Stanford Law Review

Volume 73 January 2021

NOTE

Judicial Review of Good Cause Determinations Under the Administrative Procedure Act

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Abstract. The Administrative Procedure Act (APA) permits agencies to bypass notice-and-comment procedures when justified by "good cause." The APA's drafters intended that exception to be reserved for rare instances when exigency outweighed strong interests in public participation and agency deliberation. But today, agencies claim good cause to skip notice-and-comment requirements in a significant percentage of rulemakings. When confronted with challenges to those claims, courts diverge on what constitutes good cause and how much deference to afford the agencies.

This Note examines which branch of government is best suited to ensure agency compliance with rulemaking procedures and the good cause exception to those procedures. It argues that amending the exception is not only unrealistic but also undesirable. It next argues that courts are best situated to ensure proper use of the exception. This Note then proposes a framework for improving judicial review of good cause determinations. Courts should review agency assertions of good cause de novo. The APA's text, structure, and objectives mandate that standard, as do principles of administrative deference. And the standard properly balances competing interests of public participation, agency flexibility, public safety, and judicial administrability. This Note explains why focusing on the standard of review is the best solution to courts' inconsistent treatment of good cause determinations. Finally, it demonstrates how the standard would operate in practice.

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Introduction

The conventional account of administrative rulemaking is nearly as ubiquitous as the *Schoolhouse Rock!* version of the legislative process. The familiar notice-and-comment rulemaking process requires administrative agencies to comply with procedures designed to enhance public participation.[1] Today, it is widely accepted that the textbook depiction of the legislative process is an outdated caricature.[2] But while the paradigmatic account of administrative rulemaking is subject to far less political and academic scrutiny, it is equally incomplete. Agencies skip public comment for close to half of all nonmajor rules and over one-third of all major rules.[3] And in the majority of those rulemakings, agencies justify bypassing public participation by invoking the "good cause" exception of the Administrative Procedure Act (APA).[4]

Under the good cause exception, an agency may forgo ordinary notice-and-comment procedures when it "for good cause finds" that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[5] The drafters of the APA intended the exception to be reserved for rare instances when considerations such as exigency outweighed otherwise-strong interests in public participation and agency deliberation.[6] Today, many agencies invoke the exception for a wide range of agency actions. How did use of the exception expand from what the drafters intended to today's pervasive practices? What is the appropriate remedy to address this new rulemaking terrain? Is any remedy necessary? And what implications does this new norm have for broader conversations regarding the competing interests of participation, legitimacy, accountability, and efficiency in administrative rulemaking?

This Note addresses those questions by homing in on judicial review of agency assertions of good cause. Courts inconsistently interpret both what constitutes good cause[7] and what deference to give agency assertions of good

1. *See infra* notes 21-26 and accompanying text.

2. *See, e.g.*, Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1794 (2015) (observing that the "cartoon version of the conventional legislative process is dead").

3. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 8 (2012) [hereinafter GAO 2012] (examining rulemaking from 2003 to 2010). These figures are based on sample estimations and are subject to margins of error of 4% and 7%, respectively. *Id.* at 9 fig.1.

4. *Id.* at 15.

5. 5 U.S.C. § 553(b)(3)(B). Some courts and commentators cite to the exception as "5 U.S.C. § 553(b)(B)." The text of § 553 does not provide definitive guidance as to the correct citation. This Note cites to 5 U.S.C. § 553(b)(3)(B) throughout.

6. *See infra* notes 31-38 and accompanying text.

7. *See infra* Part I.B.

cause.[8] Yet overly deferential judicial review emboldens agencies with political and resource constraints to routinely claim the good cause exception without fear of consequences. This Note examines structural theories of agency oversight and empirical findings to conclude that meaningful enforcement of rulemaking procedures by Congress or the White House is unlikely. Moreover, repeated attempts to amend the statutory text of the good cause exception have been unsuccessful and are likely to continue to fail.[9] Despite many scholars' continued calls for amendment, these proposals are not only unrealistic but also undesirable.

That leaves the courts. This Note argues that courts are institutionally best situated to enforce agency compliance with rulemaking procedures generally, and with the good cause exception specifically. Quantitative and qualitative studies suggest that the specter of litigation is the best way to influence agency decisions regarding compliance with procedural requirements.[10]

This Note proposes a framework for improving courts' review of good cause determinations. Courts should give no deference to agency assertions that good cause exists. By consistently and rigorously applying a de novo standard, courts will address much of the uncertainty surrounding the exception. That solution will curtail the worst abuses of an oft-used procedural bypass while preserving the necessary flexibility of a provision that applies to many agencies in a variety of circumstances. Applying de novo review does not require results-oriented reasoning or judicial acrobatics. To the contrary, the APA's text, structure, and objectives, as well as principles of administrative deference, mandate this standard of review.

Careful examination of judicial review of good cause assertions has important practical implications. For agencies claiming good cause, litigants challenging those assertions, and courts adjudicating the resulting disputes, adoption of a de novo standard will promote clarity and predictability in a domain sorely wanting for both. Litigation exposure will inform agency decisions regarding assertions of good cause. The standard will help eliminate the worst elements of some courts' current "ad hoc" review,[11] which causes substantial uncertainty. In turn, the increased judicial clarity will enable regulated entities and beneficiaries to better understand the contours of the exception and when litigation is an appropriate tool.

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8. *See infra* Part I.C.

9. *See infra* Part II.A.

10. *See infra* notes 207-17 and accompanying text.

11. *See* Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 120 (1984) (explaining that judicial decisions interpreting the good cause exception are characterized by an "ad hoc quality").

Agency practice and judicial review surrounding the exception also have important implications for scholars. Titans of administrative law have long debated the merits and costs of requiring agencies to comply with the APA's complex bevy of procedural requirements before promulgating rules.[12] Some scholars have argued that those procedures are important safeguards of public participation and accountability.[13] Others have argued that those procedures place unjustified burdens on agency resources, which can push agencies to use other methods of policymaking.[14] But the rates at which agencies invoke the good cause exception to promulgate rules without engaging in notice-and-comment procedures suggest that the focus of both camps may be at least somewhat misplaced. Each side of the ossification literature is premised on the archetypal account of rulemaking.[15] Yet pervasive avoidance of notice-and-comment procedures suggests that any conversation about public participation in rulemaking is incomplete without accounting for the substantial portion of rules where agencies have circumvented those participatory requirements. Understanding why agencies turn to the good cause exception, when it is most prevalent, and what the prospects are for addressing this new administrative reality is an important precondition for more fully grounding conversations about the costs and benefits of informal rulemaking.

This Note proceeds in three parts. Part I draws on the APA's legislative history and examines contemporary agency use and judicial review of the good cause exception. This Part canvasses empirical studies documenting increased agency use of the exception and catalogs the multiple axes of inconsistency in judicial review. Courts diverge with respect to what constitutes good cause and how much deference to afford an agency's good cause determination. Part II evaluates which branch of government is best positioned to oversee proper use of the statutory exceptions from procedural rulemaking requirements. This Part rejects the numerous scholarly proposals to amend the exception, arguing

12. *See, e.g.*, Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755-56 (1996) (discussing how informal rulemaking gives notice to the public and encourages participation).

13. *See, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 497 (5th ed. 2010) (explaining that "notice of proposed rulemaking enables citizens who oppose or support the proposal to alert the President and members of Congress to the existence of the proposal and to express their views of the agency's proposal to those politically accountable officials"); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440-42 (1989) (arguing that rulemaking procedures force agencies to act publicly and deliberately).

14. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 626-27 (1994).

15. A detailed analysis of the ossification literature is beyond the scope of this Note.

that amendment is neither realistic nor desirable. It ultimately concludes that courts are best situated to review agency use of rulemaking exceptions and ensure that they are not abused. Part III argues that improving judicial enforcement would be best achieved through uniform adoption of a de novo standard for reviewing agency invocations of good cause. This Part first explains why that standard of review is legally required. It then illustrates why the standard provides a better solution to the confusion surrounding judicial review of good cause than competing proposals that overlook the standard of review. Finally, this Part demonstrates how the standard would operate in practice.

I. Agency Assertions of Good Cause and Judicial Review

The need for public participation in administrative rulemaking is "axiomatic."[16] The drafters of the APA recognized that need by requiring agencies that promulgate rules to follow certain procedures aimed at encouraging participation. At the same time, it is "equally axiomatic" that not every rulemaking can or should accommodate public participation.[17] The APA's drafters codified that complementary understanding in the various exceptions that allow agencies to forgo notice-and-comment requirements in certain circumstances. Under the good cause exception, agencies can skip notice and comment when "the agency for good cause finds" that "notice and public procedure . . . are impracticable, unnecessary, or contrary to the public interest."[18] It is widely accepted that the APA's generally desirable procedural requirements must at times give way to necessity. But the precise contours of when that line is crossed, who ought to make that determination, and what criteria and remedy should govern that decision are subjects of extensive debate.[19]

In recent years, frequent agency use of the good cause exception has further muddled those questions.[20] The continued prevalence of the exception as a means for avoiding procedural requirements highlights the challenges and importance of addressing these issues. This Part starts with the exception's statutory origins and then analyzes its contemporary usage by agencies and treatment by courts. Part I.A synthesizes empirical studies documenting the

16. Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 369 (1972).

17. Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 319 (1989).

18. 5 U.S.C. § 553(b)(3)(B).

19. *See infra* Part I.B.

20. *See infra* notes 39-52 and accompanying text.

frequent use of the exception. Part I.B surveys courts' varied approaches to evaluating what constitutes good cause. Finally, Part I.C examines a less studied divergence in courts' treatment of the exception—the level of deference given to an agency's assertion of good cause.

A. Prevalent Use of the Exception

The APA's drafters designed the good cause exception to exempt agencies from notice-and-comment requirements under narrow circumstances. Today, however, agencies claim good cause to skip those procedural requirements in a significant percentage of rulemakings.

1. Statutory framework

Ordinarily, the APA requires agencies to meet three primary requirements before promulgating a substantive rule. First, agencies must give notice to the public of the proposed rulemaking.[21] That notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[22] Second, agencies must afford interested persons "an opportunity to participate in the rule making" through the submission of written comments on the proposed rule.[23] Third, after reviewing those comments, agencies must publish the final rule with a "concise general statement of [the rule's] basis and purpose."[24] While the general statement need not separately address each comment submitted, it must sufficiently "consider and respond to significant comments received during the period for public comment."[25] Rules must be published in the *Federal Register* at least thirty days before their effective dates.[26]

The same Congress that mandated those procedures also recognized that requiring a volley between agencies and the public before a rule takes effect might at times be unnecessary, or even harmful.[27] Thus, § 553 contains several exceptions that exempt agencies from the participatory procedures typically required by the statute. First, certain subject matters are fully exempt from

21. *See* 5 U.S.C. § 553(b).

22. *Id.* § 553(b)(3).

23. *Id.* § 553(c).

24. *Id.*

25. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015); *see also* La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin., 336 F.3d 1075, 1080 (D.C. Cir. 2003).

26. 5 U.S.C. § 553(b), (d).

27. *See* Lavilla, *supra* note 17, at 319-21 (discussing the balance Congress sought to strike between participation in most instances and the competing interests raised in certain circumstances).

notice-and-comment requirements.[28] Second, notice-and-comment requirements do not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[29] Finally, the good cause exception permits agencies to forgo notice-and-comment requirements when "the agency for good cause finds" that issuing a proposed rule, holding a comment period, and responding to those comments before a rule takes effect would be "impracticable, unnecessary, or contrary to the public interest."[30]

Notwithstanding the indeterminate language of the good cause exception, the APA's drafters were not oblivious to the potential tensions in § 553's statutory design. They rejected proposals that attempted to define or cabin the relevant terms.[31] The drafters instead relied on the admonition that any use of the exemption should be a narrow one.[32] Moreover, the APA's legislative history attempted to clarify the meaning of each of the three statutory terms that may justify good cause invocations.[33] "Impracticable" was meant to focus on the need for quick action; "unnecessary" referred to instances such as those involving a "minor or merely technical amendment"; and "contrary to the public interest" was designed to address circumstances in which requiring

28. The APA exempts rules regarding military and foreign affairs functions, agency management and personnel, and certain matters concerning public property, loans, grants, benefits, and contracts. 5 U.S.C. § 553(a).

29. *Id.* § 553(b)(3)(A). To be sure, agency use of guidance, policy statements, and other "nonlegislative" rules has also proliferated since the APA's adoption. *See* Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 165-68 (2000) (documenting the increased use of agency guidance). These are important forms of procedural avoidance that have received significant political and scholarly attention. *See, e.g.*, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, NO. M-19-14, GUIDANCE ON COMPLIANCE WITH THE CONGRESSIONAL REVIEW ACT 3 (2019) [hereinafter GUIDANCE ON COMPLIANCE WITH THE CONGRESSIONAL REVIEW ACT] (clarifying that the Congressional Review Act applies to guidance documents, statements of policy, and interpretive rules (citing 5 U.S.C. § 551(4))); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010) ("There is perhaps no more vexing conundrum in the field of administrative law than the problem of defining a workable distinction between legislative and nonlegislative rules."). This Note focuses on the good cause exception in part because of the relative inattention paid to it compared to the APA's other procedural exceptions.

30. 5 U.S.C. § 553(b)(3)(B).

31. Congress rejected proposals that included the phrases "impracticable because of unavoidable lack of time or other emergency" and "in emergencies, as well as in making minor and noncontroversial amendments." ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONG., 1944-46, at 157, 168 (1946) [hereinafter APA LEGISLATIVE HISTORY]; *see also* Lavilla, *supra* note 17, at 324. The *APA Legislative History* contains working papers and committee reports and is considered authoritative. *See* Jordan, *supra* note 11, at 118 n.25.

32. *See* APA LEGISLATIVE HISTORY, *supra* note 31, at 157, 167.

33. *See id.* at 258.

advance notice would prevent an agency from fulfilling its statutory duties.[34] The legislative history also emphasized that the exception for "situations of emergency or necessity is not an 'escape clause.'"[35] To the contrary, a "true and supported or supportable" finding of necessity must be made and published.[36] The legislative history led early commentators to conclude that Congress spoke "unmistakably clearly on the narrowness of the exemptions,"[37] and that narrow construction was a core principle governing interpretation of the exception.[38]

2. Contemporary agency practice

Despite Congress's early warning, agency use of the exception has proliferated since the APA was enacted. The first empirical survey of the good cause exception found that approximately 25% of all agency rules promulgated in the first half of 1987 expressly invoked the exception and thus were exempted from notice-and-comment requirements.[39] And in its first comprehensive study of broader procedural avoidance, the General Accounting Office estimated that 51% of all final agency actions during 1997 were published without notices of proposed rulemakings.[40] Agencies most frequently cited good cause as the justification for skipping notice and comment.[41]

Those studies demonstrated more frequent use of the exception than the APA's drafters and early observers contemplated. But it was not until a 2012 study by the Government Accountability Office (GAO) that data regarding agency practice triggered closer scrutiny of the exception. The study estimated that, between 2003 and 2010, federal agencies failed to give the public the opportunity to comment before publishing 44% of the 30,000 nonmajor rules and 35% of the 568 major rules.[42] Agencies claimed good cause for 61% of those nonmajor rules and 77% of those major rules.[43] Only a small number of those

34. *Id.*

35. *Id.*

36. *Id.*

37. Jordan, *supra* note 11, at 119-20.

38. Lavilla, *supra* note 17, at 333-34.

39. *Id.* at 338-39, 339 n.86.

40. U.S. GEN. ACCT. OFF., GAO/GGD-98-126, FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISHED FINAL ACTIONS WITHOUT PROPOSED RULES 11 (1998). The General Accounting Office's name was changed in 2004 to the Government Accountability Office.

41. *Id.* at 16, 20 fig.3.

42. GAO 2012, *supra* note 3, at 8-9, 9 fig.1.

43. *Id.* at 15.

assertions of the exception was ever challenged in litigation.[44] And courts held that the exception was claimed improperly in a minority of that already small number of cases.[45]

A more recent study of agency practice reveals a continued reliance on the exception.[46] In the early months of the Trump presidency, agencies often claimed the exception to curb the effects of "midnight rules" promulgated in the final months of President Obama's second term.[47] Indeed, agencies cited the good cause exception for approximately 35% of all the delayed Obama-era rules.[48] In many of those instances, agencies asserted good cause in order to allow new personnel to consider regulatory options.[49] In others, the agencies parroted the exception's statutory language.[50] While new administrations often rely on a variety of administrative tools to delay or revoke the midnight rules of their predecessors,[51] a new administration cannot "in blanket fashion use agency suspensions to provide itself with a clean slate on which to remake regulatory decisions."[52] These data and recent litigation surrounding agencies'

44. *See* Babette E.L. Boliek, *Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers*, 81 FORDHAM L. REV. 3339, 3350 (2013). Boliek's study found that between 1995 and 2011, courts reviewed only 74 of the 4,986 rules in which agencies claimed good cause. *Id.* Of those 74 rules, courts determined that the exception did not apply in 18 cases. *Id.*

45. *See id.*

46. *See* James Yates, Essay, *"Good Cause" Is Cause for Concern*, 86 GEO. WASH. L. REV. 1438, 1449-50 (2018).

47. *See id.*; Sam Batkins, Am. Action F., Obama Administration Issued $157 Billion in Midnight Regulation 1-2 (2017), https://perma.cc/NTU6-A7QM (detailing how President Obama issued at least thirty-eight major midnight rules between the 2016 presidential election and the end of his second term).

48. *See* Yates, *supra* note 46, at 1449-50 (analyzing agencies' use of good cause during the first six months of the Trump presidency).

49. *See, e.g.*, Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. 8985, 8985 (Feb. 2, 2017) (to be codified at 10 C.F.R. pts. 429-430) ("The . . . delay in effective date is necessary to give DOE officials the opportunity for further review and consideration of new regulations, consistent with the Chief of Staff's memorandum of January 20, 2017.").

50. *See, e.g.*, Delay of Effective Date of Amendments to the Select Agent and Toxin Regulations, 82 Fed. Reg. 10,855, 10,855 (Feb. 16, 2017) (to be codified at 7 C.F.R. pt. 331 & 9 C.F.R. pt. 121) ("APHIS finds that notice and solicitation of comment regarding the brief extension of the effective date for the final regulation are impracticable, unnecessary, or contrary to the public interest pursuant to [5 U.S.C. § 553(b)(3)(B)].").

51. *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 530-31 (2011) (describing the responses of President Bush and President Obama upon taking office).

52. Peter D. Holmes, *Paradise Postponed: Suspensions of Agency Rules*, 65 N.C. L. REV. 645, 692 (1987).

invocation of the exception[53] suggest that it is not just a tool for liberal or proregulatory administrations to amplify the reach of the administrative state but rather represents a new norm for agency action of all kinds.

Of course, widespread use of the exception does not necessarily indicate agency abuse. In fact, Juan Lavilla concluded in his 1989 study that although the higher-than-expected invocation of the exception "would seem to be excessive," an anecdotal review of cases in which it was invoked did not reveal "general misuse."[54] At least one set of scholars today is not as charitable. Citing the increased use of the exception, agencies' "strong incentives" to avoid or postpone notice-and-comment proceedings, and the often weak remedies even when violations are found, Kristin Hickman and Mark Thomson conclude that "at least a significant percentage" of rules bypassing notice and comment "are not, in fact, exempt from those procedures under the APA."[55]

Nonetheless, increased reliance on exceptions from rulemaking procedures may not suggest bad faith on the part of agencies. To the contrary, that reliance might be a rational response to structural incentives. In addition to agencies' resource constraints and low levels of oversight by the political branches,[56] courts have contributed to the dynamic. For example, the general presumption against the retroactivity of rulemaking encourages agencies to explore quicker ways to regulate.[57] And deferring to agencies' interpretations of ambiguous statutes—regardless of whether notice and comment was skipped when promulgating the interpreting regulations—allows agencies to reap the benefits of rulemaking without internalizing the full costs.[58] Finally, courts'

53. *See, e.g.*, California v. Azar, 911 F.3d 558, 568 (9th Cir. 2018) (challenging the Department of Health and Human Services' assertion of good cause to promulgate interim final rules exempting certain entities from the Affordable Care Act's employer mandate to provide contraceptive coverage); E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1253-54 (9th Cir. 2018) (challenging the Department of Justice and Department of Homeland Security's use of good cause to promulgate a rule modifying asylum procedures).

54. Lavilla, *supra* note 17, at 339-40.

55. Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 264, 266 (2016); *see also* 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, 1748-59 (2007) (detailing the Treasury Department's routine use of the exceptions to rulemaking procedures and critiquing the propriety of at least some invocations).

56. *See infra* Part II.B.

57. *See* Gluck et al., *supra* note 2, at 1827-28; *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (1988) (imposing a clear statement requirement in order to make a rule retroactive).

58. *See* United States v. Mead Corp., 553 U.S. 218, 246 (2001) (Scalia, J., dissenting) (explaining the connection between deference to regulations promulgated via informal rulemaking and an increase in such regulations).

willingness to find improper use of the exception to be harmless error when comments are accepted after promulgation minimizes the costs of claiming the exception in close cases.[59]

Low rates of lawsuits challenging good cause assertions, coupled with judicial inconsistency surrounding what constitutes good cause, make it difficult to systematically evaluate how many assertions are unfounded. Nonetheless, the exception's pervasiveness in contemporary administrative practice, its implications for broader questions regarding accountability and efficiency in rulemaking, and an acknowledgment that at least some uses are not warranted justify close scrutiny of the exception. These issues animate this Note's effort to delineate who should enforce the exception and how.

B. What Constitutes Good Cause? Inconsistency in the Courts

When litigants challenge agency use of the exception, courts inconsistently interpret what constitutes good cause. Armed with little more than the nebulous language of § 553(b)(3)(B) and the legislative history expounding upon it,[60] courts set out to determine whether good cause was validly invoked. Thus, it is not surprising that the resulting jurisprudence is seen as a "muddle."[61] Adrian Vermeule went as far as to say, "right at the heart of [§ 553's] requirements is an adjustable parameter that creates a potential grey hole."[62] He argues that the "APA's text is largely vacuous on this point; 'good cause' is an open-ended standard that essentially delegates the issue to future decisions of agencies and judges."[63] Despite years of litigation, much of the continued inconsistency in judicial review is a product of applying the universally applicable language to "exceedingly factbound" cases.[64]

Good cause is invoked by many agencies on different bases for a variety of agency actions. It is claimed for interim final rules,[65] direct final rules,[66]

59. *See* United States v. Johnson, 632 F.3d 912, 930 (5th Cir. 2011) (finding the Attorney General's failure to comply with publication and notice-and-comment procedures to be harmless error); Hickman & Thomson, *supra* note 55, at 294-305 (describing different judicial responses to postpromulgation comment periods).

60. *See supra* Part I.A.1.

61. Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 210 (2017) (quoting Hickman & Thomas, *supra* note 56, at 285).

62. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1123 (2009).

63. *Id.*

64. *Id.*

65. *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 & n.3 (1999).

66. *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 2-3 (1995).

suspension of the APA's thirty-day delay for final rules taking effect,[67] emergency rules,[68] minor clerical alterations,[69] and more.[70] Notwithstanding the contextual approach inherent in judicial review of the exception, scholars have attempted to divide good cause cases into broad categories. One researcher proposed the following tripartite classification: (1) emergencies; (2) circumstances where prior notice could be detrimental to the statutory scheme; and (3) instances where Congress implicitly waived § 553's requirements.[71] Though these categories bear some resemblance to the statute's "impracticable, unnecessary, or contrary to the public interest" language, some courts' treatment of the exception tends to conflate those factors in some instances and insert new considerations in others.[72]

Emergency actions in response to concerns for public safety are perhaps the paradigmatic context for invoking good cause. For example, in the wake of the September 11 terrorist attacks, the D.C. Circuit upheld a Federal Aviation Administration (FAA) rule providing for automatic suspension of certain noncitizen pilots' airmen certificates—effectively preventing them from flying in the United States—upon notification by the Transportation Security Administration that those pilots posed a security threat.[73] The agency claimed good cause to promulgate the regulation without notice and comment.[74] The court accepted the agency's argument that it needed to act swiftly to protect

67. *See* JARED P. COLE, CONG. RSCH. SERV., NO. R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 2 (2016).

68. *See, e.g.*, Jifry v. FAA, 370 F.3d 1174, 1178-80 (D.C. Cir. 2004).

69. *See, e.g.*, Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 754-55 (D.C. Cir. 2001) (rejecting the EPA's use of the exception to fix an earlier mistake in wording).

70. *See, e.g.*, GAO 2012, *supra* note 3, at 6-7 (explaining that statutes sometimes authorize or require agencies to promulgate rules without notice and comment).

71. *See* COLE, *supra* note 67, at 4-9. Another scholar has divided those categories still further to include the following factors in the analysis:

> whether the agency was acting pursuant to a statutory deadline; the potential harm from providing advance notice of the rule; the degree of economic harm created by delay to complete the notice-and-comment process; the degree of harm to public safety created by delay to complete the notice-and-comment process; whether the agency accepted and responded to post-promulgation public comment; whether the agency issued the rule on a routine basis; whether the rule was limited in scope; whether the rule implicated significant reliance interests; whether the agency issued the rule pursuant to an injunction; whether the agency revised the rule in response to a court order; and whether the agency provided contemporaneous justification for invoking good cause.

Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 88-89 (2015) (capitalization altered) (footnotes omitted).

72. *See, e.g.*, *Util. Solid Waste Activities Grp.*, 236 F.3d at 754-55 (suggesting the judicial challenge in maintaining analytically distinct boundaries for each factor, especially when the agency itself does not put forward a particular justification).

73. *See Jifry*, 370 F.3d at 1177-80.

74. *Id.*

against security threats, explaining that "legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001" warranted forgoing advance public participation.[75] The emergency rationale for invoking good cause also applies when efficient action is required due to circumstances outside of an agency's control.[76]

Courts also allow good cause when prior notice could subvert complex statutory schemes. These cases often involve regulations affecting markets or where concerns about strategic action by sophisticated actors are particularly pronounced. In those instances, courts recognize that good cause assertions can be justified "when the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare."[77] For example, the Federal Energy Administration[78] was responsible for some of the most famous uses of the exception to regulate prices during the 1970s oil crisis.[79] In one such instance, the Temporary Emergency Court of Appeals upheld that agency's good cause invocation when the agency promulgated regulations setting petroleum prices.[80] The court reasoned that advance notice could cause "price discrimination and other market dislocations" involving sophisticated oil companies.[81]

Finally, in addition to instances in which Congress explicitly exempted certain rulemakings from § 553's requirements through agency-specific statutes, courts have found good cause to be justified in circumstances involving implicit waiver by Congress.[82] Most frequently, agencies invoke statutory deadlines by which they must promulgate regulations as grounds for forgoing public comment.[83] Especially when those congressional deadlines are

75. *Id.* at 1179-80.

76. *See, e.g.*, Nw. Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1320-21 (8th Cir. 1981) (upholding a temporary FAA rule allocating airport air carrier slots for the holiday season after the air carriers failed for the first time ever to reach a voluntary agreement).

77. Mobil Oil Corp. v. Dep't of Energy, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983); *see also* Nader v. Sawhill, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975); DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332-33 (Temp. Emer. Ct. App. 1974).

78. The Federal Energy Administration is now known as the Department of Energy.

79. *See, e.g.*, *Mobil Oil Corp.*, 728 F.2d at 1490-94.

80. *Id.* at 1481-84, 1494.

81. *Id.* at 1492.

82. *See generally* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 956-60 (2008) ("Agencies faced with deadlines, however, often contend that deadlines require pressed work, making 'notice and public procedure thereon . . . impracticable, unnecessary, or contrary to the public interest,' and therefore within the APA's 'good cause' exception to notice and comment requirements." (quoting 5 U.S.C. § 553(b)(3)(B))).

83. *See id.* at 956-59.

"very tight" and where the statute at issue is "particularly complicated," courts may infer a legislative intent to waive the APA's ordinary notice-and-comment requirements.[84] For example, in *Petry v. Block*, the D.C. Circuit held that enactment of an "extraordinary piece of legislation" that imposed a sixty-day deadline for promulgating interim rules pursuant to the Child Care Food Program justified the Department of Agriculture's invocation of the exception.[85]

The foregoing survey confirms that the broad contours of the types of circumstances that *might* justify good cause are discernible. But it also demonstrates with equal force that the precise bases for decisions in close cases are not amenable to precise line drawing. All agree that an "emergency" might justify skipping notice and comment in certain instances. But it is not clear what level of threat to public safety constitutes a sufficient level of emergency to justify good cause. Similarly, Congress might not have wanted businesses to seize upon advance notice to manipulate a market. Does that same rationale apply to bypassing public comment when suspending asylum practices to prevent strategic border crossing?[86] Finally, there is no doubt that some statutory deadlines render advance notice impracticable. But where exactly should courts draw the lines of how complex the scheme must be and how soon the deadline must fall to justify skipping notice and comment?

Ultimately, courts continue to use a contextual approach to "analyze the entire set of circumstances" and assess whether good cause was properly invoked.[87] That may give decisions reviewing good cause assertions an "ad hoc quality."[88] Because § 553 applies to all rulemaking agencies facing a range of problems and constraints, the agencies will inevitably invoke the exception in "vastly different factual settings."[89] As a result, "courts have little choice but to

84. Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1236-37 (D.C. Cir. 1994). But courts will generally not find good cause when an agency "creates" its own emergency by waiting to act until the end of a long deadline. *See* Nat'l Women, Infants & Children Grocers Ass'n v. Food & Nutrition Serv., 416 F. Supp. 2d 92, 106 (D.D.C. 2006) (collecting cases).

85. Petry v. Block, 737 F.2d 1193, 1200-01 (D.C. Cir. 1984).

86. *See* E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1253-54 (9th Cir. 2018) (recognizing that announcing proposed rules can create an incentive for regulated entities to act before the action becomes final, but finding the government's argument that advance notice would cause a "surge" across the southern border to be too speculative to justify promulgation without public comment).

87. *Petry*, 737 F.2d at 1203; *see* Gersen & O'Connell, *supra* note 82, at 958 ("In lieu of a bright-line rule on deadlines and good cause, courts typically apply a multifactor analysis in assessing whether an agency can rely on a deadline to forego traditional notice and comment procedures.").

88. *See* Jordan, *supra* note 11, at 120.

89. *Id.*

examine each claim in context, weighing all the facts and circumstances to decide whether other legitimate interests outweigh the desirability of providing an opportunity for public participation in rulemaking."[90]

C. Deference to Good Cause Determinations

Courts struggle not only to interpret what constitutes good cause, but also to determine how much deference to give an agency's assertion of good cause. This Note focuses on that second aspect of judicial inconsistency and argues that it is considerably less justified than the confusion described in Part I.B.

Courts that have addressed the issue fall into four groups. First, some circuits review agency assertions of good cause under an arbitrary-and-capricious standard.[91] Second, a surprising number of appellate courts have considered the issue at length before explicitly declining to decide the applicable standard.[92] In many of those cases, the courts ultimately applied, without endorsing, the arbitrary-and-capricious standard.[93] Third, in 2014, the D.C. Circuit became the first circuit to expressly announce a de novo standard.[94] But the D.C. Circuit's justifications for applying that standard were underdeveloped, and—perhaps for that reason—the opinion did not precipitate widespread adoption of a de novo standard by other circuits.[95] Finally, some circuits have not articulated a standard but appear to use various permutations of mixed standards of review.[96]

90. *Id.*

91. *See, e.g.*, United States v. Johnson, 632 F.3d 912, 928 (5th Cir. 2011); United States v. Dean, 604 F.3d 1275, 1278 (11th Cir. 2010); United States v. Garner, 767 F.2d 104, 115-16 (5th Cir. 1985); United States v. Gavrilovic, 551 F.2d 1099, 1105 (8th Cir. 1977) (explaining that "an agency cannot arbitrarily find good cause" but noting that the court may not "substitute its judgment for that of the agency").

92. *See, e.g.*, Pennsylvania v. President U.S., 930 F.3d 543, 567 & n.22 (3d Cir. 2019); United States v. Brewer, 766 F.3d 884, 888-90 (8th Cir. 2014); Mack Trucks, Inc. v. EPA, 682 F.3d 87, 92-93 (D.C. Cir. 2012); United States v. Valverde, 628 F.3d 1159, 1162 (9th Cir. 2010).

93. *See infra* note 107 and accompanying text.

94. Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014).

95. *See infra* notes 226-27 and accompanying text.

96. *See, e.g.*, California v. Azar, 911 F.3d 558, 575-76 (9th Cir. 2018); Mid Continent Nail Corp. v. United States, 846 F.3d 1364, 1372 (Fed. Cir. 2017); United States v. Gould, 568 F.3d 459, 469-70 (4th Cir. 2009).

1. Arbitrary-and-capricious review

Courts reviewing for arbitrariness root the standard in 5 U.S.C. § 706(2)(A), one portion of the APA's judicial review provision.[97] For example, in *United States v. Dean*, the Eleventh Circuit applied that standard to uphold the Attorney General's claim of good cause for issuing an interim rule that retroactively applied the requirements of the Sex Offender Registration and Notification Act (SORNA).[98] The interim rule at issue made SORNA applicable to all sex offenders convicted before SORNA's statutory enactment date.[99] The Attorney General included a statement of good cause asserting that "[d]elay in the implementation of [the] rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders."[100] The statement of good cause also noted that the "immediate effectiveness of [the] rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements."[101]

On appeal, the Eleventh Circuit announced that because the interim rule was an agency action governed by the APA, it reviewed the good cause assertion under the arbitrary-and-capricious standard.[102] It explained that this standard provided the court with "very limited discretion to reverse an agency decision."[103] Applying that standard, the court relied heavily on the Attorney General's appeals to public safety and avoidance of legal uncertainty to justify bypassing notice-and-comment procedures.[104] Ultimately, the Eleventh Circuit upheld the use of good cause on those efficiency and public welfare grounds, even though Congress had given the states over three years to comply with SORNA and the Attorney General had taken over seven months from the Act's passage to adopt the interim rule.[105]

Meanwhile, several federal appellate courts have explicitly or implicitly acknowledged the uncertainty surrounding which standard to apply before

97. *See* 5 U.S.C. § 706 ("The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]").

98. United States v. Dean, 604 F.3d 1275, 1278-82 (11th Cir. 2010).

99. *Id.* at 1277.

100. Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007) (to be codified at 28 C.F.R. pt. 72).

101. *Id.*

102. *Dean*, 604 F.3d at 1278.

103. *Id.* (quoting Warshauer v. Solis, 577 F.3d 1330, 1335 (11th Cir. 2009)).

104. *See id.* at 1278-81.

105. *See id.* at 1287 (Wilson, J., concurring in the result) ("Congress balanced the costs and benefits of allowing the Attorney General to determine SORNA's pre-enactment reach, and in doing so it countenanced the inevitable delays of administrative rulemaking.").

declining to endorse an approach.[106] Ultimately, those courts have applied (without endorsing) the arbitrary-and-capricious standard.[107] For example, in *United States v. Reynolds*, the Third Circuit engaged in an extended discussion of the appropriate standard of review.[108] It canvassed the existing circuit split,[109] examined tensions between various subsections of the APA's judicial review provision,[110] reviewed its own precedent,[111] and drew upon the APA's legislative history and objectives.[112] And in *United States v. Valverde*, the Ninth Circuit panel extensively questioned the advocates at oral argument about which standard of review should govern the government's good cause assertion.[113] That colloquy also expressly referenced the conflict among the circuits.[114] Similarly, in *United States v. Brewer*[115] and *Mack Trucks, Inc. v. EPA*,[116] the Eighth and D.C. Circuits discussed the appropriate standard for reviewing good cause invocations.

106. *See, e.g.*, United States v. Brewer, 766 F.3d 884, 888 (8th Cir. 2014) (collecting cases before declining to decide the appropriate standard of review); United States v. Reynolds, 710 F.3d 498, 506-09 (3d Cir. 2013) (same); Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) (same); United States v. Valverde, 628 F.3d 1159, 1162 (9th Cir. 2010) (declining to determine the standard of review).

107. *See Reynolds*, 710 F.3d at 502-03 ("We conclude that we need not decide the appropriate standard of review today because the Attorney General's assertion of good cause cannot withstand review even under the most deferential standard available."); *Mack Trucks*, 682 F.3d at 93 ("[W]e need not decide the standard of review since, even if we were to review EPA's assertion of 'good cause' simply to determine if it is arbitrary or capricious, 5 U.S.C. § 706(2)(A), we would still find it lacking."); *Valverde*, 628 F.3d at 1162 ("Because we would, under either standard, affirm the dismissal of the indictment on the ground that no validly promulgated regulation had applied SORNA retroactively to Valverde at the time of his failure to register, we need not determine whether a de novo or an abuse of discretion standard of review applies here.").

108. 710 F.3d at 506-09.

109. *Id.* at 506-07 (comparing "the Fifth and Eleventh Circuits' use of the arbitrary and capricious standard" with the Fourth and Sixth Circuits' less deferential review).

110. *Id.* at 506-08 (comparing arbitrary-and-capricious review under § 706(2)(A) with de novo review under § 706(2)(D)).

111. *See id.* at 507-08 (discussing the court's prior decisions before concluding that they "are in tension with one another").

112. *See id.* (reading the APA's legislative history to favor narrow construction of the exception but recognizing that a prior Third Circuit decision is "ambivalent about whether narrow construction of good cause mandates *de novo* review exclusively").

113. *See* Transcript of Oral Argument, United States v. Valverde, 628 F.3d 1159 (9th Cir. 2010) (No. 09-10063), 2010 WL 7430180, at *2-3, 8 (acknowledging that the government and defendant argue for different standards and asking which standard should govern).

114. *See id.* (comparing the Eleventh Circuit's standard with the Fourth and Sixth Circuits').

115. 766 F.3d 884, 888-89 (8th Cir. 2014).

116. 682 F.3d 87, 93 (D.C. Cir. 2012).

Despite all this, those courts ultimately declined to decide the applicable standard and found that good cause would not be present under any level of deference.[117] In *Reynolds*, the Third Circuit concluded its lengthy discussion of the applicable standard of review by conceding that this was "a question for another day."[118] It then held that the interim rule regarding SORNA retroactivity—the same rule that was at issue in the Eleventh Circuit—did not satisfy the good cause requirements.[119] The court determined that the need to address legal uncertainty did not constitute good cause and that the finding of urgency was unsubstantiated.[120] And as recently as 2019, the Third Circuit again described its standard for reviewing agency assertions of good cause as "an open question."[121] Nonetheless, it again declined to decide the applicable standard and, to err on the safe side, reviewed the agency's good cause assertion for arbitrariness.[122]

So too, in *Valverde*, the Ninth Circuit declined to decide the applicable standard of review and held that the same rule regarding SORNA retroactivity did not comply with the good cause requirements under any standard of review.[123] And in its 2012 *Mack Trucks* decision, the D.C. Circuit declined to decide the applicable standard before rejecting the EPA's claim that good cause justified promulgating an interim final rule to prevent economic harm to a regulated entity.[124]

2. De novo review

In its 2014 decision in *Sorenson Communications Inc. v. FCC*, the D.C. Circuit became the first appellate court to expressly review an agency's assertion of good cause de novo.[125] The court rejected the FCC's call for deference in a challenge to an interim final order governing compensation for telecommunications relay services.[126] Without referring to any particular part

117. *See Brewer*, 766 F.3d at 888-90; *Reynolds*, 710 F.3d at 509; *Mack Trucks*, 682 F.3d at 93; *Valverde*, 628 F.3d at 1162. While the D.C. Circuit did not decide the applicable standard in *Mack Trucks*, it has subsequently done so. *See infra* Part I.C.2.

118. *Reynolds*, 710 F.3d at 509.

119. *Id.* at 508-14.

120. *See id.* at 510. ("This rationale cannot serve as a basis for good cause because some uncertainty follows the enactment of any law that provides an agency with administrative responsibility.").

121. Pennsylvania v. President U.S., 930 F.3d 543, 567 n.22 (3d Cir. 2019).

122. *Id.*

123. United States v. Valverde, 628 F.3d 1159, 1162 (9th Cir. 2010).

124. Mack Trucks, Inc. v. EPA, 682 F.3d 87, 89, 93-94 (D.C. Cir. 2012).

125. *See* 755 F.3d 702, 704, 706 (D.C. Cir. 2014).

126. *Id.* at 704-06.

of § 706, the APA's judicial review provision, the court explained that "[t]o accord deference would be to run afoul of congressional intent. From the outset, we note an agency has no interpretive authority over the APA . . . ."[127] Drawing on circuit precedent, the court reasoned that deferring to an agency's invocation of good cause would conflict with the mandate to "'narrowly construe[]' and 'reluctantly countenance[]' the exception."[128] It therefore concluded that it would review the agency's "legal conclusion of good cause" de novo.[129] Applying that exacting standard, the D.C. Circuit held that good cause was lacking—noting that the FCC's appeal to "the threat of impending fiscal peril as cause for waiving notice and comment" was unsubstantiated by "factual findings supporting the reality of the threat."[130] Despite announcing a de novo standard for reviewing the agency's claim of good cause, the court acknowledged in a footnote that "we defer to an agency's factual findings and expert judgments therefrom, unless such findings and judgments are arbitrary and capricious."[131]

After *Sorenson*, one other circuit court—the Second Circuit—has indicated that an agency's claim of good cause ought to be reviewed de novo.[132] Notably, the Second Circuit did not expand upon *Sorenson*'s reasoning but merely cited its standard.[133] It then applied that "exacting" review to conclude that the National Highway Traffic Safety Administration lacked good cause to indefinitely delay a previously published rule increasing civil penalties.[134] The court's probing review found the agency's claim of imminence to be of its own creation, which violated the principle that "[g]ood cause cannot arise as a result of the agency's own delay."[135] It does not appear, however, that the Second Circuit has applied this standard of review in any other cases concerning challenges to good cause assertions.

127. *Id.*

128. *Id.* (alteration in original) (quoting *Mack Trucks*, 682 F.3d at 93).

129. *Id.*

130. *Id.*

131. *Id.* at 706 n.3.

132. Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 113-14 (2d Cir. 2018). The D.C. Circuit continues to consistently apply the standard. *See, e.g.*, United States v. Ross, 848 F.3d 1129, 1132 (D.C. Cir. 2017); Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1, 45 (D.D.C. 2019); Nat'l Venture Capital Ass'n v. Duke, 291 F. Supp. 3d 5, 15-16 (D.D.C. 2017).

133. *See Nat. Res. Def. Council*, 894 F.3d at 113-14.

134. *Id.* at 114-15.

135. *Id.*

3. No clear standard

Finally, a number of courts continue to review good cause assertions without making clear the standard of review. In cases involving SORNA, the Fourth Circuit upheld the Attorney General's good cause finding[136] while the Sixth Circuit invalidated it[137]—with neither identifying how much deference was given to the Attorney General's assertion. Even recent opinions that cite to *Sorenson* for core principles of interpreting the exception do not specify a standard.[138]

It is not unheard of for courts to decide procedural issues under the APA without determining a standard of review.[139] But the continued ambiguity is striking given the regularity with which the issue is litigated and the fact that the D.C. Circuit has staked out a position.[140] Plainly, there is an entrenched conflict among the circuits regarding how much deference to give an agency's assertion of good cause. That divergence compounds the uncertainty surrounding how courts substantively review good cause.[141] For agencies that promulgate regulations, those affected by regulations, and courts adjudicating challenges to regulations, the result is an unpredictable landscape that reduces administrability without clear benefits.

II. Ensuring Compliance with Rulemaking Procedures

Part I demonstrated that, contrary to what the APA's drafters contemplated, agencies routinely assert good cause to avoid notice-and-comment requirements. It also demonstrated that courts disagree about how to review challenges to those assertions. Part II asks what should be done. More specifically, this Part addresses *who* is best situated to oversee agency compliance with rulemaking procedures and the good cause exception to those requirements. The lack of consensus on the issue is not for want of options.

136. *See* United States v. Gould, 568 F.3d 459, 470 (4th Cir. 2009).

137. *See* United States v. Utesch, 596 F.3d 302, 304-07, 312 (6th Cir. 2010); United States v. Cain, 583 F.3d 408, 421-23 (6th Cir. 2009).

138. *See* E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1253 (9th Cir. 2018) (citing *Sorenson* among other cases to establish that the exception requires agencies to overcome a high bar, but not applying de novo review).

139. *See, e.g.*, Nuvio Corp. v. FCC, 473 F.3d 302, 309-10 (D.C. Cir. 2006); Career Coll. Ass'n v. Riley, 74 F.3d 1265, 1276 (D.C. Cir. 1996); Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Donovan, 757 F.2d 330, 338-39 (D.C. Cir. 1985); Career Coll. Ass'n v. Duncan, 796 F. Supp. 2d 108, 134-35 (D.D.C. 2011).

140. The D.C. Circuit hears a disproportionate number of administrative law cases and is regarded as having special expertise in the field. *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376-77 (2006).

141. *See supra* Part I.B.

Scholars and legislators have called for statutory amendment to the exception since shortly after its enactment. A substantial body of literature in positive political theory contends that Congress can and should impose procedural requirements to control agency actions. That might suggest that congressional monitoring is the antidote for agency abuse of the exception. Finally, others suggest that the executive branch has abundant tools to supervise agency use of procedural exceptions.

This Part rejects each of those options. It first explains why amendment is unrealistic. Perhaps more importantly, it argues that even if feasible, amending the statutory text would be ineffective. It then analyzes why congressional and executive oversight have proven inadequate and argues that this is unlikely to change. Finally, this Part draws on political science and empirical studies of agencies' responsiveness to litigation threats to argue that courts are the key to ensuring agencies' proper use of the good cause exception.

A. Obstacles to Amending the Exception

Legislators have attempted to amend the text of the good cause exception since shortly after its enactment in 1946. These attempts have been animated by a sentiment that the exception's language is "unsatisfactory" and indeterminate.[142] In the 1950s and 1960s, a series of bills proposed limiting the exception to cases in which "immediate adoption of the rule is imperatively necessary for the preservation of public health, safety, or welfare."[143] Other early proposed amendments sought to excise all but the "contrary to the public interest" standard,[144] to refine the "unnecessary" standard,[145] or to tailor the exemption to rules concerning monetary rates or policies.[146]

The Senate Judiciary Committee's 1981 report regarding the most significant amendment attempt to date described the exception's language as "unsatisfactory."[147] It opined that the exception gave agencies inadequate guidance and was contrary to the APA's underlying policy favoring participation in rulemaking.[148] That bill would have limited the exception to only two circumstances: when (1) delay in issuing a regulation would "seriously injure a person or class of persons without serving any important public

142. *See, e.g.*, S. REP. NO. 97-284, at 108 (1981) (recommending an amendment that would, among other things, address perceived agency overuse of the exception due to statutory imprecision).

143. *See* S. 2335, 88th Cong. § 1003(d) (1963); S. 1070, 86th Cong. § 1003(d) (1959).

144. *See* S. 1663, 88th Cong. § 4(b) (1963).

145. *See* Lavilla, *supra* note 17, at 325 (quoting S. 518, 90th Cong. § 4 (1967)).

146. *See id.*

147. *See* S. REP. NO. 97-284, at 108.

148. *See id.*

interest" or (2) allowing comments and participation by the public would "seriously injure 'an important public interest.'"[149] By the time the bill passed the Senate in 1982, however, the more stringent proposals were weakened to practically mirror the existing statutory language.[150] Nonetheless, the bill never passed the House. Despite continued criticism of the exception's indeterminacy, significant attempts at amendment have abated and today the text remains unchanged since its enactment in 1946.

In the wake of those failed amendments, commentators picked up where legislators left off in calling for statutory amendment. Lavilla's primary recommendation coming out of his early systemic study of the exception was to amend the language establishing the criteria for good cause.[151] Renewed scholarly attention to the exception after the GAO's 2012 findings has included advocacy for statutory amendment to cabin perceived agency abuse.[152] One proposal suggests replacing the federal language with the "imminent peril" standard set forth in the Model State APA and adopted by a majority of the states.[153] Other proposals seek to define the circumstances justifying good cause with more specificity[154] or to clarify the "brief statement of reasons"

149. *Id.* at 107. A separate section of the report proposed limiting the exception to rules with an insignificant impact. *Id.* at 115.

150. *See* Lavilla, *supra* note 17, at 325-26 (noting the language of the 1982 bill closely mirrored the APA's original good cause formulation).

151. *See id.* at 416-17 ("The notice and comment requirements should be waived only when the agency for good cause finds that notice and public procedure thereon are (a) impracticable or would substantially frustrate legislative policies; (b) unnecessary, because the rule is nondiscretionary or does not change the legal order; or (c) contrary to the public interest.").

152. *See* Boliek, *supra* note 44, at 3344 (advocating for Congress to adopt the "imminent peril" standard used by the majority of states); James Kim, Comment, *For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045, 1070-73 (2011) (recommending an amendment that would provide that "an agency may dispense with notice and comment procedures in informal rulemaking when the agency for good cause finds . . . that (a) immediate adoption of the rule is imperatively necessary for the preservation of public health, safety, or welfare; (b) notice of proposed rulemaking would seriously impair the effectiveness of the rule; or (c) delay in implementing the rule would substantially frustrate legislative policies"); Nathanael Paynter, Comment, *Flexibility and Public Participation: Refining the Administrative Procedure Act's Good Cause Exception*, 2011 U. CHI. LEGAL F. 397, 417 (arguing for an amendment incorporating more precise terminology); Yates, *supra* note 46, at 1461 (incorporating Kim's proposal to suggest an amendment after concluding that "[j]udicial intervention . . . is probably out of the question").

153. Boliek, *supra* note 44, at 3343-44.

154. *See* Lavilla, *supra* note 17, at 416-17; Paynter, *supra* note 152, at 417-18.

standard.[155] Undergirding each of these proposals is a belief that agency use of the exception is excessive and that changing the language of the statute is the best solution.

1. Amendment is not realistic

The scholarly fixation on amending the exception is misplaced. First, amendment is highly improbable and thus not a pragmatic solution. As a preliminary matter, Congress has infrequently amended the APA, especially with respect to rulemaking procedures.[156] Coupled with the many failed attempts to amend the terms of the good cause exception,[157] that pattern of legislative inaction may be enough to demonstrate a lack of political appetite to amend a statute with "quasi-constitutional" status.[158] Though Congress's inaction on the matter should not be taken to indicate permanent ratification by acquiescence,[159] it does suggest a lack of political will supporting amendment.[160]

Those observations could suggest that amendment is unlikely for the reason that most significant legislation is unlikely to be enacted: an increasingly polarized and unproductive Congress.[161] But Congress may *particularly* struggle to reach consensus on procedural rulemaking requirements, which apply to all rulemaking agencies. That universal applicability cuts across substantive areas, making the consequences especially

155. Yates, *supra* note 46, at 1461 (calling for a brief statement standard that explains "how prepromulgation procedures would frustrate an identifiable, measurable, and substantial harm to public health, safety, or welfare").

156. *See* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 633-34 (2017) (noting that Congress has amended the APA only sixteen times, most recently in 1996).

157. *See supra* notes 142-50 and accompanying text.

158. *See* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1260 (2015) ("The APA is a quasi-constitutional, entrenched superstatute.").

159. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction . . . ." (quoting United States v. Wise, 370 U.S. 405, 411 (1962))); Bob Jones Univ. v. United States, 461 U.S. 574, 620 (1983) (Rehnquist, J., dissenting) (explaining that "congressional inaction is of virtually no weight in determining legislative intent").

160. That inference is further supported by increased polarization and decreased legislative productivity in Congress. *See* Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1693-99 (2015) (synthesizing the political science literature regarding the severity of congressional polarization and dysfunction).

161. *See id.*

unpredictable and potentially politically costly.[162] Since members of Congress often support specific rules in certain substantive areas, even abstract support for greater administrative accountability may give way to desires for swift rulemaking in areas of unusual political salience. And members may be worried that adding still more procedural requirements for rulemaking will further ossify agency rulemaking or encourage turns to adjudication.[163] That presents a daunting challenge for legislators, who increasingly rely on agency rulemaking to carry out much of what once was considered the core of legislating.

All of those factors make amending the exception especially unlikely. Notably, the recent proposals for amendment tend either to downplay these pragmatic concerns or to omit them entirely.[164] Consequently, the proposals become hollow recommendations that are unlikely to meaningfully address the problems they astutely identify.

2. Amendment is not desirable

Calls to amend the statute also suffer from a second, more central flaw. Even a successfully enacted amendment would be at best ineffective and at worst harmful to administrative rulemaking.

Changes to the exception's statutory text would likely have little effect because the proposed marginal modifications are unlikely to affect legal outcomes. For instance, the "imminent peril" standard adopted by a majority of states would appear at first blush to be a drastic departure from the federal standard. But the leading scholars comparing state and federal administrative law suggest that the precise wording of the exceptions for emergency rules does not actually affect legal outcomes in practice.[165] Michael Asimow and Ronald Levin suggest that any nominal distinctions in the statutes' terminology are likely not appreciated by reviewing courts.[166] Admittedly, limited information regarding judicial review of state agencies' use of emergency powers complicates the force of that finding. But the finding is consistent with the federal courts' approach to determining what constitutes

162. *See* Raso, *supra* note 71, at 121-23 (exploring the complex political calculus for legislators considering rulemaking reform).

163. For a fuller discussion of ossification and rulemaking, see notes 12-15 and the accompanying text above.

164. *See* Yates, *supra* note 46, at 1461-63.

165. *See* MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 308-09 (3d ed. 2009) (examining cases under a variety of good cause provisions to conclude that the effect of different wordings is unclear).

166. *See id.*

good cause, which remains largely untethered from the specific textual provisions of the exception.[167]

More fundamentally, inevitable ambiguity in language, especially statutory language designed to specify all contingencies in which the exception may apply, renders futile attempts at a comprehensive and precise good cause provision.[168] Courts' evaluations of the circumstances that justify avoiding notice and comment have developed in a quasi-common law fashion. This suggests that replacing one set of ambiguous words with another will not meaningfully affect judicial review. Additionally, many of the proposals continue to use the residual "contrary to the public interest" clause from the current phrasing.[169] Because courts tend not to identify which of the various clauses of the exception apply in a given case, any amendment that maintains that catchall phrase could render new statutory language surplusage.

Moreover, any statutory amendment that is restrictive enough to affect judicial review might unduly constrain agencies. Though much of the modern debate surrounding good cause implicates impropriety on the part of agencies asserting it, that focus fails to account for the many instances in which there is a legitimate need for efficient rulemaking. Congress is ill equipped to foresee and describe the countless factual permutations that may require circumventing notice-and-comment procedures.[170] Indeed, that inability is one reason why rulemaking procedures "are not susceptible to precise codification."[171] Of course, legislatures always face versions of this problem in enacting legislation. But prescribing when a certain set of facts qualifies for exemption from generally applicable procedures presents an especially difficult issue.[172]

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167. *See supra* Part I.B.

168. *See* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983) ("The basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted—though many are—and not that the legislators failed to agree on just what they wanted to accomplish in the statute—though often they do fail—but that a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application.").

169. *See supra* notes 142-51 and accompanying text.

170. *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751-52 (2007) (discussing Congress's relative informational deficits and the use of its constituents to monitor agencies).

171. *Id.*

172. *See* Raso, *supra* note 71, at 121-22 (arguing that Congress's inability to comprehensively "foresee factual contingencies" has "particular significance with respect to statutes imposing rulemaking procedures").

The problem is compounded by the reality that the APA's rulemaking procedures apply to over 100 agencies.[173] Those agencies handle diverse issues ranging from national security to workplace regulations. Each will face different circumstances in which it is beneficial to promulgate rules without notice and comment, based on different facts and underlying justifications. Thus, language that is specific enough to genuinely constrain some agencies in appropriate cases might present unforeseeable challenges in others.[174] Those wooden requirements would limit agencies' flexibility when they need it most: reacting to unanticipated scenarios that require action more quickly than the legislative process can deliver it.[175]

The existing body of agency-specific statutes adding or removing procedural requirements confirms the challenges inherent in prescribing an emergency exception for all agencies. Those rules tend to more narrowly provide for exceptions based on fact patterns endemic to the agency in question.[176] Because these statutes address a much smaller range of circumstances than the APA, they can codify procedural triggers with more precision. Moreover, it may be politically easier to negotiate agency-specific statutes because their applicability is cabined to a fixed policy area.[177]

The relative success of agency-specific statutes regarding procedural rulemaking requirements highlights the unique challenges presented by the APA's general good cause exception. But those more targeted statutes also suggest that Congress should consider more agency-specific requirements for exempting agencies from rulemaking procedures. This Note endorses that approach. Since adoption of agency-specific statutes widespread enough to replace the need for the APA provision is unlikely, however, that recommendation is not the primary focus of this Note.

B. Limits on Oversight by the Political Branches

Setting aside legislative amendment, Congress and the White House have other tools to oversee agency use of the exception. But meaningful oversight

173. *See* JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 118-19 (2d ed. 2018) (listing 123 federal agencies that promulgated a significant rule between 2002 and 2017).

174. *See* Raso, *supra* note 71, at 122-23 (describing the challenge of prescribing universally applicable procedures).

175. *See supra* Part I.A.

176. *See, e.g.*, 29 U.S.C. § 655 (specifying requirements for the Occupational Safety and Health Administration to promulgate regulations).

177. *See* Raso, *supra* note 71, at 124 (suggesting that agency-specific statutes do not face the same challenges of anticipating the myriad circumstances in which the procedures could apply).

by those branches has been largely absent. And institutional factors suggest that practice is unlikely to change.

1. Obstacles to congressional monitoring

Congress has ample tools other than legislative amendment to oversee agency use of the exception. For instance, Congress could increase reporting obligations or more diligently enforce existing ones.[178] It could commission further GAO investigations.[179] Taking review a step further, Congress could rely more heavily on its spending power to specifically fund or "defund" specific agency actions.[180] It could also make use of the various review mechanisms detailed in the Congressional Review Act.[181] Indeed, Congress has used many of those strategies to influence specific rules in the past—though these practices have been cabined to rules of unusual political salience.[182]

But these congressional oversight mechanisms have proven inadequate. And they are likely to continue to suffer from systemic deficiencies. First and foremost, these tools are time and resource intensive. Effective implementation presumes that Congress places a priority on compliance with rulemaking procedures. Yet legislators have admitted it is a "well founded" criticism that "Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments."[183] And the reality remains that congressional committees have limited resources to conduct hearings and engage in other forms of oversight for all but the most politically

178. *See* Boliek, *supra* note 44, at 3360-62. Under the Congressional Review Act, Congress may review all rules, including interim final rules and nonlegislative rules. *Id.* at 3360 & n.104. Though the statute was seldom used from its enactment in 1996 until 2017, Congress has recently made renewed use of it. *See* PETER L. STRAUSS, TODD D. RAKOFF, GLLIAM E. METZGER, DAVID J. BARRON & ANNE JOSEPH O'CONNELL, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 846-47 (12th ed. 2018).

179. *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 65-68 (2006) (detailing Congress's formal and informal options for involvement in the administration and execution of regulations, including commissioning GAO reports).

180. Boliek, *supra* note 44, at 3360; *see also* Beermann, *supra* note 179, at 84-91.

181. *See* Boliek, *supra* note 44, at 3360.

182. Congress used some of these strategies to great effect with a proposed rule regarding credit risk and mortgages in 2011, when political attention on those issues was intense. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-656, MORTGAGE REFORM: POTENTIAL IMPACTS OF PROVISIONS IN THE DODD-FRANK ACT ON HOMEBUYERS AND THE MORTGAGE MARKET 33-49 (2011) (investigating the impact of the proposed rule on the housing market).

183. 142 CONG. REC. 6926 (1996).

salient rules.[184] Even if committees had more capacity to regularly monitor rules, the political incentives may favor oversight of certain substantive areas rather than oversight of procedural compliance for its own sake.[185]

What's more, oversight of the good cause exception faces special, additional challenges. Many forms of agency oversight rely on agency reporting of rulemakings.[186] And as a practical matter, disclosure to Congress and the Office of Information and Regulatory Affairs (OIRA) often occurs because of other statutory reporting requirements. But when agencies invoke the good cause exception, they are specifically excused from some of the most significant reporting requirements,[187] such as those imposed by the Regulatory Flexibility Act (RFA)[188] and the Unfunded Mandates Reform Act (UMRA).[189] Those exemptions from certain reporting requirements—which Congress relies on for notification of agency actions—make rules promulgated under the good cause exception even less likely to receive serious congressional scrutiny than ordinary rules promulgated via notice and comment.[190]

The practice of exempting rules claiming good cause from statutory reporting requirements might be in keeping with the rationale underlying the exception—that there are situations in which the need for efficiency trumps a desire for participation and accountability.[191] In any event, the result is that Congress may not even learn of rules invoking the exception in time to assert meaningful oversight. And even if it does, the political incentives are such that legislators are unlikely to mobilize to effectively police misuse of the exception.

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184. The proposed Credit Risk Retention Rule is one such recent example. Credit Risk Retention, 76 Fed. Reg. 24,090 (proposed Apr. 29, 2011) (to be codified at 24 C.F.R. pt. 267). But it is an outlier compared to the many lower-profile rules promulgated each year.

185. *See supra* notes 162-65 and accompanying text.

186. *See* Boliek, *supra* note 44, at 3362 ("If the agency fails to prioritize its reporting obligations, covered rules may come before Congress only by luck or through complaints of interest groups.").

187. Boliek, *supra* note 44, at 3355-62.

188. 5 U.S.C. §§ 601-605 (requiring agencies to assess new rules' impact on small businesses).

189. 2 U.S.C. §§ 1532-1538 (requiring agencies to submit a cost-benefit analysis for certain regulatory actions).

190. *See* Boliek, *supra* note 44, at 3355-62 (explaining how use of the exception excuses agencies from certain reporting requirements and providing examples).

191. *See supra* notes 16-19 and accompanying text. But the practice of some state legislatures suggests the opposite approach might be more in line with the rationales animating emergency rulemaking procedures. Those states increase reporting requirements for agencies promulgating emergency rules. This practice reflects a belief that political oversight is *most* important when there is no public participation. *See, e.g.*, COLO. REV. STAT. § 24-4-103(3) (2019); MINN. STAT. § 14.388 (2019); OHIO REV. CODE ANN. § 119.03(C) (West 2020).

2. Executive inattention

Significant executive oversight of the exception's use is equally unlikely. Like Congress, the executive branch is armed with options to influence agencies.[192] Most notably, presidential directives order executive regulatory agencies to submit drafts of most significant rules to OIRA.[193] The President also influences agencies' practices through the appointment of their leaders, who ostensibly share the President's priorities and communicate with the White House. The specter of removal is omnipresent.[194] Relatedly, the White House may be the strongest source of informal control through political pressures. Such pressures include expressing preferences through the budgeting process and information requests, strategic messaging via speeches,[195] and making use of signing statements.[196]

As with their congressional counterparts, each of those forms of presidential control suffers from critical flaws when applied to good cause assertions. Most importantly, executive attention to rulemaking is exceedingly concerned with substance, not procedure. This can be seen in presidential directives to initiate rulemaking regarding certain specific issues.[197] The executive's focus on substance makes sense: Agency rulemaking is often the President's clearest path to exerting influence on policy. And the executive is less likely to be concerned about a democratic deficiency in rulemaking than is the legislature that delegated statutory authority to the agency. Relatedly, the White House has far more reason to devote its limited resources to presidential directives, which more directly reflect its priorities, than to statutory compliance with the APA.[198]

Many agencies are not even subject to the White House's most potent oversight tools. For example, the many independent agencies, including the

192. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281-99 (2001) (detailing the tools available to the White House to influence agencies).

193. *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. § 638 (1994).

194. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 610-11 (1984).

195. *See, e.g.*, Kagan, *supra* note 192, at 2299.

196. *See* Christopher S. Kelley, The Law: *Contextualizing the Signing Statement*, 37 PRESIDENTIAL STUD. Q. 737, 738-39 (2007).

197. *See* Kagan, *supra* note 192, at 2249 (describing how the Clinton administration "regularly issued formal directives to the heads of executive agencies to set the terms of administrative action").

198. Even OIRA cannot scrupulously monitor all or even a substantial portion of all rulemaking. *See* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1110 (2008) (explaining that resource constraints limit "the extent to which the routine of agency decisionmaking may be subjected to meaningful OIRA scrutiny").

EPA and the FCC, are not bound by executive orders requiring agencies to submit proposed rules to OIRA.[199] Indeed, one study suggests that OIRA reviewed at most 17% of all emergency rulemakings in 2011.[200] Only one such rule was withdrawn, and none of the rules reviewed were found to be improperly submitted.[201] Even if rules claiming good cause are submitted, OIRA typically reviews them for substance, not procedural compliance.[202] So OIRA review would do little to curtail inappropriate assertions of good cause. For all these reasons, the executive branch is as ill equipped as Congress to ensure that agencies do not improperly seek to avoid notice-and-comment procedures by invoking good cause.[203]

C. Judicial Review of Rulemaking Procedures

That leaves the courts. Are they well situated to police agency use of the good cause exception? Both theory and practice suggest that they are. Indeed, commentators have long maintained that courts are *especially* skilled at reviewing agency compliance with procedures. Judge Carl McGowan called judges their "own experts in the field of procedural fair play" and advocated for the "most intense level of scrutiny" in reviewing procedural compliance.[204] That view is premised on the notion that, unlike substantive review of agency action, which may involve discretionary judgments delegated by Congress and specialized agency expertise, procedural review focuses on content-neutral compliance with rules.[205] Judges routinely interpret and enforce procedural rules such as the Federal Rules of Civil Procedure. These observations led one set of scholars to conclude that "the courts bear much of the costs of ensuring

199. *See* Exec. Order No. 12,866, § 3(b), 3 C.F.R. § 641 (1994) (explaining that the executive order does not apply to independent regulatory agencies, as defined in 44 U.S.C. § 3502).

200. *See* Boliek, *supra* note 44, at 3368. This review was of all interim final rules, suggesting that less than 17% of all emergency rulemakings (a subset of interim final rules) claiming good cause were subject to OIRA review. *Id.*

201. *See id.*

202. *See* Raso, *supra* note 71, at 126-27.

203. To be sure, recent executive actions directed at reforming agency use of nonlegislative rules suggest the White House might have sufficient tools to oversee compliance with procedural requirements. *See, e.g.*, GUIDANCE ON COMPLIANCE WITH THE CONGRESSIONAL REVIEW ACT, *supra* note 29, at 2-3. But compared to nonlegislative rules, the executive branch has shown little interest in addressing good cause rulemaking. Because of the executive's focus on substance over procedure, *see supra* notes 197-99 and accompanying text, that is unsurprising. Moreover, it suggests that recent actions targeting nonlegislative rules are unlikely to spawn analogous actions directed at good cause rulemaking.

204. Carl McGowan, *Reflections on Rulemaking Review*, 53 TUL. L. REV. 681, 691-92 (1979).

205. *See id.* at 692-93; Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 59 (1985).

compliance. Indeed, courts are the key, for without them political actors could not rely on decentralized enforcement."[206]

Empirical studies support that conclusion. In an important recent study, Connor Raso examined the effects of litigation and litigation risk on agency avoidance of rulemaking procedures.[207] The study looked at the likelihood that agencies would face litigation for improper avoidance of procedural requirements under the APA, the RFA, and the UMRA, the rates of agency success in those lawsuits, and the penalties agencies faced if courts found their actions to be improper.[208] The data suggest that as litigation risks rose, agencies more frequently complied with procedural requirements.[209] Even though agencies still skipped the APA's notice-and-comment requirements in a substantial percentage of all rules included in the dataset, procedural avoidance was lower under the APA than under the other statutes.[210] Moreover, agencies with lower litigation risks under the APA, such as the Department of Defense, avoided notice-and-comment procedures at much higher rates than agencies with more litigation exposure.[211] Raso concluded that agencies will skip procedural requirements "unless they face the threat of punishment for doing so improperly," and that "the most important threat of such punishment is 'litigation risk.'"[212]

Survey data similarly suggest that agency staffers are highly sensitive to the shadow of judicial review when making procedural rulemaking decisions. The most extensive survey to date—which questioned over 100 rule drafters across independent agencies and executive departments—found that 87% of rule drafters agreed that, "[w]hen drafting rules and interpreting statutes, agency drafters . . . think about subsequent judicial review."[213] The survey found that drafters were highly cognizant of the various judicial deference doctrines.[214] Taking these results together, the author concluded that "[a]gency

206. Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 255 (1987).

207. Raso, *supra* note 71, at 71-72.

208. *Id.*

209. *Id.* at 72.

210. *Id.*

211. *Id.* at 93.

212. *Id.* at 71.

213. Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. ONLINE 106, 121 (2017) [hereinafter Walker, *Against Remedial Restraint*] (first alteration in original) (quoting Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 722 (2014)).

214. *Id.* at 121-22; Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1059-62 (2015). The questions related more explicitly to deference with respect to agency interpretations of statutes they administer, but the staffers indicated

footnote continued on next page

officials, especially agency lawyers, pay close attention to judicial developments in administrative law and think about judicial doctrines when regulating."[215] That is consistent with findings by political scientists that agency staffers "are likely to be sensitive to the predilections of judicial overseers."[216]

These data all support the arguments that (1) courts are well positioned to review rulemaking for procedural compliance, and (2) agencies are responsive to that judicial review. The second insight is particularly important given the infrequency of judicial review of good cause assertions.[217] It suggests that agencies will take notice of developments in judicial review of good cause and thus will comply with procedural requirements more frequently, even if courts review only a fraction of all good cause invocations.

III. Improving Judicial Review of Good Cause Determinations

Part II argues that amending the text of the good cause exception is neither a probable nor a desirable solution. It further demonstrates that the courts, rather than Congress or the White House, are uniquely well positioned to monitor proper use of the exception. This Part proposes a framework for courts to apply when reviewing good cause assertions. Courts should afford no deference to an agency's determination that good cause exists. That standard of review properly balances the competing interests of public participation, agency flexibility, public safety, and judicial administrability. After explaining why de novo review is appropriate, this Part illustrates why addressing the standard of review is the right solution to the uncertainty surrounding judicial review of good cause.

A. No Deference to Agency Assertions of Good Cause

A number of circuit courts have reviewed agency invocations of good cause under the arbitrary-and-capricious standard or declined to choose the applicable standard.[218] Those courts were mistaken. The APA's text, structure, and objectives make clear that reviewing courts should give no deference to agency assertions of good cause.

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an intricate knowledge of many standards of review applicable in a variety of contexts. *See* Walker, *supra*.

215. Walker, *Against Remedial Restraint*, *supra* note 213, at 122.

216. Rachel Augustine Potter & Charles R. Shipan, *Agency Rulemaking in a Separation of Powers System*, 39 J. PUB. POL'Y 89, 110 (2019).

217. *See supra* notes 44-45 and accompanying text.

218. *See supra* Part I.C.

The D.C. Circuit's analysis in *Sorenson Communications Inc. v. FCC* provides a starting point for analyzing the proper standard of review.[219] As the court explained, agencies have "no interpretive authority over the APA."[220] That principle is premised on the notion that agencies do not wield the same specialized expertise regarding the APA as they do with the substance of agency-specific statutes.[221] The rationale has special force in the realm of procedural compliance, where courts' informational deficits are least pronounced[222] and agency incentives for self-serving interpretations are at their apex.[223] On its own, the principle that agency interpretations of the APA merit no deference blunts the force of calls for deference to good cause determinations.[224] Thus, the D.C. Circuit was correct to conclude in *Sorenson* that "we cannot find that an exception [to the APA] applies simply because the agency says we should."[225]

Though the D.C. Circuit's analysis was correct, it was underdeveloped.[226] For instance, the court did not root its standard in the APA's text or discuss other circuits' contrary approaches to reviewing good cause invocations.[227] Indeed, the D.C. Circuit's truncated explanation may partially explain other circuits' reluctance to embrace de novo review. But careful examination of the APA makes clear that all courts should afford no deference to an agency's legal conclusion that good cause is present.

The Supreme Court has mandated that the "standards to be applied on review" of agency actions "are governed by the provisions of § 706" of the APA.[228] And the most natural reading of § 706's text instructs courts to give no deference to agency invocations of good cause. Specifically, § 706(2)(D) directs courts to "hold unlawful and set aside agency action, findings, and conclusions

219. 755 F.3d 702 (D.C. Cir. 2014).

220. *Id.* at 706.

221. *See* Envirocare of Utah, Inc. v. Nuclear Regul. Comm'n, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) ("[W]hen it comes to statutes administered by several different agencies—statutes, that is, like the APA and unlike the standing provision of the Atomic Energy Act—courts do not defer to any one agency's particular interpretation."); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 146 (2010) ("De novo review is appropriate when agencies are interpreting laws that they do not have a special responsibility to administer, like the Constitution, the APA, or Title VII.").

222. *See supra* Part II.C.

223. *See* Hickman & Thomson, *supra* note 55, at 266.

224. *See Envirocare*, 194 F.3d at 79 n.7.

225. 755 F.3d at 706.

226. Subsequent courts reviewing good cause determinations de novo have not supplemented this analysis substantially. *See supra* notes 132-35 and accompanying text.

227. *See Sorenson*, 755 F.3d at 706.

228. Heckler v. Chaney, 470 U.S. 821, 828 (1985).

found to be . . . without *observance of procedure* required by law."[229] The statute's express reference to *procedural* compliance suggests that this subsection governs review of whether agency actions conformed with the APA's procedural strictures.[230] Consistent with that interpretation, courts regularly apply § 706(2)(D) to review an agency's characterization of a rule as interpretive rather than legislative—which allows the agency to skip notice-and-comment procedures.[231] Since an agency's decision to invoke the good cause exception and thus to forgo ordinary procedures is a similarly paradigmatic procedural issue, it follows that § 706(2)(D) must also govern courts' review of good cause determinations. And § 706(2)(D)—which mandates that courts "hold unlawful" agency actions found to be "without observance of procedure required by law"—plainly authorizes de novo review of those determinations.[232] Indeed, courts and commentators have repeatedly recognized that § 706(2)(D) calls for de novo review in other contexts.[233]

To be sure, another portion of § 706 complicates the textual analysis. Specifically, § 706(2)(A) requires courts to "set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law*."[234] That subsection provides the foundation for the "arbitrary and capricious" review that applies in other domains of administrative law.[235] And the circuits that review good cause for arbitrariness ground their standard in

229. 5 U.S.C. § 706(2)(D) (emphasis added).

230. *See, e.g.*, United States v. Hacker, 565 F.3d 522, 524 (8th Cir. 2009) (evaluating procedural compliance with the APA under § 706(2)(D)); COLE, *supra* note 67, at 12 (explaining that an agency's decision to "bypass Section 553's notice and comment rulemaking procedures" is generally governed by § 706(2)(D)).

231. *See* COLE, *supra* note 67, at 12.

232. 5 U.S.C. § 706(2)(D).

233. *See, e.g.*, *Hacker*, 565 F.3d at 524 (stating that questions of law under § 706(2)(D) are reviewed de novo); Reno-Sparks Indian Colony v. EPA, 336 F.3d 899, 909 n.11 (9th Cir. 2003) ("This Court reviews *de novo* the agency's decision not to follow the APA's notice and comment procedures. The agency is not entitled to deference because complying with the notice and comment provisions when required by the APA 'is not a matter of agency choice.'" (quoting Sequoia Orange Co. v. Yeutter, 973 F.2d 752, 757 n.4 (9th Cir. 1992))); COLE, *supra* note 67, at 13 ("[P]rocedural challenges pursuant to Section 706(2)(D) that an agency failed to comply with the provisions of the APA are often reviewed de novo."); Raso, *supra* note 71, at 115 n.242 (noting "§ 706(2)(D) provides for de novo review of procedural issues").

234. 5 U.S.C. § 706(2)(A) (emphasis added).

235. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (applying the arbitrary-and-capricious standard to assess the adequacy of the FCC's explanation of its decision to forbid the broadcasting of certain expletives); Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983) (applying the arbitrary-and-capricious standard to assess the National Highway Traffic Safety Administration's rescission of regulations).

this provision.[236] The logic is that agency actions not conforming to the APA's procedural requirements are by definition "not in accordance with law," and thus § 706(2)(A)'s arbitrariness standard could also apply. Courts and commentators have observed the apparent tensions between the application of § 706(2)(A) and § 706(2)(D) without resolving the matter.[237] For example, the Third Circuit declined to choose the applicable standard of review after observing that there is "surprisingly little guidance" regarding the "respective scopes of § 706(2)(A) and (2)(D)" in relation to each other.[238]

But the APA's structure confirms what its text indicates: Section 706(2)(D)'s express coverage of procedural issues requires de novo review of good cause determinations. Courts must "give effect, if possible, to every word Congress used."[239] Reviewing issues of *procedural* noncompliance under § 706(2)(A) flouts that mandate and renders § 706(2)(D) surplusage.[240] If courts were to review good cause assertions for arbitrariness under § 706(2)(A) on the theory that those determinations were allegedly "not in accordance with law,"[241] the same rationale would counsel in favor of reviewing all procedural issues under that provision. Yet if § 706(2)(A) were to govern judicial review of every procedural issue, § 706(2)(D) would effectively be read out of the statute. It would be entirely unnecessary to include a provision that addressed procedural compliance—as § 706(2)(D) expressly does—if those issues were already covered by § 706(2)(A). That cannot be right. Congress would not have included a special provision governing review of procedural noncompliance if the more general § 706(2)(A) controlled in those circumstances.

Thus, courts that apply § 706(2)(A) to review good cause determinations for arbitrariness fail to give meaning to the entirety of the APA's judicial review provision. Moreover, reviewing good cause assertions under § 706(2)(A) is also inconsistent with courts' application of § 706(2)(D) to other issues of agency compliance with procedural requirements.[242] At a minimum, there is no clear reason why de novo review of procedural issues under § 706(2)(D) is proper in other instances, but not for review of good cause determinations.

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236. *See supra* notes 97-105 and accompanying text.

237. *See* United States v. Reynolds, 710 F.3d 498, 509 (3d Cir. 2013); Levin, *supra* note 205, at 13 n.76 (noting the "question-begging quality" of § 706(2)(D)); Raso, *supra* note 71, at 115 n.242 (observing that the APA "does not resolve this issue"). The APA's legislative history does not address the issue.

238. *Reynolds*, 710 F.3d at 509.

239. Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 632 (2018) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979)).

240. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174-76 (2012).

241. 5 U.S.C. § 706(2)(A).

242. *See supra* note 233 and accompanying text.

The APA's objectives also reinforce the conclusion that good cause determinations should be reviewed de novo. The Congress that enacted the APA explained that the findings supporting good cause assertions must be "sustainable upon inquiry by a reviewing court."[243] It explained that a case "must be made" of necessity or emergency, and that agencies have no "discretion to disregard [the] terms or the facts" when invoking good cause.[244] In short, the drafters were careful to ensure that the exception did not become an "escape clause."[245] And they designed the APA to fulfill that objective by providing for probing, independent judicial review of good cause assertions.[246]

Courts recognize that Congress designed the exception to be limited in scope. Courts have "repeatedly made clear that the good cause exception 'is to be narrowly construed and only reluctantly countenanced.'"[247] Looking to the objectives underlying the APA and the exception, these courts have described the good cause inquiry as "meticulous,"[248] "demanding,"[249] and "deliberate."[250] Those oft-repeated mantras provide a further basis for affording no deference to agency assertions of good cause. While courts' widespread recitations of these general principles for reviewing good cause are appropriate, some courts have failed to apply them to reach their logical conclusion. Indeed, it is unclear how principles of narrow construction and demanding inquiries are relevant to courts' review of good cause *other than* requiring a de novo standard. Meanwhile, those precepts not only can be reconciled with, but also can help to inform, a rigorous de novo review.

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243. APA LEGISLATIVE HISTORY, *supra* note 31, at 278-79.

244. *Id.* at 258.

245. *Id.*

246. One early scholar suggested that the good cause provision severely limited independent judicial review because its phrasing "makes the exception dependent upon the finding by the agency, not upon facts underlying the finding." *See* Nathaniel L. Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 384 (1946). But that reading neglects the statutory context and clearly stated congressional intent and has been rejected by other scholars. *See, e.g.*, Lavilla, *supra* note 17, at 398 n.328.

247. *See, e.g.*, Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 754 (D.C. Cir. 2001)); San Diego Air Sports Ctr., Inc. v. FAA, 887 F.2d 966, 969 (9th Cir. 1989) ("We have stated that '[t]he exceptions to section 553 will be "narrowly construed and only reluctantly countenanced."'" (quoting Alcaraz v. Block, 746 F.2d 593, 612 (9th Cir. 1984))); Mobay Chem. Corp. v. Gorsuch, 682 F.2d 419, 426 (3d Cir. 1982) ("In considering whether there was good cause for the agency to adopt the data compensation regulations without prior notice-and-comment, we are guided by the principle that the exception is to be narrowly construed.").

248. N.J. Dep't of Env't Prot. v. EPA, 626 F.2d 1038, 1046 (D.C. Cir. 1980).

249. *Id.*

250. Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014).

Principles of administrative deference in other contexts also counsel in favor of reviewing good cause determinations de novo. As the D.C. Circuit reasoned in *Sorenson*, that standard is consistent with agencies' lack of interpretative authority over the APA.[251] Reviewing issues of procedural compliance for arbitrariness would give considerable weight to an agency's interpretation of the APA's rulemaking requirements. But this is a context in which the traditional justifications for deference to agency interpretations are not present. For example, a common rationale for affording *Chevron* deference to agencies' interpretations of ambiguous statutes is their expertise with respect to the statutes they administer.[252] Yet agencies claiming good cause have no special subject-matter expertise in that domain. And another frequent justification for invoking *Chevron* deference—that it is "rooted in a background presumption of congressional intent"[253]—is equally inapposite in the good cause context. Whereas *Chevron* deference offers a "stable background rule against which Congress can legislate,"[254] no such rationale supports deferring to agency determinations of good cause. The APA does not dictate procedural requirements on a case-by-case or even agency-by-agency basis.[255] To the contrary, affording deference to good cause assertions undercuts Congress's carefully calibrated procedures for promulgating rules that apply to all rulemaking agencies.[256]

Thus, the APA's text, structure, and objectives, as well as principles of administrative deference, all confirm the conclusion that courts should review good cause determinations de novo.

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251. *See supra* notes 219-21 and accompanying text.

252. *See, e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (suggesting that relative expertise is at least a reason Congress delegates statutory authority to agencies); Kagan, *supra* note 192, at 2374 (explaining that courts have invoked the expertise rationale "to delimit the scope of the *Chevron* doctrine"); Sapna Kumar, *Expert Court, Expert Agency*, 44 U.C. DAVIS L. REV. 1547, 1549 (2011) ("*Chevron* is based, in part, on the idea that agencies have superior expertise and institutional advantages over courts.").

253. City of Arlington v. FCC, 569 U.S. 290, 296 (2013); *see also* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1284 (2008) ("Arguably the leading rationale for *Chevron* deference is the presumption that Congress delegates interpretive authority to administrative agencies when it commits regulatory statutes to agency administration.").

254. *See City of Arlington*, 569 U.S. at 296.

255. *See supra* notes 21-26 and accompanying text.

256. Just as the justifications for *Chevron* deference are inapposite in the good cause context, the arguments supporting de novo review of good cause determinations are equally inapplicable to *Chevron* deference. This Note's proposal in no way bears on that longstanding doctrine of judicial deference.

B. Why the Standard of Review?

Part III.A demonstrated why, as a matter of law, courts should afford no deference to agency assertions of good cause. This Part explains why, as a matter of policy, applying that standard will have desirable practical consequences. Consistently applying the rigorous de novo standard will curtail the judicial inconsistencies found in good cause jurisprudence. In turn, this consistency will help to address the most pronounced concerns about contemporary use of the exception. Applying de novo review will also promote predictability for agencies, litigants, and courts, while preserving the flexibility necessary for a provision that is implicated in a wide range of factual circumstances. Moreover, this solution is a pragmatic one. It does not require an unlikely legislative amendment or judicial activism. Rather, it is legally correct and already adopted by the D.C. Circuit. For these reasons, crystallizing the standard of review is a more effective solution to continued uncertainty surrounding the exception than reforming the substantive terms of good cause.

The risk of self-serving agency interpretations is especially pronounced in the good cause context. Affording deference to agencies' procedural determinations engenders skepticism in other contexts as well. For example, with respect to the distinction between legislative and nonlegislative rules, Ronald Levin observed that the "concrete reason for caution about deference" is the "obvious risk that the agency's claim that it intends a rule to be nonlegislative, and thus not subject to APA obligations, could be self-serving."[257] Yet in that scenario, an agency's claim that a rule is nonlegislative may affect that agency's ability to enforce the rule as binding, so agencies must consider factors beyond litigation exposure when deciding how to characterize rules.[258] Meanwhile, those conflicting pressures are simply not present in the good cause context. Once in effect, a rule promulgated via the good cause exception has the same force as a rule promulgated via the normal notice-and-comment rulemaking process.[259]

When agencies contemplate whether to invoke good cause, the *only* downside they face for improperly claiming the exception is subsequent invalidation in court. Thus, it is not surprising that the threat of litigation and likelihood of success in court affect agency decisions regarding good cause.[260]

257. Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 291 (2018) (emphasis omitted).

258. *See id.* at 289-91. For more on judicial review of agencies' determinations that rules are nonlegislative, see John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004) ("Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called 'nonlegislative rules.'").

259. *See supra* notes 27-30 and accompanying text.

260. *See supra* notes 207-12 and accompanying text.

Indeed, it is unclear which, if any, other factors similarly inform agencies' calculations regarding whether to invoke good cause. Precisely because agencies face strong efficiency incentives to claim good cause and have little reason to tread carefully, applying a more exacting standard of review is a powerful antidote to the urge for frequent invocation.

That argument presumes that giving no deference to an agency's finding of good cause will affect judicial review enough for agencies to take note. Empirical findings support that intuitive presumption, though it is far from a foregone conclusion. In an influential study, William Eskridge and Lauren Baer found that in cases involving agency interpretations of statutes, more deferential standards of review corresponded to higher affirmance rates for agencies.[261] Similarly, other studies have found that agencies prevail more frequently when lower courts afford *Chevron* deference to the agencies' statutory interpretations.[262] While David Zaring's findings partially call into question the conventional account by suggesting that the standard of review affects affirmance rates less than previously contemplated,[263] the thrust of earlier empirical studies remains. Zaring primarily examined judicial review of agency actions in the contexts of *Chevron*, *Skidmore*, and *Mead*.[264] He admits that de novo review "is not particularly common," and that "de novo review has been interpreted to be quite different from deferential standards of review."[265] And Zaring recognizes that even "legal realists"—who might endorse some degree of simplification in administrative standards of review—understand that there is a clear divide between de novo and other forms of review.[266] For example, despite then-Judge Posner's critique of the seemingly endless gradations of administrative standards of review, he concluded that "[t]he only distinction the judicial intellect actually makes is between

261. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099 (2008); *see also* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1054-59 (finding results similar to Eskridge and Baer's in an older study).

262. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017) (finding that agencies' success rate in the circuit courts was approximately 25% higher when the courts applied *Chevron* deference as compared to when they did not apply *Chevron*); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 31 (1998) (finding that 89% of circuit court decisions that reached step two of the *Chevron* analysis upheld the agency's view of the statute).

263. *See* Zaring, *supra* note 221, at 137 (concluding that "administrative law outcomes do not depend on hard looks, substantial evidence, or distinctions between *Chevron* and *Mead*").

264. *Id.* at 143-46.

265. *Id.* at 147, 155.

266. *See id.* at 155.

deferential and nondeferential review."[267] Indeed, even the Supreme Court has explained that the "upshot" of different standards of "judicial review is some practical difference in outcome depending upon which standard is used."[268]

The commonsense claim that nondeferential review is distinct in practice from deferential review accords with empirical findings on rates of agency affirmance. What's more, it demonstrates the potential impact of applying de novo review to good cause assertions.[269] Those studies buttress the intuitive conclusion that applying a more rigorous review to agency determinations of good cause would result in lower rates of affirmance, which in turn would affect agency willingness in future decisions regarding whether to invoke good cause.

For at least three reasons, focusing on the standard of review is a better solution to courts' divergent treatment of good cause than reformulating the substance of what constitutes good cause. First, reforming the standard of review would better address agency abuse of the exception without imposing counterproductive rigidity.[270] An ex ante focus on the standard of review maintains the necessary flexibility for prescribing the parameters of review in unforeseeable factual circumstances. And ratcheting up the rigor of judicial review provides safeguards against the most extreme instances of agency overreach in ways that legislative attempts to cabin the substance of the exception might not be able to anticipate. Second, courts are more likely to adopt an easily administrable standard that is justified by text, structure, and purpose than the political branches are to exert meaningful influence over the proper use and scope of the exception.[271]

Finally, as Eskridge and Baer, Zaring, and others who have studied administrative standards of review have observed in related contexts, simplifying the standard of review can enhance judicial rigor and improve predictability for litigants. Those scholars recognize that convoluted standards of review can lead judges either to eschew a standard entirely "in favor of ad hoc judicial reasoning"[272] or to "twist themselves into knots" attempting to choose and apply a standard.[273] Pragmatically, both approaches result in unpredictable and at times inconsistent application of whichever standard a court purports to apply. That insight accords with the practice of numerous courts discussed above in Part I.C that either considered and declined to choose

267. RICHARD A. POSNER, HOW JUDGES THINK 113-14 (2008).

268. Dickinson v. Zurko, 527 U.S. 150, 162 (1999).

269. *See supra* note 261 and accompanying text.

270. *See supra* notes 165-75 and accompanying text.

271. *See supra* Part II.

272. Eskridge & Baer, *supra* note 261, at 1100.

273. Zaring, *supra* note 221, at 193.

a standard for reviewing good cause or did not discuss the standard at all.[274] When these courts ultimately reached the merits, their analyses tended to be divorced from any clear standard—lending even greater indeterminacy to the notoriously fact-bound good cause analysis.[275] This reality further indicates that a well-developed, consistently applied standard of no deference might influence even those courts that already nominally apply de novo review. In turn, that would provide more predictability for litigants about how courts would assess cases involving good cause.

Relatedly, the standard of review has "little intrinsic relationship to the other factors"[276] considered by courts when adjudicating agency invocations of good cause. Thus, to the degree jurisprudence on what constitutes good cause has developed in a common law fashion, adopting a nondeferential standard of review will not disrupt that development. Rather, it will facilitate a continued distillation of the doctrine under a more consistent standard of review.

To be sure, this proposal is no panacea. The ambiguities in good cause jurisprudence will persist to some degree.[277] But that does not mean that courts' current approaches are preferable. Because judicial analysis of good cause suffers from multiple axes of indeterminacy, fixing one of them will promote more consistent analysis, if not perfect regularity. And enhanced judicial rigor will promote more predictability in litigation. Ultimately, increased predictability will benefit courts and litigants who currently do not know how claims of good cause will be evaluated *or* what standard of review will govern. Even agencies may prefer a more consistently applied de novo standard of review, which will provide a clearer backdrop against which to make procedural decisions and litigation risk assessments. If nothing else, removing the confusion surrounding the standard of review is an important step to addressing the myriad issues that plague good cause jurisprudence.

C. Applying the Standard

How would courts apply this standard of no deference? Several circuits' treatment of the Attorney General's claim of good cause regarding SORNA retroactivity provides insights. As discussed in Part I, this dispute involved challenges to the Attorney General's rules, promulgated via the good cause exception, that made SORNA's requirements applicable to all sex offenders convicted prior to the statute's enactment.[278] Comparing the analyses of the

274. *See supra* note 92.

275. *See supra* Parts I.B-.C.

276. *See* Levin, *supra* note 257, at 291.

277. *See supra* Part I.B.

278. *See supra* notes 99-101 and accompanying text.

D.C. Circuit in *United States v. Ross*[279] and the Sixth Circuit in *United States v. Cain*[280] with the Eleventh Circuit's approach in *United States v. Dean*[281] indicates how the standard of review would concretely affect judicial reasoning when reviewing assertions of good cause.

In *Dean*, the Eleventh Circuit reviewed the good cause invocation under the arbitrary-and-capricious standard.[282] The court stated that this standard provided it with "very limited discretion to reverse" the Attorney General's decision.[283] Turning to the facts, the court explained that the Attorney General provided a statement of good cause that made reference to the potentially heightened risk of future sex offenses if SORNA was not made immediately retroactive.[284] And the Attorney General claimed that the rule "provides guidance to eliminate uncertainty."[285] Taking those assertions at face value, the court found that good cause was present because the Attorney General's proffered rationales "relate[d] to the public interest" and were reasonable.[286] In concurrence, Judge Wilson astutely observed that the majority opinion "quotes but does not give due weight to" the requirement that courts must "construe narrowly the good cause exceptions."[287] He then identified the core issue with the majority's deferential review of the Attorney General's good cause determination: "It is now easier for an administrative agency to avoid notice and comment in our circuit by claiming an emergency or threat of serious harm, whether or not the facts support one."[288]

In *Ross*, the D.C. Circuit examined the validity of the same good cause assertion for promulgating rules regarding SORNA retroactivity.[289] Like the Eleventh Circuit, the D.C. Circuit noted that the good cause exception must be "narrowly construed and reluctantly countenanced."[290] But the court then went on to explicitly state that it reviews agency findings of good cause de

279. 848 F.3d 1129 (D.C. Cir. 2017).

280. 583 F.3d 408 (6th Cir. 2009).

281. 604 F.3d 1275 (11th Cir. 2010).

282. *Id.* at 1278.

283. *See id.*

284. *See id.* at 1277.

285. *Id.* at 1279.

286. *Id.* at 1279-82.

287. *Id.* at 1283 (Wilson, J., concurring in the result).

288. *Id.* at 1290.

289. United States v. Ross, 848 F.3d 1129, 1132 (D.C. Cir. 2017).

290. *Compare id.* at 132 (quoting Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004)), *with Dean*, 604 F.3d at 1279 (quoting *Jifry*, 370 F.3d at 1179).

novo.[291] Applying that exacting review, the court rejected the Attorney General's proffered justifications for skipping notice and comment.[292] First, the court reasoned that Congress "built in" a delay for the Attorney General to specify the statute's application to pre-SORNA offenders.[293] Second, the court observed that because the Attorney General waited over seven months to publish the rules, his "own behavior also undercuts the current claim of urgency."[294] Thus, the D.C. Circuit held that the Attorney General's invocation of the good cause exception was invalid.[295]

The difference in outcomes between the Eleventh and D.C. Circuits under divergent standards of review was not anomalous. Reviewing the same interim rule regarding SORNA retroactivity, the Sixth Circuit in *Cain* also began by explaining that "the Government's burden to show that good cause exists is a heavy one—the good cause exception is 'narrowly construed and only reluctantly countenanced.'"[296] It then cited nearly identical flaws as the D.C. Circuit did with the Attorney General's good cause rationale: Congress's tacit sanction of a delay period, and the Attorney General's own delay, belied the Attorney General's claim of emergency.[297] The court concluded that the "conclusory speculative harms the Attorney General cites are not sufficient."[298] In dissent, Judge Griffin castigated the majority for its apparent de novo review.[299] He observed that "because the Attorney General has been granted the authority to decide whether good cause exists," that decision should be reviewed under the arbitrary-and-capricious standard.[300] Turning to the facts,

291. *Ross*, 848 F.3d at 1132 (citing Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014)).

292. *Id.* at 1132-33.

293. *Id.* at 1132.

294. *Id.* at 1133.

295. *Id.*

296. United States v. Cain, 583 F.3d 408, 420 (6th Cir. 2009) (quoting Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 754 (D.C. Cir. 2001)). Though the Sixth Circuit appeared to apply a version of de novo review, it did not formally announce a standard. *See id.* at 420-22. That practice underscores the unpredictability surrounding which standard courts apply. While the majority may have applied the better standard in this case, it failed to provide clarity for future courts. Indeed, the Sixth Circuit has still not adopted a standard, and the scope of judicial review of good cause in that circuit may depend on which panel hears a given case.

297. *Id.* at 421.

298. *Id.*

299. *See id.* at 434 n.4 (Griffin, J., dissenting) ("It appears that the majority has reviewed de novo the Attorney General's finding of good cause.").

300. *Id.* ("Under the APA, our authority to review an agency decision is limited to a determination whether it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' . . . . In my view, because the Attorney General has been

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Judge Griffin reasoned that the Attorney General "did comply with the APA requirement of incorporating the finding of good cause and a summary of the good cause justification within the interim rule."[301] Applying the deferential arbitrary-and-capricious standard, he concluded that because the Attorney General's "explicit rationale demonstrates good cause," he would hold that the interim regulations were properly promulgated.[302]

These opinions reflect the stark contrasts in how the good cause analysis proceeds under each standard. A court applying the arbitrary-and-capricious standard "'must not substitute [its] judgment for that of the agency' but 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"[303] Under that standard, the majority's analysis in *Dean* and the dissent's in *Cain* may well be correct. The Attorney General's proffered reasons at least demonstrated consideration of the appropriate factors, and thus the invocation of good cause may not have been clear error. But that deferential approach is incorrect.[304] And beyond mere doctrinal impropriety, the error is important precisely *because* these divergent conclusions might be warranted under the more deferential approach.

The analyses in *Ross* and *Cain* provide insights into how courts should apply this Note's proposal going forward. Those courts examined the agency's justifications and made independent determinations about whether they were supported by the record. And they agreed that Congress's delegation of regulatory authority without waiving notice-and-comment requirements undercut agency appeals to implicit waiver.[305] They similarly noted the Attorney General's seven-month delay in promulgating the regulations, which further cast doubt on its claims of urgency.[306] That careful testing of arguments against the record is not foreign to appellate courts. Indeed, it is at the heart of much of what judges do when they engage in de novo review of a lower court ruling.[307]

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granted the authority to decide whether good cause exists, judicial deference should be afforded the decision." (quoting 5 U.S.C. § 706(2)(A))).

301. *Id.* at 434.

302. *Id.* at 434-36 (quoting United States v. Hernandez, 615 F. Supp. 2d 601, 612-13 (E.D. Mich. 2009)).

303. *Id.* at 434 n.4 (quoting Phila. Citizens in Action v. Schweiker, 669 F.2d 877, 886 (3d Cir. 1982)).

304. *See supra* Part III.A.

305. *See* United States v. Ross, 848 F.3d 1129, 1131-32 (D.C. Cir. 2017); *Cain*, 583 F.3d at 420-21.

306. *See Ross*, 848 F.3d at 1133; *Cain*, 583 F.3d at 421.

307. To be sure, these standards may not be theoretically identical. *See, e.g.*, Zaring, *supra* note 221, at 153 n.67 (explaining that, "at least in theory," administrative standards of

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The D.C. and Sixth Circuits' similar treatment of the Attorney General's good cause assertion suggests that a uniform de novo standard would enhance judicial consistency and predictability. The Third,[308] Fourth,[309] Fifth,[310] Eighth,[311] Ninth,[312] and Eleventh[313] Circuits applied different standards in reviewing the same regulations to reach a variety of conclusions for an array of reasons. But the only courts to apply de novo review—either explicitly or impliedly—reached the same conclusions with remarkably similar reasoning.[314]

These cases support the hypothesis that more clarity regarding the degree of deference to agency assertions of good cause will help to standardize judicial review and to resolve some of the substantive uncertainty surrounding the exception's scope. For example, in cases involving statutory deadlines, courts should examine the nature of the deadline and whether agencies created an "emergency" through their own delay. And in cases involving claims that notice and comment would trigger strategic action, courts should scrutinize—based on the record before them—how a comment period would affect the conduct of sophisticated actors as well as the benefits of preempting strategic action.

Inevitably, reviewing claims of good cause will be a fact-intensive inquiry. The hints offered in the cases above do not begin to cover all future factual permutations. But they confirm the importance of the standard of review for judicial evaluations of good cause. They also provide guidance for making de novo review workable and consistent. It may be impossible to precisely enumerate the factors relevant to evaluating the substance of future good cause assertions. But that difficulty raises the stakes of selecting a standard of review that is consistent and adaptable without giving agencies reason to skip the APA's procedural requirements merely because they can get away with doing so. This Note's proposal does precisely that.

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review do not perfectly match the standards used for appellate review of trial courts). But "it is by no means clear that these doctrinal differences are strictly observed." *Id.* at 143 n.23. In any event, nondeferential review of trial court rulings in practice likely bears enough similarities to nondeferential review of agency determinations in order to provide reviewing courts with guidance about how to apply that standard of review.

308. United States v. Reynolds, 710 F.3d 498, 502-03 (3d Cir. 2013).

309. United States v. Gould, 568 F.3d 459, 469-70 (4th Cir. 2009).

310. United States v. Johnson, 632 F.3d 912, 928 (5th Cir. 2011).

311. United States v. Brewer, 766 F.3d 884, 887-88 (8th Cir. 2014).

312. United States v. Valverde, 628 F.3d 1159, 1162 (9th Cir. 2010).

313. United States v. Dean, 604 F.3d 1275, 1278 (11th Cir. 2010).

314. *See supra* notes 290-95 and accompanying text.

Conclusion

The foregoing discussion provides a novel entry point into conversations about the proper role of the federal courts relative to the other branches of government in the administrative law context. Questions regarding the appropriate relationship between Article III courts and executive agencies acting pursuant to authority delegated by Congress have been most salient in debates about the legitimacy of other deference doctrines—most notably *Chevron* and *Auer*.[315] But similar questions regarding the separation of powers and the relative strengths and functions of the courts are also central to judicial review of administrative *procedure*. Close examination of the good cause exception's early history, contemporary agency practice, the promises and pitfalls of extrajudicial oversight, and inconsistent judicial review demonstrates the delicate balance between the branches that lies at the core of rulemaking procedures.

Since the APA's adoption in 1946, courts have struggled to reconcile the capacious good cause exception with the statute's carefully calibrated procedures for promoting participation and deliberation.[316] The circuits inconsistently interpret both what good cause means[317] and the appropriate level of deference to afford an agency's claim of good cause.[318] This Note argues that the best solution to that muddle is to focus on the standard of review. Specifically, courts should give no deference to an agency's assertion of good cause. Consistent application of a de novo standard—which is dictated by the APA's text, structure, and objectives—will curtail the most egregious abuses of the exception without imposing counterproductive rigidity.

This Note's proposal is a modest one. It is also one that could be easily adopted and is likely to have real impact. The time is ripe for courts to reexamine their good cause jurisprudence and reclaim their interpretive role to ensure that agencies do not turn a narrow procedural exception into an escape clause. Eliminating the unwarranted equivocation and inconsistency regarding which standard of review to apply to assertions of good cause is an important step toward doing so.

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315. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 381-82 (1986); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654-60 (1996); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833 (2001); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2074 (1990).

316. *See supra* Part I.B.

317. *See id.*

318. *See supra* Part I.C.