during the summer of 1941, as Nazi Germany began its brutal invasion of the Soviet Union, and Japan had already “conquered the Philippines, Burma, Hong Kong, Malaya, Singapore, and the Dutch East Indies.”²⁶⁶ The War Department objected that the national security exceptions in both bills were still inadequate, arguing that the military “could not properly function” if it had to meet the procedural requirements and demanding a full exception for *all* activities of the War Department and all military branches.²⁶⁷ The Attorney General's Committee, chaired by Assistant Secretary (and future Secretary) of State Dean Acheson—who would play a key role in restructuring the national security state after the war²⁶⁸—did not seem to share these concerns, describing as “very clear” the majority bill's exceptions for

261. S. DOC. NO. 77-8 (1941); Shepherd, *supra* note 217, at 1632.

262. Shepherd, *supra* note 217, at 1632.

263. *Id.* at 1633-34.

264. S. 674, 77th Cong. § 111 (1941).

265. *Id.* § 201.

266. See KATZNELSON, *supra* note 40, at 41.

267. Administrative Procedure: Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. of the S. Comm. on the Judiciary, 77th Cong. 36 (1941) (statement of Karl R. Bendetson, Captain, Office of the Judge Advocate General) [hereinafter Administrative Procedure: Hearings on S. 674, S. 675, and S. 918].

268. See STUART, *supra* note 217, at 5.

“the military service, the armed forces, or the selection and discharge of employees.”²⁶⁹ But the Committee, in another sense, chose to go further.

In rejecting agency-specific exceptions to rulemaking requirements, the Committee instead settled on a “functional” approach, under which *any* agency would be exempt from rulemaking (and adjudication) requirements to the extent that it performed certain substantive functions.²⁷⁰ This functional approach prevailed and was included in the APA. This approach would limit the scope of the exception in some respects: no agency could firmly declare itself entirely free of notice-and-comment requirements.²⁷¹ On the other hand, the functional approach vastly expanded the number of agencies that could engage in national security rulemaking. In practice, this meant that agencies across the government could, and did, rely on the exception, to varying degrees, to eschew notice-and-comment procedures.²⁷² And, as it turned out, agencies would enjoy a great deal of discretion to use the exception when they saw fit.²⁷³

Although administrative law reform was largely put on the back burner while the war was waged, by 1946, with the war over and New Dealers on the defensive in Congress, the moment for comprehensive administrative law reform had finally arrived.²⁷⁴ The APA would be enacted into law by year’s end.²⁷⁵

Nonetheless, the lessons learned from the war about the appropriate way to control the exploding administrative state were hardly straightforward. During the war, administrative agencies had grown even more powerful and more numerous, but significantly less popular. Americans were chafing under the price controls, comprehensive rationing, and other rigid regulations required during wartime.²⁷⁶ The war revealed the ugly side of bureaucracies, which proved to be often “inefficient, incompetent, bullying, and perhaps even captured

269. *Administrative Procedure: Hearings on S. 674, S. 675, and S. 918*, *supra* note 267, at 820 (statement of Dean Gooderham Acheson, Assistant Secretary of State for Economic Affairs).

270. S. DOC. NO. 79-248, at 191 (1946); *see also* Bonfield, *supra* note 22, at 235-36. The Navy was, at the time, considered a service separate from the rest of the military. *See* STUART, *supra* note 217, at 10-15 (discussing military restructuring after the war).

271. *See* S. DOC. NO. 79-248, at 13 (“All departments may, and often do, exercise civil and regulatory powers which should be subject to an administrative procedure statute.”); *see also* Bonfield, *supra* note 22, at 235-36.

272. *See* Bonfield, *supra* note 22, at 233-34.

273. *See supra* Part II.C.

274. *See* McNollgast, *supra* note 217, at 192-93, 203.

275. *See* Kovacs, *supra* note 125, at 703-04 (describing the APA’s passage).

276. *See* KATZNELSON, *supra* note 40, at 216.

by the interests they were supposed to regulate.”²⁷⁷ One scholar concluded that the experience “weakened Americans’ faith in expertise.”²⁷⁸

Americans’ confidence in the administrative state had been further weakened by the struggle against fascism. Before the war, many American political scientists had studied the governance of Nazi Germany and Fascist Italy with great interest and even admiration.²⁷⁹ Many more expressed not illegitimate fears that the United States would be left behind if it did not, in some sense, emulate these rising foreign powers.²⁸⁰

During the war, such scholars either abandoned their earlier views or fell into disrepute.²⁸¹ There was a widespread belief among the public that “administrative power could pave the road to totalitarianism” and “‘the claim that imposing the rule of law on agency behavior could protect Americans from an administrative state run amok . . . was increasingly heard across the political spectrum.’”²⁸²

Despite the disgust with which the fascist governments were regarded after the war, policymakers in the military and foreign affairs establishments were well aware that the United States had, in one sense, needed to beat the enemy at its own game in order to win the war. Only through aggressive centralization, militarization, and, often, lack of transparency—hallmarks of fascist governance—had the United States managed to mobilize its resources so quickly and comprehensively during the early 1940s to meet the challenge of defeating Hitler, Mussolini, and Imperial Japan.²⁸³ Pendleton Herring, a prominent theorist of governmental organization highly influential in the Roosevelt and Truman Administrations, had argued that “totalitarian states can be opposed only through an equally effective mobilization of resources.”²⁸⁴ Twenty-six new agencies with broad powers had been created during the war.²⁸⁵ Moreover, the United States

277. Schiller, *supra* note 217, at 195; *see also id.* at 201 (“Too often American wartime agencies had the appearance of incompetent bullies, captured by special interests, acting with an autocratic disregard of due process.”).

278. Schiller, *supra* note 237, at 92.

279. *See, e.g.*, Lawrence Dennis, *Fascism for America*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1935, at 62, 62 (arguing that the New Deal was not fascist enough and that fascism is “the inevitable alternative to chaos or communism”); *see also* OREN, *supra* note 217, at 47-49.

280. *See* OREN, *supra* note 217, at 47-49.

281. *See id.* at 46-52. Lawrence Dennis was tried for treason in 1944. *See* KATZNELSON, *supra* note 40, at 30-31.

282. Kovacs, *supra* note 125, at 695-96 (quoting Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism*, 1945-1970, 53 VAND. L. REV. 1389, 1405 (2000)).

283. *See* Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417, 1461-62 (2012).

284. PENDLETON HERRING, *THE IMPACT OF WAR* 14 (1941). For a definitive account of Herring’s career and influence, *see* STUART, *supra* note 217, at 9, 27-32.

285. Schiller, *supra* note 217, at 190.

could not have accomplished this task without allying itself with another totalitarian regime, the Soviet Union.²⁸⁶

More specifically, the disaster at Pearl Harbor had left an indelible mark on the thinking of policymakers at the top of the Roosevelt and Truman Administrations.²⁸⁷ They, and ultimately the American people as well, believed that America had been left vulnerable to Japanese aggression by its inability to coordinate defense and military functions effectively.²⁸⁸ In addition, those in government responsible for national security had permitted isolationism among the public to influence critical decisions about foreign policy and national defense in ways that weakened America's position in the world.²⁸⁹ The same values that were praised by proponents of administrative law reform that undergird the APA—transparency, legitimacy, deliberation, and accessibility, among others—were regarded as dangerous in the national security context.²⁹⁰

The threat of fascism and communism had therefore affected the APA debate in complex, conflicting ways. Influential members of the Roosevelt and Truman Administrations, such as Herring, Dean Acheson (who had chaired Roosevelt's Committee that proposed the bill that became the APA), and George Marshall, adhered to a "Pearl Harbor" view of government policymaking that treated national security matters as uniquely requiring a closed, militarized, and centralized process—just the opposite of the principles of transparency, public participation, and judicial oversight animating the APA.²⁹¹

The year after Congress enacted the APA, it enacted the APA's mirror image—the National Security Act (NSA) of 1947.²⁹² In contrast to the APA, the NSA, the crafting of which was very heavily influenced by Herring, was entirely animated by the Pearl Harbor view.²⁹³ Congress debated it in the shadow of the harsh, bi-partisan report on the Pearl Harbor attacks issued in mid-1946.²⁹⁴ The NSA's purpose was to centralize government decisionmaking in the national security realm and, for the most part, insulate it from public scruti-

286. See KATZNELSON, *supra* note 40, at 32, 94-95 (describing the alliance and Americans' ambivalence about the Soviet Union in the 1930s and 1940s).

287. See STUART, *supra* note 203, at 42.

288. *Id.* at 43, 70-71.

289. See *id.* at 39-40.

290. See *id.* at 70-71; Rana, *supra* note 283, at 1423-24 (noting "the steady emergence, beginning during the New Deal, of the prevailing American idea of security, with its emphasis on professional expertise and insulated decision-making").

291. See STUART, *supra* note 217, at 41-42, 70-71.

292. National Security Act of 1947, ch. 343, 61 Stat. 495.

293. See STUART, *supra* note 217, at 8-9.

294. David F. Rudgers, *Creating the Secret State* 138-39 (2000); see also J. Comm. on the Investigation of the Pearl Harbor Attack, *Investigation of the Pearl Harbor Attack*, S. Doc No. 79-244, at 252-53 (1946).

ny. Although the Act's supporters were not able to accomplish their goal of unifying the military services, the NSA created what became known as the Department of Defense (DoD), the Joint Chiefs of Staff, the National Security Council, and the CIA.²⁹⁵

The co-existence of these two radically different perspectives on the lessons for the administrative state to be learned from World War II—the Reform view animating the APA and the Pearl Harbor view animating the NSA—are also reflected in the structure of the APA. The national security exception enshrines the Pearl Harbor view within the constitution of the modern administrative state.

The Pearl Harbor view's influence on legislation and agency behavior was powerful, but not particularly prominent in the debates on administrative reform.²⁹⁶ It was only years later that the government agencies benefitting most from the national security exception would be required to defend it to Congress.²⁹⁷

In 1964, congressional committees first began to scrutinize the national security exception and its justifications.²⁹⁸ By then, the Cold War had replaced World War II as the main inspiration for national security exceptionalism.²⁹⁹ And yet the arguments in favor of national security administration remained the same. The difference is that, by this point, they had been essentially abstracted from the post-World War II historical context in which they had emerged and the debates over fascism that had inspired them.

The justifications for the national security exception articulated by agencies in 1964 are familiar ones. They appear frequently in cases and scholarly defenses of national security exceptionalism in general.³⁰⁰ The first rationale agencies submitted to Congress to justify the exception is that national security often requires secrecy, which is defeated by public participation.³⁰¹ Second, the agencies argued, the fluid nature of international relations requires agencies to react quickly.³⁰² Suppose, for example, that the DoD must respond to a coup in a foreign country by immediately revising its rules regarding

295. See STUART, *supra* note 217, at 110-50.

296. See *supra* notes 287-291 and accompanying text.

297. Agencies responded to surveys about their use of the national security exception in 1957. See *supra* notes 130-131 and accompanying text.

298. See Letter from L. Niederlehner, Gen. Counsel of the Dep't of Def., to James O. Eastland, Chairman, Comm. on the Judiciary, U.S. Senate (July 23, 1964), reprinted in *Administrative Procedure Act: Hearings on S. 1663 Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 88th Cong. 492-93 (1964) [hereinafter *Administrative Procedure Act: Hearings on S. 1663*].

299. See DUDZIAK, *supra* note 44, at 88-90.

300. See Knowles, *supra* note 215, at 105.

301. See Bonfield, *supra* note 22, at 280-82.

302. See *id.* at 279-80.

military support for that country's government.³⁰³ Notice-and-comment would make this impossible. Finally, because nations are unitary actors on the world stage, the United States must "speak with one voice" in foreign relations; agencies must act in a coordinated fashion and cannot be changing positions in response to public comment without risking embarrassment and undermining U.S. foreign policy.³⁰⁴ For example, as a DOJ spokesman testified to Congress, "[a] requirement of public participation in . . . promulgation of rules to govern our relationships with other nations . . . would encourage public demonstrations by extremist factions which might embarrass foreign officials and seriously prejudice our conduct of foreign affairs."³⁰⁵

These justifications are variations on the familiar tropes that still dominate national security and foreign relations law.³⁰⁶ They are rarely challenged outside academia, and their origins and theoretical justifications are rarely discussed. But those justifications are surprisingly brittle.³⁰⁷ As reasons for exempting national security rulemaking entirely from notice-and-comment, moreover, they fall short. As Professor Arthur Bonfield observed, in some rare situations, truly necessary secrecy would make notice-and-comment all but impossible.³⁰⁸ But this hardly supports removing notice-and-comment entirely from all national security rulemaking. Second, these hoary justifications rely on an illusion that the boundary between national security and ordinary rulemaking can be clearly delineated.³⁰⁹ Finally, these justifications draw on overbroad principles that seek to shut down, rather than encourage, policy debates. They are too often used to avoid accountability and public participation in governance—even in aspects of governance, such as rulemaking, in which such accountability and public participation are thought to be especially important.

303. *Id.* at 280.

304. *Munaf v. Geren*, 533 U.S. 674, 702 (2008) ("The Judiciary is not suited to second-guess such determinations . . . that would require federal courts to . . . undermine the Government's ability to speak with one voice in this area."); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("[T]he President alone has the power to speak or listen as a representative of the nation.").

305. *Administrative Procedure Act: Hearings on S. 1663*, *supra* note 298, at 363.

306. See Knowles, *supra* note 215, at 111-12; Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1202 (2007) (describing the justifications for special deference by courts in foreign relations as "often less textual than functional, based on traditional practices and understandings").

307. See Knowles, *supra* note 215, at 121-23; David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 979 (2014) (explaining why the one voice doctrine is "fatally flawed").

308. See *id.* at 283.

309. See, e.g., Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1257-58 (2007) (describing the intractable boundary problems created by attempting to apply different deference standards for foreign and domestic issues).

The next Part discusses why these tropes do not accurately reflect the complexity of rulemaking in today's world and what should be done to reform national security rulemaking.

V. REFORMING NATIONAL SECURITY RULEMAKING

As the history makes clear, the modern American administrative state was formed in the shadows of war and the existential threat posed by the rise of totalitarian states. These regimes, by ignoring transparency and public participation, could whip their own bureaucracies into line, leaving democracies at a disadvantage. Or so many believed. In the face of this threat, the APA's authors carved out modes of national security rulemaking distinct from domestic ones.

This response was understandable, but it is not at all clear that it was correct. One could argue that the United States and its allies prevailed over their enemies because of, and not despite, their adherence to democratic values.³¹⁰

And it is even less clear that these distinct modes of national security rulemaking are serving the United States well in the twenty-first century. Few observers would argue that U.S. government agencies are functioning as efficiently or effectively as they should be in the national security realm. Obsession with secrecy, overclassification,³¹¹ unnecessary redundancy, lack of coordination, inter- and intra-agency communication failures, and lack of accountability to the public—these are just a few of the criticisms regularly leveled at agencies by observers inside and outside government.³¹² Legislative efforts to reform the intelligence community after September 11—in part by creating the Department of Homeland Security and the position of Director of National Intelligence, who would, in theory, coordinate intelligence-gathering—was followed by massive growth in the number and type of agencies handling secret and top-secret intelligence and simply made these problems worse.³¹³

Moreover, several factors have led to increasing entanglement of the government's national security policies with the lives of ordinary

310. See, e.g., President Franklin D. Roosevelt, Third Inaugural Address (Jan. 20, 1941) (contending that “democracy alone, of all forms of government, enlists the full force of men’s enlightened will. . . . [I]t is the most humane, the most advanced, and in the end the most unconquerable of all forms of human society”).

311. See *supra* notes 22-26 and accompanying text.

312. See, e.g., PRIEST & ARKIN, *supra* note 24, at 95, 125 (describing two such examples); see generally STEPHEN HOLMES, *THE MATADOR’S CAPE: AMERICA’S RECKLESS RESPONSE TO TERROR* (2007) (contending that the failure by government agencies to follow established rules and be transparent resulted in numerous policy disasters following September 11).

313. See PRIEST & ARKIN, *supra* note 24, at 92, 95 (describing the creation of the Office of the Director of National Intelligence and the belief among “leaders of the intelligence agencies” that this restructuring “extremely reckless”).

Americans. Globalization continues to blur, and even erase, the distinction for Americans between what is foreign and what is domestic.³¹⁴ The terrorist threat emerges primarily from small groups and individuals, rather than nation-states; in response, government more closely monitors the lives of individuals to learn about and stop these threats.³¹⁵ Agencies' national security rulemaking therefore falls more often into the category of "substantive" or "legislative" than ever before: because it directly affects the public, it was meant to be conducted through notice-and-comment procedures so that the public can be involved.

For the founders of modern American administrative law, this state of affairs would be seen as the worst of both worlds. National security rulemaking today lacks both the democracy and accountability-enhancing features of ordinary rulemaking and the centralization and efficiency that were supposed to characterize rulemaking in the areas of military and foreign affairs.³¹⁶ It is hard to justify maintaining broad substantive exceptions from notice-and-comment requirements for national security rulemaking when agencies conducting such rulemaking are largely inefficient, uncoordinated, and ineffective.³¹⁷

In light of these changes, the traditional distinction between national security and ordinary rulemaking must be re-examined. U.S. foreign and national security policy, as well as ordinary policy, can in many, if not most, instances best be furthered by greater transparency, public participation, and deliberation—values that the APA's notice-and-comment rulemaking procedures advance.

The APA's national security exception and the model of agency behavior that it signifies are not serving the administrative state well. The exception cannot be justified in its current form, and it should be modified to better reflect the requirements of regulation today. However, the best answer may not be simply making requirements for national security rulemaking identical to those for ordinary rulemaking. The optimal reforms will encourage more openness in rulemaking while recognizing the reality that agencies conducting national security rulemaking have the ability, through classification authority, to hide their activities from view. Classification reform is

314. See, e.g., Jinks & Katyal, *supra* note 309, at 1258-59; Knowles, *supra* note 215, at 110-20.

315. See Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 908 (2012) (describing the shift from "state-based enemies" to "new threats in the more fragmented international environment"); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1938 (2013) (observing that democracies have "invested heavily in surveillance technologies in the aftermath of the September 11 attacks in America, the London subway bombings of 2005, and other atrocities").

316. See *supra* notes 283-299 and accompanying text.

317. See Huq, *supra* note 315, at 905-11.

also desperately needed, but in the past this has proven very difficult to implement successfully.³¹⁸

In fact, legislative reform in general would be a challenge. Amending the APA, given its quasi-constitutional status, is an immensely difficult legislative task.³¹⁹ And the *Vermont Yankee* doctrine generally prohibits courts from imposing additional rulemaking procedures beyond those required by the APA.³²⁰

Instead, reform is more likely to take place within the executive branch. In the past, this has been the primary means by which limitations have been placed on the national security administrative state.³²¹ In response to loss of public confidence and increased scrutiny after national security scandals, administrations have sought to pre-empt legislative solutions through the use of executive orders and regulations.³²² To enact comprehensive national security rulemaking reform, the President could issue an executive order that, like E.O. 12,866, requires additional procedural requirements for rulemaking by non-independent federal agencies. Such an executive order would legally bind those agencies. And it could be enforceable in court—especially if the order itself so provided.³²³

One risk, of course, is that executive branch reforms are more easily undone than legislation. National security agencies, in particular, have a tendency to revert, over time, to more insular and opaque modes of operation as they seek to expand their power within the bureaucracy.³²⁴ Nonetheless, many past executive branch reforms have had “stickiness”: they have persisted and become part of agency culture.³²⁵ In any event, although they may be second-best solutions, they are better than the status quo.

318. D.A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429, 443-45 (2012).

319. William R. Andersen, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1033 (2006) (“The federal APA would be difficult to amend because it has acquired something like constitutional status . . .”).

320. *See* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543-48 (1978).

321. The executive often undertakes its own reforms to forestall more sweeping reforms from Congress. *See, e.g., supra* notes 129-32 and accompanying text; *see also* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2341 (2006) (arguing that, with respect to the war on terror, the collapse of external checks on executive power demonstrates the need for internal checks on that power).

322. *See supra* notes 129-138 and accompanying text.

323. *See* *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997) (reviewing and measuring agency action against the standards in an executive order).

324. *See* Dalal, *supra* note 132, at 83-84.

325. A prominent example is OIRA review under Executive Order 12,866, 3 C.F.R. § 638 (1993), *reprinted as amended* in 5 U.S.C. § 601. *See supra* notes 126-139 and accompanying text.

A. *Eliminating the National Security Rulemaking Exception*

To begin with, it is worth exploring whether the national security exception should be eliminated altogether. This change's impact on rulemaking would be vast. For the large number of agencies that, unlike DoD, currently lack internal rules requiring notice-and-comment, their non-secret rulemaking would be opened up to public input for the first time. In addition, many other departments or agencies, particularly within the Treasury and Commerce Departments, that do, or might be disposed to, rely on the national security exception would be required to undertake notice-and-comment for many types of rules that had been previously exempt.

For those critics of notice-and-comment rulemaking, of course, this would be moving in precisely the wrong direction, as the burden imposed on these agencies would likely be a substantial one. A complex rule can elicit thousands of comments or more, requiring hundreds of pages to address in the final rule's statement of basis and purpose.³²⁶ Indeed, these critics argue that the procedure is not worth its cost in any policy area.³²⁷ In particular, they argue, notice-and-comment may have an anti-regulatory bias, imposing unacceptably high burdens on government agencies when swift and decisive regulatory action is necessary to address urgent problems.³²⁸

Moreover, even if one believes that notice-and-comment's benefits exceed its costs in ordinary rulemaking, national security matters remain unique in ways that may make notice-and-comment still inappropriate—even though many of the particular concerns that drove the creation of the national security administrative state no longer exist. For one thing, the stakes are quite often higher where national security is concerned, which could make an anti-regulatory bias particularly problematic.³²⁹ For example, if the National Highway Traffic Safety Administration fails to promulgate a rule requiring more auto safety testing, this may, over time, cost lives. But if government agencies fail to properly regulate the disposal of nuclear material that falls into terrorists' hands, the consequences could present an existential threat to the United States.³³⁰

In addition, even in a globalized world, where special interest groups often fiercely lobby national security policymakers, secrecy—

326. See, e.g., Pierce, *supra* note 68, at 119-20.

327. See *supra* notes 88-91 and accompanying text.

328. Pierce, *supra* note 68, at 118-19.

329. Huq, *supra* note 315, at 924-25 (observing that administrative "procedures can function as frictions on desirable agency action," and that the APA's "deregulatory bias . . . may have serious unintended consequences in the national security domain").

330. See PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 201-02 (2008) (stating that an existential threat "is precisely the sort of threat that terror poses").

or at least some degree of opacity—still has an important place in national security policymaking. Suppose, as one critic has asked us to imagine, that the notice-and-comment requirements were imposed on decisions about military support for Taiwan and its effect on relations with China or the rules governing targeting of Al Qaeda safehouses.³³¹ This would expose to public (indeed, global) scrutiny the inner workings of the government's military and diplomatic machinery, making it much more difficult for the United States to effectively eliminate dangerous enemies or to conduct the delicate give-and-take at the heart of diplomacy.

However, in measuring notice-and-comment's value for national security rulemaking, it is important to take account of all the ways in which the APA and other laws insulate these types of agency decisionmaking from public scrutiny. First, even without the national security exception, administrative law would treat the two examples above quite differently. Although rulemaking regarding military aid to foreign countries would arguably require notice-and-comment, military-targeting rulemaking—along with many other rules regarding the conduct of military operations abroad—would almost certainly fall within the exclusion from the APA of “military authority exercised in the field in time of war or in occupied territory.”³³²

Second, as Professor Evan Criddle has persuasively argued, at least some of these concerns can be addressed through the APA's “good cause” exception, which authorizes rulemaking without notice-and-comment when it would be “impracticable, unnecessary, or contrary to the public interest.”³³³ In particular, agencies could rely on previous cases in which courts have approved agencies' invocation of the exception as “contrary to the public interest” when undertaking notice-and-comment would thwart the rule's purpose.³³⁴ Similarly, when national security rules issued during a crisis situation must take effect immediately, notice-and-comment rulemaking could be considered by a court to be “impracticable.”³³⁵

At the same time, requiring agencies to rely on the “good cause” exception instead of the national security exception would discipline agency decisionmaking by requiring the agency to articulate a legal basis for departing from the ordinary APA process. The APA provision establishing the “good cause” exception requires that the agency explicitly invoke the exception when issuing the rule and explain why

331. Pierce, *supra* note 68, at 119-20.

332. 5 U.S.C. § 551(1)(G) (2012); see Kovacs, *supra* note 125, at 674-76.

333. 5 U.S.C. § 553(b)(3)(B) (2012); see Criddle, *supra* note 34, at 192-93.

334. See *supra* notes 144-154 and accompanying text.

335. See 5 U.S.C. § 553(b)(3)(B); GAO REPORT, *supra* note 121, at 16.

the exception applies.³³⁶ Courts have generally voided rules when the agency failed to follow this requirement.³³⁷

However, one risk in relying on the “good cause” exception in place of the national security exception is that it could inspire agencies to expand the breadth of rulemaking exempt for good cause, turning the exception into something like the all-purpose escape hatch from notice-and-comment that some critics (mistakenly) fear it already is.³³⁸ As the GAO report reveals, the most common reason agencies rely on the “good cause” exception is that Congress has either mandated the text of the rule or has imposed restrictions making notice-and-comment impossible.³³⁹ It is much less common for an agency to cite an “emergency” as the reason for invoking the exception.³⁴⁰ But if the national security exception were no longer available, it is easy to see how agencies would be tempted to broaden significantly the definition of “emergency” and expand the category of rules for which notice would be “contrary to the public interest.”

Finally, and perhaps most importantly, whether or not agencies are relying on the “good cause” exception, eliminating the national security exception would leave in place agencies’ power to classify information, significantly reducing the plausibility of notice-and-comment for many rules.³⁴¹ Imagine a notice of proposed rulemaking in which the most important and specific reasons for the proposed rule are redacted. Of course, the simple knowledge that an agency is conducting rulemaking in a particular area may be useful to the public. This enables concerned citizens or interest groups to alert Congress, which may have the ability to further scrutinize or influence the agency’s process.³⁴² Outside parties could use the notice as a means for crafting more effectively targeted FOIA requests, possibly leading to the release of more specific information or, at the very least, requiring the agency to articulate in court its reasons for classifying the redacted information. It is also possible, however, that in some circumstances an agency could simply determine that the fact that rulemaking is taking place should be classified as well.

336. See 5 U.S.C. § 553(b)(3)(B) (requiring that an agency invoking the “good cause” exception must “incorporate[] the [good cause] finding and [include] a brief statement of reasons therefor in the rules issued”).

337. See, e.g., *Buschmann v. Schweiker*, 676 F.2d 352, 356 (9th Cir. 1982); *Bohner v. Daniels*, 243 F. Supp. 2d 1171, 1176 (D. Or. 2003), *aff’d sub nom.* *Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005).

338. See *supra* notes 148-154 and accompanying text; Boliek, *supra* note 152, at 3343.

339. See GAO REPORT, *supra* note 121, at 16-17.

340. See *id.*

341. See *supra* notes 22-23 and accompanying text.

342. See *supra* notes 85-87 and accompanying text.

The authority to classify information is a powerful one. Agencies, like most organizations, respond to new challenges using familiar tools. There is a risk that, if agencies are forced to open up their deliberations via notice-and-comment, they may be inclined to push back by ramping up classification to keep those deliberations effectively closed.³⁴³ Therefore, a potential difficulty with eliminating the national security rulemaking exception is that it could, perversely, result in a process even less accessible to the public.

B. Encouraging Notice-and-Comment Rulemaking as a Best Practice

If eliminating the national security exception would impose unacceptable costs by burdening agencies, encouraging over-classification, and failing to take account of the uniqueness of national security rulemaking, an alternative approach that avoids these problems would be to encourage agencies to use notice-and-comment for national security rulemaking whenever possible. Under this approach, an executive order would mandate notice-and-comment as the default mode for national security rulemaking but allow each agency to choose to opt out for particular types of rules.³⁴⁴ This approach would require agencies to assess the costs and benefits of notice-and-comment for each category of national security rule and make a determination about whether notice-and-comment will be used for that category. It would give agencies sufficient flexibility to permit them to take account of the uniqueness of national security policies but would bring more regularity and deliberation to the process of departing from notice-and-comment.

The value of this approach depends in part on the accuracy of the *ex ante* determinations agencies could be expected to make about each type of rule's suitability for notice-and-comment. For some types of rules, the decision could be a relatively easy one. Some agencies that regularly make rules in the national security realm already engage in notice-and-comment for certain types of rules. The State Department, for example, uses notice-and-comment in developing most

343. Cf. Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 342 (1994) (describing agencies' increasing use of special exceptions to avoid disclosure following a sharp increase in FOIA requests).

344. Cf. Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 480-81 (2010) (advocating for a complete repeal of the national security exception).

International Traffic in Arms Regulations (ITAR)³⁴⁵ and rules implementing the Hague Convention on Intercountry Adoption.³⁴⁶

However, in other contexts, agencies will often face difficulty predicting whether in any particular instance notice-and-comment would harm national security interests. For example, one can imagine few harmful national security consequences flowing from using notice-and-comment to promulgate rules implementing a trade agreement with Great Britain or another liberal democratic ally. On the other hand, given the political volatility of U.S. relationships in the Middle East, using notice-and-comment for rules implementing a similar agreement with a nation in that region could have more negative national security consequences.

Lacking certainty about how notice-and-comment would affect the process of national security policymaking for a particular rule, agencies may be inclined to be cautious and avoid it—despite a mandate that they adopt it whenever possible. On the other hand, so long as the agency is allowed to change its mind and eschew notice-and-comment should it prove unworkable, agencies could be successfully nudged to experiment with notice-and-comment in areas where it has not been used.

A second factor of equal importance is agency culture. Regardless of its value, will agencies voluntarily cede some degree of control over the rulemaking process to regulated parties? In general, agencies tend to function like fiefdoms—without external pressure to do otherwise, they hoard power, avoid oversight, and provide only *ex post* rationales for their decisionmaking.³⁴⁷ Agencies making rules in the national security area are especially likely to operate this way because their mandate to protect national security provides justification for rejecting the ordinary administrative law values of transparency and accessibility.³⁴⁸

345. See, e.g., Amendment to the International Traffic in Arms Regulations: Initial Implementation of Export Control Reform, 78 Fed. Reg. 22,740, 22,740-01 (Apr. 16, 2013) (to be codified at 22 C.F.R. pts. 120, 121, 123).

346. See Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 8064 (Feb. 15, 2006) (to be codified at 22 C.F.R. pt. 96); see also Anjanette Hamilton, Comment, *Privatizing International Humanitarian Treaty Implementation: A Critical Analysis of State Department Regulations Implementing the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 58 ADMIN. L. REV. 1053, 1073 (2006).

347. See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 700 (2000) (describing the politicized federal agencies as “unruly bureaucratic fiefdoms”); Dalal, *supra* note 132, at 102.

348. See Dalal, *supra* note 132, at 99-100 (describing agencies given the “national security mandate” as having stronger incentives to gather more power to carry out that mandate).

On the other hand, there is evidence that agencies often do voluntarily seek to learn about best practices and adopt them.³⁴⁹ In many instances, a “nudge”³⁵⁰ may be all that is required to persuade an agency to use notice-and-comment more often. In addition, even power-hungry agencies can benefit from increased use of notice-and-comment. The act of opening up the rulemaking process to the public—particularly in response to criticism—has a strong legitimizing effect on the rules that are produced and the agency itself. This is why, for example, the Department of Homeland Security has chosen to use notice-and-comment in developing new rules for Advanced Imaging Technology at airports, despite the strong probability that it could successfully invoke either the good cause or national security exceptions to avoid notice-and-comment.³⁵¹ Agencies may rationally conclude that the legitimacy gained is worth the cost of increased public awareness.

Agencies also may rationally conclude that voluntarily adopting notice-and-comment is actually a way to avoid further congressional scrutiny and possible legislative reforms. In fact, executive branch reform is a strategy the President and DoD have used in the past to head off more restrictive legislation during periods of intense public criticism. The post-Watergate revelations of domestic spying by the CIA and other national security-related abuses, documented in the Church Committee Hearings and Reports, led to the passage of the Foreign Intelligence Surveillance Act.³⁵² But the President preempted other types of legislative restrictions—for example, by imposing a ban on assassinations by executive order, which arguably contained sufficient ambiguity to allow the President to order an assassination in some circumstances.³⁵³ And, similarly, as discussed above, during the same reform-infused era, the Pentagon shrewdly deflected the

349. See David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 297-98 (2006) (identifying a trend toward “best practices,” a form of regulation “in which regulated entities experiment with best practices as a way of vindicating the broad principles of various regulatory programs, while the regulators keep track of their progress and help to celebrate and publicize particularly successful local initiatives”).

350. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 7-8 (2008) (proposing that regulators take account of cognitive biases to craft more effective incentives for regulated parties, including default rules that individuals are free to opt out of).

351. The agency had not relied on these exceptions earlier. See *supra* notes 157-160 and accompanying text.

352. See Richard Henry Seamon & William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL’Y 319, 334-36 (2005).

353. William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 717-20 (2003) (contending that the assassination ban contained in President Ford’s 1976 Executive Order 11,905 extended only to assassinations, for their political views, of officials of foreign nations with which the United States was not at war, and that the president may waive the ban).

Administrative Conference's call for elimination of the national security exemption by adopting notice-and-comment for rules "having a substantial effect upon the public" yet reserving authority to opt out.³⁵⁴

The skill with which agencies have used selective internal reforms to stave off legislative reform suggests that simply encouraging agencies to use notice-and-comment cannot, by itself, fully transform the way national security rulemaking is conducted. Indeed, it may be that the types of rulemaking in this area most crippled by insularity and lack of deliberation are those that agencies would be least likely to want to expose to public scrutiny. A nudge will not always be enough.

C. Establishing a Chenery-Type Rule for Invoking the National Security Exception

Notice-and-comment would not be effective without the courts' enforcing the APA requirement and, under *Chenery I*, requiring agencies to sink or swim with the rationales they articulate during the rulemaking process. If agencies are required or strongly encouraged to use notice-and-comment for national security rulemaking, the courts will necessarily play a larger role in overseeing national security policy. For the many critics who believe the courts are far too deferential in national security matters, this would be a welcome development.

However, to the extent that the national security exception remains a viable option for agencies, the way in which courts treat an agency's invocation of the exception must also be reformed. Currently, courts allow agencies to get away with remaining silent during the rulemaking process, issuing a rule without notice-and-comment and, when a regulated party challenges the rule on the ground that it was promulgated without notice-and-comment, invoking the national security exemption as a get-out-of-jail-free card.³⁵⁵

This permissiveness by courts encourages agencies conducting national security rulemaking to neglect notice-and-comment. And relatedly, when an agency is aware that it need not invoke the exception during rulemaking, it will have little incentive to articulate reasons why the exception should apply. The bottom line is that, absent unusual public or congressional attention, agencies face little pressure to seriously deliberate about the boundaries of the national security exception and have strong incentives to rely on it whenever it could possibly be applicable. The likely result is a largely unmentioned but broad exception that becomes broader and broader until the very rare case where a court determines that it does not apply.

354. See *supra* notes 131-138 and accompanying text.

355. See *supra* notes 161-165 and accompanying text.

To avoid this ever-expanding national security exception and ensure that national security rulemaking is undertaken effectively, courts must play the role *Chenery* recognized for them—to test the legality of the rationales the agency actually used to produce a rule while it was being produced. The notice-and-comment process is fundamental to the proper functioning of the administrative state. A decision by an agency to eschew notice-and-comment should have a legally authorized basis that the agency can articulate during the rulemaking process.

To encourage the serious deliberation that is a quality of all effective rulemaking, agencies should be required to specifically invoke the national security exception contemporaneously with the rulemaking process and state with specificity their reasons for invoking the exception. In addition, courts should apply a *Chenery*-type rule to the exception, strictly enforcing this new requirement by refusing to consider the applicability of the exception unless the agency invoked it during rulemaking. Moreover, courts should consider the exception's applicability only on the grounds articulated by the agency.³⁵⁶

It could be a challenge for the courts to impose such a *Chenery*-type rule on their own. There is not much of a textual peg for it. In stark contrast to the "good cause" exception, the APA's text does not require agencies to specifically invoke the national security exception when they proceed without notice-and-comment. As I discuss above, *Chenery* does have a constitutional dimension, however, which provides it with roots deeper than the APA's text: it is a means of enforcing the non-delegation doctrine.³⁵⁷ It is true that the courts have long recognized that the non-delegation doctrine is much weaker in foreign affairs and national security matters.³⁵⁸ In a series of cases, most prominently *United States v. Curtiss-Wright Export Corp.*,³⁵⁹ the courts permitted the President to engage in lawmaking in foreign affairs that would not have been permissible in the domestic realm.³⁶⁰

Nonetheless, there must be some limit to the President's power to make law, even where national security is concerned. To conclude otherwise is to make the error Carl Schmitt made: if national security exceptionalism has no discernible limits, it is no longer an exception but the rule.³⁶¹ Wherever that limit is must, in the end, be de-

356. See *supra* notes 109-115 and accompanying text (discussing the *Chenery* rule).

357. See *supra* notes 111-115 and accompanying text.

358. See, e.g., *Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir. 2000) ("[T]he authority of the executive branch to fill gaps is especially great in the context of immigration policy.").

359. 299 U.S. 304 (1936).

360. See *id.* at 319-22. *Curtiss-Wright* is controversial and has been the subject of "withering criticism." HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990).

361. See *supra* Part IV.

terminated by the courts. In some recent cases concerning the war against terrorist organizations, the Supreme Court seems to have recognized this reality.³⁶² Asking courts to better police the boundaries of the national security exception is another way in which the courts should ensure that the administrative state operates within constitutional bounds.

Even if the courts will not recognize the constitutional necessity of a *Chenery*-type rule, and Congress will not reform the APA to require it, the President should impose it on agencies through an executive order. Whether required by the Constitution or the spirit of the APA, procedural reforms must be implemented for the national security administrative state to be effective. And it is the President's duty as Commander-in-Chief to ensure that reform happens; the security of the nation depends on it.

VI. CONCLUSION

National security rulemaking desperately needs less secrecy and more public participation. Along with classification reform, the more frequent use of notice-and-comment procedures, enforced by the courts through a *Chenery*-type rule, can help immensely. Notice-and-comment deserves the fulsome praise it has received. A keystone of the APA's "bill of rights" for those affected by agency regulation, it encourages deliberative decisionmaking, increases accountability, ensures public participation, and legitimates the final agency decision.³⁶³ In short, notice-and-comment rulemaking enhances democratic values.

Notice-and-comment rulemaking has also grown more popular as technological advances continue to make it easier for the public to comment on proposed regulations and the agency to respond. In fact, the United States government now proselytizes worldwide for the procedure.³⁶⁴

However, notice-and-comment rulemaking turns out to be yet another practice that the United States urges for other nations while reserving for itself a healthy dose of American exceptionalism. Secrecy enshrouds a large portion of the federal bureaucracy performing a broad range of national security functions.³⁶⁵

The APA's national security exception plays a more important role in establishing and maintaining the national security administrative

362. See Knowles, *supra* note 215, at 91-92 (discussing the Supreme Court's refusal to defer to the government's claims of military exigency in the enemy combatant cases such as *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

363. See *supra* Part II.A-B.

364. See Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469, 471 (2008); Mendelson, *supra* note 41, at 1344.

365. See, e.g., PRIEST & ARKIN, *supra* note 24, at 22.

state than its sporadic invocation by agencies might suggest. To be sure, it provides a useful escape hatch for agencies whose rules are challenged in court. But more importantly, it is the formal legal incarnation of the culture of insularity that dominates national security rulemaking. And because the exception informs the rule, understanding the scope of this widespread avoidance of notice-and-comment rulemaking on national security grounds is critical for understanding how the American administrative state operates as a whole.

Our bifurcated administrative state evolved from Americans' ambiguous views toward fascism and the New Deal. It may have been a useful way to address some of that era's challenges. But today, the existence of two overlapping administrative law regimes often encourages agencies to select the one subjecting them to less scrutiny. And in contexts like the NSA surveillance programs and the post-September 11 Alien Registration Program, the use of notice-and-comment would not only have made the agencies more effective in achieving their goals, but it also would have protected the rights of minorities and the American people in general.³⁶⁶ The present arrangement simply does not make sense in a world where the foreign and the domestic are not only intertwined, but are often indistinguishable. As the NSA surveillance programs reveal, national security rulemaking regulates our lives as intimately as any other kind. It deserves our sustained attention and participation.

366. See *supra* notes 10-12, 50-55 and accompanying text.