THE C. BOYDEN GRAY
Center for the Study of the Administrative State
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# Administrative Law Consequentialism: A Response to Vermeule on Emergencies

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CSAS Working Paper 21-10

*Public Health: Regulation, Innovation, and Preparation*

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# Administrative Law Consequentialism: A Response to Vermeule on Emergencies

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The Constitution places the president as the nation's chief law enforcement officer. As such, the president's discretion in how to implement and enforce the law is not generally subject to judicial review or political oversight even as the Constitution regulates the acts of federal officials once an enforcement decision is made. But this picture becomes more complicated when considering the advancement of modern regulatory administration. Our law categorizes federal administrative agents as different in kind from federal enforcement officials. And yet for the regulated person (and those who counsel him) investigations and orders from administrative agencies present as "enforcement" in type (one hires a "white collar" defense lawyer) or substance, where it bodes similar costs, consequences and penalties for a target. Unitary executive theorists have long held that the holding in *Humphrey's Executor*, distinguishing administrative agencies from presidentially-supervised departments by deeming administration as non-executive and therefore non-law enforcement in nature, has been effectively reversed by the courts and practitioners. In this sense, all executive branch enforcement of statutes, administrative, civil, or criminal, is constitutional law enforcement and therefore subject to presidential supervision and control. This revised picture of the administrative state challenges assumptions by scholars about legislative delegation and political control by raising the specter that delegation is unconstitutional even with "intelligible principles" ascribed to it. And what might appear to be delegation in fact is simply authorization, by law, within the law enforcement branch's purview. Such a state of affairs lets the administrative state have its cake and eat it too, for the regulatory enforcement agent is suddenly entitled to qualified immunity protection for his official enforcement acts while also exempt from constitutional procedures attendant to traditional law enforcement investigations. And as the president's inherent constitutional discretion over law enforcement expands in scope, the line demarcating Congress's power to investigate political acts via impeachment from Congress's power to monitor regulators implementing legislative powers via the oversight power is suddenly blurred. The expanded unitariness of presidential administration may only appear to advance executive strength, for congressional oversight responsively extends beyond the monitoring of delegated power to target political officials for political purposes, diluting executive discretion as a result. No statute clarifies whether and when such line blurring is justified or otherwise distinguishes a law enforcement agency occupied by agents with badges and guns from a purely legislative one occupied by civil servants with advanced degrees. And yet our administrative law still hangs together. Rather than seek to narrow the breadth of governing principles that structure our constitutional jurisprudence in this area, my more modest interest is interrogating how our administrative law appears to function notwithstanding the lack of a singularly applicable law or decision-maker governing the complex possible circumstances. This inquiry is what concerns the legal thought of German jurist Carl Schmitt and American administrative law scholar Adrian Vemeule's treatment of Schmitt.

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[†] Director, Trust Ventures and PhD candidate, George Washington University. I am grateful to the participants in the research roundtable on *Public Health: Regulation, Innovation, and Preparation* sponsored by the C. Boyden Gray Center for the Study of the Administrative State, and particularly the helpful feedback from Adam White, Erika Lietzan, Andrew Torrance, Patricia Zettler, Ana Santos Rutschman, Dan Troy, and Tony Mills.

This essay responds to Professor Adrian Vermeule's hypothesis (and challenge for empiricists) in "Our Schmittian Administrative Law" that post 9/11 lower courts, in administrative law matters, are more deferential to the administration. Using novel data combined with quantitative methods, I find substantial evidence to reject Vermeule's hypothesis. I then explore the implications of that rejection to Vermeule's broader theories about the American system of administrative law. I draw on the empirical political science literature concerning political power, interest groups, delegation and oversight to interpret model case studies in our administrative law to argue that our administrative law achieves legal formalism without succumbing to indeterminacy in the ways predicted by Schmitt.

My contention is that the political features of American administrative law, beyond the Administrative Procedure Act (APA) and its judicial interpretation, ensure both legality – where legal rules can accommodate exceptions to norms – and legitimacy – legal rules are not employed arbitrarily. What we observe is that our administrative law involves a robust cross-institutional dynamic: (1) congressionally-originated statutes empower interest groups to petition for federal judicial review of administrative decisions, (2) federal judicial decisions are constrained by the issues presented by the interest groups, (3) because precedent serves to codify statutory and regulatory interpretations, judicial decisions function with statutory force, and (4) both presidents and Congress can respond to judicial opinions through oversight of agencies and programs. These political features, where both political officials and courts can provide normative content to rules through enactment, adjudication, and oversight, ultimately reveal how our federal administrative law, inclusive of discretion, is rule-constrained, for administrative rules function as both formal procedures and consequentialist norms directed toward policy outcomes.

I explore the particular implications of this principle to the phenomena of enforcement discretion by administrative agencies. Because administrative agencies like the Food and Drug Administration (FDA) have been categorized differently in our administrative law from law enforcement departments like the Department of Justice, the constitutional procedures regulating traditional law enforcement do not apply to agencies like the FDA. I therefore apply the methods used and their implications for administrative law to the present national emergency facing the United States and the world: the coronavirus pandemic. I argue that our consequentialist administrative law binds administrative policies of enforcement discretion by rules. This principle directly applies to the FDA's guidance on its temporary non-enforcement against certain unapproved medical devices which nevertheless are low-risk yet beneficial to consumers during the pandemic.

This essay proceeds as follows: in Part I, through a review of the relevant literature, I clarify what it means for our administrative law to be "Schmittian" as Vermeule understands Schmitt; in Part II, I empirically test a specific hypothesis supposed by Vermeule predicting that sub-Supreme Court judges will be more deferential to the administration on national security matters post the 9/11 emergency. I contribute to the legal literature by collecting a novel set of data limited to judicial review of national security claims by the executive branch and use a logistic treatment effects model to test whether the intervention of the 9/11 emergency causally affected judicial deference in national security cases. Based on the empirical model, 9/11 did not have a statistically significant effect on deference. This indicates the plausibility that contra Vermeule, our administrative law is not arbitrarily applied in the case of the exception. I then discuss the implications of my failure to reject the null hypothesis that 9/11 did not significantly change judicial deference in Part III, and through case studies and data, I identify a number of

political features of American administrative law, including the overdispersion, yet underenforcement, of rules that place interest groups as a central fulcrum in our administrative law. The claim is that American administrative law achieves both legality and legitimacy in being overdetermined by interest group politics. In Part IV, I extend the results of the quantitative model and observational examples to argue that administrative exercises of enforcement discretion are only legitimate if publicly justified by rules with the force of law. Part V assess this argument in the context of the FDA's exercises of enforcement discretion during the 2020 public health emergency. Part VI briefly concludes, suggesting that the rule of law ideal in American administrative law does not succumb to the Schmittian critique.

## I. What does it mean for Administrative Law to be "Schmittian"?

Administrative law scholars have increasingly incorporated German jurist Carl Schmitt's constitutional critique of liberalism as a lens for understanding administrative law phenomena. For Schmitt, legal liberalism, to the extent it subscribes to a concept of law whereby political decisions are authorized in publicly available rules of law, fails as a theory due to the fact that its executives during states of emergency will make decisions with no formal basis in law and yet no liberal theory can successfully justify these exceptions.[1] On a granular level, recent Americanists have described agency adjudication as "ruled by a norm of exceptionalism."[2]

To say that American administrative law is "Schmittian" is to say that the image of law as rule-bound fails in cases where the executive branch exercises discretion to permissibly violate legal rules during national emergencies. That liberal democracy tolerates or permits rule infractions during emergencies is suggested as evidence that the rule of law, and constitutional liberalism, fails to hold as a governing theory. Professor Adrian Vermeule argues that any "aspiration to extend legality everywhere, so as to eliminate the Schmittian elements of our administrative law, is hopelessly utopian."[3] For Vermeule, the failure of legality is evident when courts rely on emergencies to "increase deference to administrative agencies."[4] Such deference is possible because of "open-ended standards" in administrative law that aspire to direct courts to constrain executive action but are substantively ineffective. These feckless legal standards result from "grey holes" in the law. As applied to administrative law, grey holes, like the "arbitrary and capricious" standard for judicial review under the Administrative Procedure Act (APA), "represent adjustable parameters that courts can and do use to dial up or dial down the intensity of judicial review" in emergency circumstances of war or threats to security.[5] Judicial review becomes "more apparent than real."[6]

The relevance of German state thinker Carl Schmitt arises because of the concern that political circumstances, not the legal code itself, best governs how the law is applied.[7] Schmitt's implication, according to Vermeule, is that "[t]he legal systems of liberal democracies cannot hope to specify either the substantive conditions that will count as an emergency, because

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[1] CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY, trans. George Schwab ([1922] 1985) at 3.
[2] Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 19 Wisc. L. Rev. 1351 (2019).
[3] Adrian Vermeule, *Our Schmittian Administrative Law*, 122 Harv. L. Rev. (2009) at 1097.
[4] *Id*.
[5] *Id*. at 1118.
[6] *Id*.
[7] For Schmitt the rule of law is fanciful because it replaces a "hierarchy of norms" with "a hierarchy of concrete people and instances." CARL SCHMITT, LEGALITY AND LEGITIMACY (1993) at 53.

emergencies are by their nature unanticipated, or even the procedures that will be used to trigger and allocate emergency powers, because those procedures will themselves be vulnerable to being discarded when an emergency so requires."[8] While not stated explicitly by Vermeule, Schmitt's view is that when the chief executive (or administrative state) has the discretion to determine both the existence of an emergency and how to address it, the chief executive remains the only legitimate sovereign.[9]

In the context of the public law, Schmitt presents two problems: first, lawmakers cannot craft rules that are sufficient for governing in emergency situations; second, as such, legislators therefore anticipate the need for executive branch discretion (during emergencies or otherwise) by creating "vague standards and escape hatches . . . in the code of legal procedure[.]"[10] For Vermeule, statutes governing administrative action can, at most, specify which official is authorized to act during an emergency but cannot foretell those sets of facts that justify an exception from the general rule.[11] This is why Vermeule concludes that "exceptions" to the general rules that delegate discretion to judges or administrative officials are built into the fabric of administrative law.[12] In practice, Vermeule shows how in a host of judicial decisions interpreting the Administrative Procedure Act (APA), courts have simply excluded certain agency conduct from the scope of the APA without even analyzing whether the conduct was excepted or excluded under the act, reflecting the existence of "black holes".[13] And for those administrative law decisions where agency conduct is subject to the APA, Vermeule argues that otherwise stringent standards of review and exceptions are relaxed in the face of emergency, thus reflecting "grey holes".[14]

Vermeule's reasoning also indirectly responds to Jurgen Habermas, the legal and political theorist who has aggressively defended legal liberalism against Schmitt. Habermas argues that liberal democratic law is both formalistic and substantive by involving a distinction between principles and rules.[15] Further, judges resolving public law disputes can avoid merely deferring to the executive when rules are underspecified because they rely on liberal democratic background principles in interpreting and applying statutes.[16] Vermeule suggests that the idea that "judges would draw upon thick background principles of legality [e.g.,] principles of

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[8] Vermeule, *supra* note 3 at 1099-1100. Here, Vermeule is paraphrasing Schmitt's statement in POLITICAL THEOLOGY that "the precise details of an emergency cannot be anticipated" by legal norms in advance of an emergency. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY, trans. George Schwab, 6 (2005[1934]).

[9] Schmitt, POLITICAL THEOLOGY, *supra* note 8 at 7 ("[the] Sovereign is he who decides on the exception").

[10] *Id*. at 1101.

[11] *Id*. at 1103 (citing WILLIAM SCHEUERMAN, CARL SCHMITT: THE END OF LAW (1999)).

[12] *Id*. at 1104.

[13] *See* discussion at *id*. at 1107-1112. For instance, the APA's black holes are its general exclusion of uniquely presidential functions and its exceptions for military authorities and functions.

[14] *Id*. at 1123. Note that Vermeule argues that U.S. federal administrative law intentionally embraces "grey holes" in its "ordinary" (as opposed to "emergency") functioning. *See id*. at 1134 ("[g]rey holes arise because administrative law in any modern regulatory state cannot get by without adjustable parameters. Such parameters are the lawmakers' pragmatic response to the sheer size of the administrative state, the heterogeneity of the bodies covered by the APA, the complexity and diversity of the problems that agencies face and of the modes of administrative action, and (related to all these) the lawmakers' inability and unwillingness to specify in advance legal rules or institutional forms that will create a thick rule of law in all future contingencies, a core Schmittian theme").

[15] Jurgen Habermas, BETWEEN FACTS AND NORMS (1996), 172.

[16] *Id.* at 218 (arguing that in adjudication involving government authority, open texture in normative principles does not undermine the public and democratic expectations of adjudication).

procedural regularity and fairness" is "a hopeless fantasy".[17] Vermeule's view is most strongly stated in the following terms: "it is an inescapable fact that judges applying the adjustable parameters of our administrative law have upheld executive or administrative action on such deferential terms as to make legality a pretense. In such cases, judicial review is itself a kind of legal fiction and the outcome of judicial review is a foregone conclusion - not something that is compatible, even in theory, with the banal liberal-legalist observations that administrative law contains standards and permits deference."[18]

## II. Do "Grey Holes" in the Law Enhance Executive Discretion?

The Schmittian theory of law during emergencies is that governments sidestep blackletter rules in order to exercise necessary political discretion. Adrian Vermeule theorizes that in the United States, lower federal courts permit such sidestepping.[19] In the congressional context, the counterfactual might simply mean that congressional oversight is a political, rather than legal, kind of activity. But scholars and state thinkers have argued that in the context of national emergency, enforcement of legal rules are suspended in service of greater deference to executive branch discretion. This argument is most vehemently defended by Vermeule, who has argued that in the context of emergencies, courts fill "grey holes" in the law in ways that grant greater deference to executive branch decisions.[20] As I will explore in depth in Part III, the premise that rules underspecify emergency situations is insufficient to justify the existence of grey holes. An additional assumption is needed, such that legal rules are underinclusive because the dispersion of rules will never be large enough to cover the diversity of circumstances for which rules could apply, thus permitting judges to fill gaps in rules. Without this empirical assumption, Vermeule's argument is susceptible to invalidation on its own terms. For instance, if there were an oversupply of statutory solutions for each possible issue that arose in a justiciable regulatory dispute, judges would be forced to weigh and reject text-based interpretations rather than rely on extra-textual arguments. And if the assumption is wrong because there is evidence that rules are sufficiently numerous to apply or cover black or grey holes in the law yet fail to be enforced, then Vermeule's greater project becomes seriously undermined as then legal holes become a judicial construct. Taking empirical account of the arguments, then, is essential to the legal theory Vermeule employs.

Vermeule clarifies the empirical hypothesis I seek to test: "lower courts after 9/11 have applied the adjustable parameters of the APA – 'arbitrariness,' 'reasonableness,' and so on – in quite deferential ways, creating grey holes in which judicial review of agency action is more apparent than real."[21] Vermeule made the prediction that after 9/11, lower federal courts, that is sub-Supreme Court, would be more deferential to the federal government in "emergency" cases, particularly ones raising national security concerns. Vermeule argues that "[i]t is logically possible that judges might exercise vigorous review during perceived emergencies, but it is institutionally impossible for them to do so."[22] My goal is to test this hypothesis presented by

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[17] Vermeule, *supra* note 3 at 1105.
[18] *Id*. at 1106.
[19] Adrian Vermeule, *Our Schmittian Administrative Law*, 122 Harv. L. Rev. 1095, 1097-1098 (2009).
[20] *Id*. at 1101.
[21] *Id*. at 1097.
[22] *Id*. at 1135. Vermeule further explains, at *id.*, "[j]udges defer because they think the executive has better information than they do, and because this informational asymmetry or gap increases during emergencies. Even if the judges are skeptical that the executive's information really is superior, or if they are skeptical of executive

Vermeule, particularly his claim that "as judicial perception of a threat increases, deference to agencies increases."[23]

A. Data and Methods

I have built a novel set of data on all merits decisions involving exemption 1 of the Freedom of Information Act (FOIA), which permits the government to withhold information classified "under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is "in fact properly classified pursuant to such an Executive order."[24] Exemption 1 cases are the most common national security cases subject to review under the Administrative Procedure Act (APA), which FOIA amended. That FOIA contains exemptions, exclusions and provides a private right of action for unlawful withholdings by the government creates a useful observational scheme for the sorts of issues Vermeule finds relevant in identifying grey holes. Further, the government's interest in national security secrecy, particularly after 9/11, would well-fit the central expectations of Vermeule's hypothesis as above-articulated.

A couple of comments on the methodology. First, in coding "deference" I would count any partial summary judgment to the government or partial reversals on appeal that gave appellant some relief as government losses ("0"), else they were government wins ("1"). Given Vermeule's expectations, it makes little sense to expect that judicial threat perception would be addressed by only partially deferring to the government. In other words, partial deference is a loss for the government during an emergency. Second, if national security was at issue but the case was decided against the government on threshold questions like whether *in camera* review was necessary or affidavits were sufficient, I counted those decisions as a government loss. In other words, I coded 'deference' in such a way as to create a presumption against the government because I'm trying to avoid any error or bias that measures something other than what Vermeule predicted: federal judges voting deferentially toward the government after an exogenous shock in the form of a terror attack. Furthermore, threshold issues present fertile grounds for deference-leaning judges to craft grey holes particularly if case law on a merits question would restrain more engaged interpretations.

While a substantial portion of the exemption 1 FOIA cases are appealed, a coding scheme where not all district-level data has an appellate-level value could significantly bias any model. A number of features of the data explain how I carefully pared the data by coding only some appellate cases while dropping certain district court decisions to avoid any panel-level effects influencing my model: first, and perhaps unique to the FOIA context, the government did not appeal its district court losses so those cases in the sample never have corresponding appeals; second, because of this phenomenon, when a FOIA plaintiff appeals a district court loss and wins on appeal, the initial government win should be considered a loss (indeed as a matter of law it was in error) and therefore I drop these reversed district court deference decisions from the sample; third, in order to avoid homoskedasticity in the data, I drop appellate affirmances of district court decisions for the government. This coding choice effectively corrects what would

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motivations, they are aware of their own fallibility and fear the harms to national security that might arise if they erroneously override executive policies. They also fear the delay and ossification that may arise from judicial review, and that might be especially harmful where time is of the essence").

[23] *Id.* at 1143.

[24] 5 U.S.C. § 552(b)(1).

otherwise be a problematic hierarchical model in which panel decisions were viewed as independent from district court decisions, which *de novo* review logically prevents.

I hand coded each case by date, whether the case occurred before or after September 11, 2001 (the emergency situation), whether the opinion deferred to the federal government on national security (the outcome variable, 'y' in my equation), and whether the decision was by a court within the D.C. Circuit to model any biases on deference that might occur due to the fact that most administrative law cases are brought within the D.C. Circuit. This allows me to test a potential sub-hypothesis: whether administrative law expertise leads to less deference in cases of emergency. In the 296 unique exemption 1 cases I studied from 1971 (when the first exemption 1 case appears) to the present, federal courts defer to the administration's secrecy argument in 72.3% of all cases. And deference by the courts has increased after 9/11 to 74.10%. But that increase is not statistically significant when compared to pre 9/11 deference, for in the 157 exemption 1 cases decided by lower courts prior to 9/11, the courts deferred to the administration in 70.7% of cases. The dependent variable (deference) is binary and my models must aim to measure the effect of 9/11 on the likelihood of judicial deference to government secrecy claims. I also suspect that any effect on deference varies with whether the decision was by a judge or a panel of judges within the D.C. Circuit given their unique expertise in administrative law matters. I discuss my modeling choices and their interpretation in the next section.

B. Empirical Results and Discussion

Given deference is a binary (1 or 0 event) dependent variable, I start with a logistic regression model which predicts the likelihood ratio (log-odds) of the dependent variable occurring (in this case, deference) given each unit increase or occurrence in the independent variables. The results are shown in Table 1. Neither of the log odds of the coefficient estimates (increased likelihood of deference post 9/11 but decreased likelihood of deference by D.C. federal courts) reveal a statistically significant ($p<.05$) relationship with deference so we would fail to reject the null hypothesis that there is no association between the 9/11 attack and deference to national security secrecy by the executive branch.

**Table 1**: Logistic Regression Model: Effects of 9/11 on Judicial Deference to the Executive

| Likelihood of deference | Coef. | St.Err. | t-value | p-value | [95% Conf | Interval] | Sig |
|---|---|---|---|---|---|---|---|
| Period (pre v. post 9/11) | .187 | .262 | 0.71 | .476 | -.327 | .701 | |
| Federal courts within D.C. Circuit | -.346 | .272 | -1.27 | .203 | -.878 | .186 | |
| Constant | 1.087 | .243 | 4.48 | 0 | .612 | 1.563 | *** |
| Mean dependent var | | 0.723 | SD dependent var | | | 0.448 | |
| Pseudo r-squared | | 0.006 | Number of obs | | | 296.000 | |
| Chi-square | | 2.076 | Prob > chi2 | | | 0.354 | |
| Akaike crit. (AIC) | | 353.277 | Bayesian crit. (BIC) | | | 364.348 | |

**** p<.01, ** p<.05, * p<.1*

Vermeule's claim that our legal system cannot specify the substantive conditions that will count as an emergency or the procedures for allocating emergency powers means that emergencies like 9/11 function as exogenous shocks to our legal institutions, thus providing a

quasi-experimental condition for making causal inferences about the effects of emergencies on our legal institutions. I conceive of the event of the 9/11 attack as a treatment applied to the sample of judges deciding exemption 1 cases on 9/11 and thereafter. Because case assignments to district court judges or panel selection for appellate judges is random (or assumed random), the parameter error (standard deviation of the sample) for judges hearing exemption 1 disputes after 9/11 would be uncorrelated with the likelihood that a given judge defers to the government's secrecy claims. Further because 9/11 was itself a random event (at least as it affected federal courts) the treatment is exogenous to the sample of judges deciding exemption 1 cases on or after 9/11. The functional form of a treatment effects model is: $\mathbf{DEFERENCE_i = \beta_0 + \beta_1 DCCIRCUIT_i + \beta_2 TREATED_i + \beta_3 TREATED_i DCCIRCUIT_i + e_i * DEFERENCE}$ and where the model examines the independent effects of the exogenous shock of 9/11 and administrative law expertise among judges, while also measuring the effects of interacting administrative law expertise and 9/11 on deference. Unlike the first probability model, a treatment effects model can measure the unique causal effects of the 9/11 attack on federal courts within the D.C. Circuit by regressing the difference in variation between the D.C. Circuit courts and all other federal courts as a result of exposure to the 9/11 attack. The results are shown in Table 2a.

**Table 2a**: Treatment Effects Model of 9/11 on D.C. Circuit Deference

| Likelihood of deference | Coef. | Std.Err. | z | P>z | [95%Conf. | Interval] |
|---|---|---|---|---|---|---|
| Period*federal courts within D.C. Circuit | | | | | | |
| 0 | -0.102 | 0.215 | -0.470 | 0.635 | -0.524 | 0.320 |
| 1 | -0.342 | 0.245 | -1.390 | 0.164 | -0.822 | 0.139 |
| Period (pre v. post 9/11) | | | | | | |
| 0 | 0.605 | 0.165 | 3.660 | 0.000 | 0.281 | 0.928 |
| 1 | 0.869 | 0.200 | 4.340 | 0.000 | 0.477 | 1.262 |

The effects of 9/11 when interacted with the effects of D.C. federal courts on deference are not statistically significant. In looking at the average treatment effect on the entire population of judicial decisions and the specific population of within-D.C. Circuit decisions, in order to measure the difference pre- versus post- treatment, we also cannot reject the null that 9/11 had no effect on deference. The results of these model specifications are displayed in Tables 2b and c.

**Table 2b**: Average Treatment Effect of 9/11 on all Judicial Decisions

| Margin | Std.Err. | z | P>z | [95%Conf. | Interval] |
|---|---|---|---|---|---|
| 0.037 | 0.052 | 0.720 | 0.471 | -0.064 | 0.139 |

**Table 2c**: Average Treatment Effect of 9/11 on Decisions within the D.C. Circuit

| Margin | Std.Err. | z | P>z | [95%Conf. | Interval] |
|---|---|---|---|---|---|
| 0.036 | 0.052 | 0.680 | 0.494 | -0.067 | 0.138 |

Finally, as a robustness check and because the data contains both expert (within-D.C. Circuit) judges and non-expert judges and where members of (decisions within) each group are not exposed to the treatment (pre-9/11) as well as exposed (post-9/11), I used a causal inference technique called difference-in-differences to model effects of the difference between the treated and non-treated groups as they varied between D.C. federal courts and non-D.C. federal courts in order to model potential causal effects with an additional technique. The results are displayed in Table 3.

**Table 3**: Difference-in-Differences Model on Treatment Effects on Judges Before v. After 9/11

Number of observations in the DIFF-IN-DIFF: 296

| | Before | After | |
|---|---|---|---|
| Control: | 66 | 52 | 118 |
| Treated: | 91 | 87 | 178 |
| | 157 | 139 | |

| Outcome var. | Deference | S. Err. | t | P>t |
|---|---|---|---|---|
| Before | | | | |
| Control | 0.727 | | | |

| | | | | |
|---|---|---|---|---|
| Treated | 0.692 | | | |
| Diff (T-C) | -0.035 | 0.073 | -0.48 | 0.630 |
| After | | | | |
| Control | 0.808 | | | |
| Treated | 0.701 | | | |
| Diff (T-C) | -0.107 | 0.079 | 1.35 | 0.177 |
| Diff-in-Diff | -0.072 | 0.107 | 0.67 | 0.504 |

R-square: 0.01
* Means and Standard Errors are estimated by linear regression
**Inference: *** p<0.1

In the final causal model, we again cannot reject the null hypothesis of 9/11 having no effect on deference. The implication of these results is that lower court federal judges do not unmistakably defer to the executive even when presented with opportunities to fill black or grey holes and where constitutional deference to an administration's secrecy needs during an emergency would easily outweigh a citizen's right to access information.

C. Implications

These results indicate that when modeling causal effects of a terrorist attack on federal judges deciding executive branch arguments for an exception from disclosure on national security grounds, judges do not flex their discretion to rely on broad standards in the law as justifications to defer more substantially to the government. While the empirical results could be interpreted to support a number of theories, there are two clear findings from the results. First, that there were no statistically significant differences in deference before versus after the emergency means that legal rules were applied consistently throughout which means even if judges ratchet up grey holes in order to achieve a preferred policy outcome, they do so independent of the presence of an emergency. Importantly, if motivated reasoning by public law judges is a feature of liberal legal institutions in the normal case and the exception, alike, Schmitt's critique of the rule of law would fail to gain traction. Second, the data reflects that 9/11 did not alter the statistically observable differences in deference between courts within the D.C. Circuit and other federal courts. This finding supports a number of claims, which can be deduced from Figure 1.

**Figure 1**:

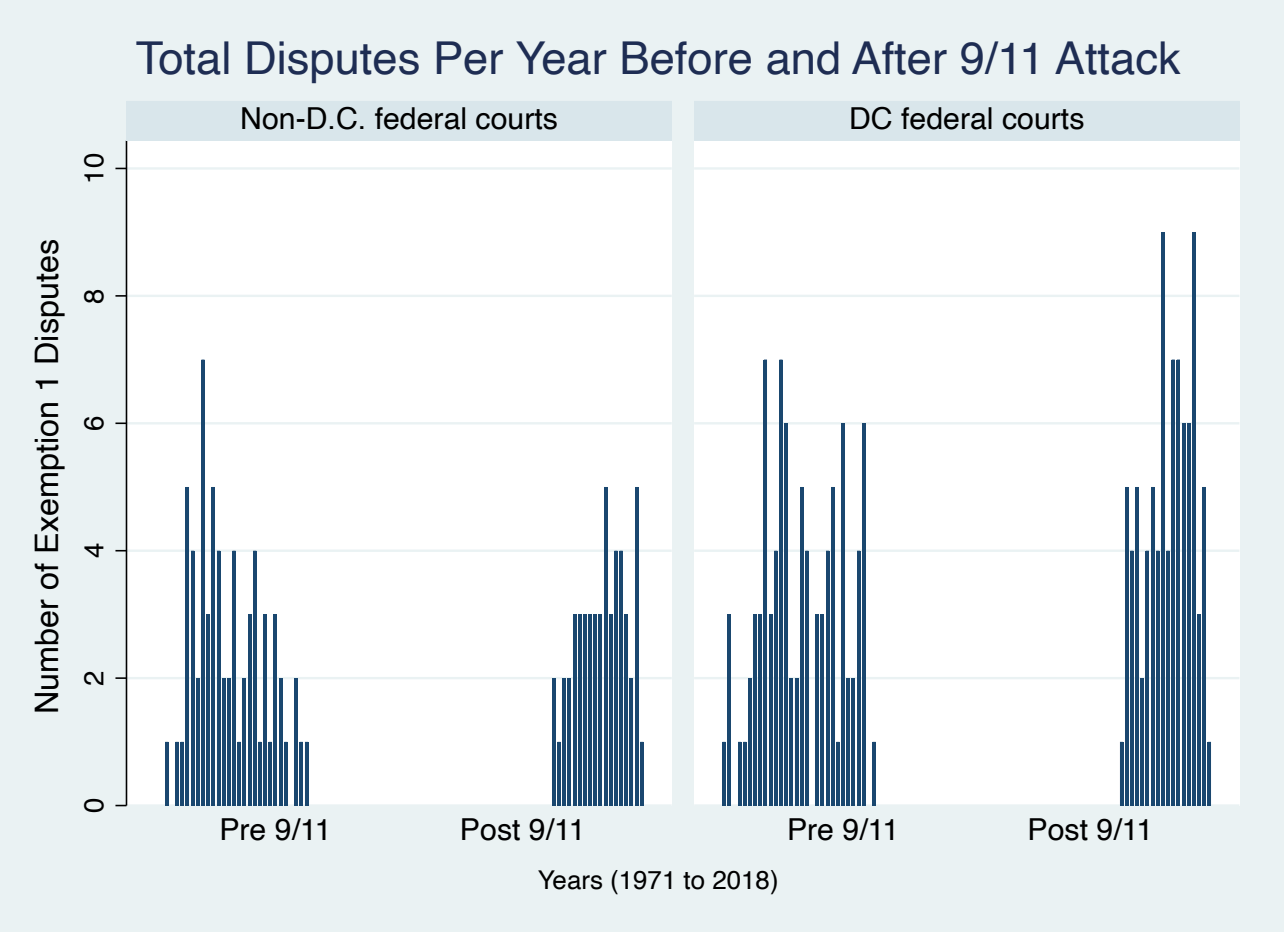


Figure 1 illustrates that prior to 9/11, the number of exemption 1 filings per year never exceeded around 7 per year in either the D.C. federal courts or the non-D.C. federal courts. But after 9/11, the exemption 1 filings in D.C. federal courts increased (reaching as high as 9 per year) while the number of exemption 1 filings outside of D.C. courts decreased (to a high of around 5). Even without graphically representing deference, the likelihood that disputes were filed in the D.C. federal courts after 9/11 appears potentially significant.

While the statistical evidence supports rejecting Vermeule's hypothesis, the parameter measures may be relevant for rethinking causal direction. Rather than Vermeule's hypothesis, *viz.,* that courts increase deference after an emergency, the data suggests the possibility that as the number of judicial decisions (both deferring and not deferring) increases in both D.C.-based and non-D.C. based federal courts, petitioners (those suing the government) may view D.C. courts as more favorable and determine the likelihood of accessing otherwise secret documents after 9/11 as higher in those courts. We can thus propose the following model (simply refactoring the variables from the Vermeule-informed model and changing the proposed causal direction): $\textbf{TREATED}_i\textbf{DCCIRCUIT}_i = \beta_0 + \beta_1\textbf{DISPUTECOUNTPERYEAR}_i + \beta_2\textbf{TREATED}_i\textbf{DEFERENCE}_i + \beta_3\textbf{DEFERENCE}_i\textbf{DCCIRCUIT}_i + \textbf{e}_i$.[25]

[25] This model is simply a transformation of $\textbf{DEFERENCE}_i = \beta_0 + \beta_1\textbf{DCCIRCUIT}_i + \beta_2\textbf{TREATED}_i + \beta_3\textbf{TREATED}_i\textbf{DCCIRCUIT}_i + \textbf{e}_i$*DEFERENCE, where I move interaction of treatment (sample of disputes exposed to 9/11 attack) with D.C.-based federal courts ($\beta_3$) to the dependent variable; move likelihood of deference ($y^{\hat{}}$) to

In order to run a model with these parameters that are interactions of original model variables, I create new variables representing these products so that we can think of the parameters as influencing the likelihood of future petitions by plaintiffs. The outcome variable is the product of two prior variables: whether a decision was before or after 9/11 (treatment) by whether the decision was in a D.C.-based federal court. This product is labeled "Post 9/11 D.C. filings" as it tracks the likelihood of treatment. The key independent variables are first, a product of government deference and the binary variable indicating before or after 9/11, which given 65% of its observations are null, I've labeled "Pre 9/11 deference"; second, a count variable of exemption 1 disputes per year; and third, the product of deference and the variable identifying disputes in the D.C. federal courts, which I've labeled "D.C. courts' deference". Given the goal is a model that can predict the likelihood that cases will be pursued in the D.C. federal courts after 9/11 (i.e., the likelihood or odds the value of the binary variable is '1'), we can use the logistic regression model form from Table 1. The transformed model is shown in Table 4.

**Table 4a**: Logistic Regression Model on Effects of Prior Judicial Deference on Likelihood of Filing in D.C. federal courts

| Post 9/11 D.C. filings | Coef. | St.Err. | t-value | p-value | [95% Conf | Interval] | Sig |
|---|---|---|---|---|---|---|---|
| Pre 9/11 deference | 1.906 | .312 | 6.11 | 0 | 1.295 | 2.517 | *** |
| Exemption 1 disputes/yr | .154 | .06 | 2.55 | .011 | .035 | .272 | ** |
| D.C. courts' deference | 1.494 | .313 | 4.77 | 0 | .881 | 2.107 | *** |
| Constant | -3.73 | .579 | -6.44 | 0 | -4.865 | -2.594 | *** |

| | | | |
|---|---|---|---|
| Mean dependent var | 0.294 | SD dependent var | 0.456 |
| Pseudo r-squared | 0.272 | Number of obs | 296.000 |
| Chi-square | 97.411 | Prob > chi2 | 0.000 |
| Akaike crit. (AIC) | 269.118 | Bayesian crit. (BIC) | 283.879 |

**** p<.01, ** p<.05, * p<.1*

The results show that my transforming the original model by creating new variables out of the same data, the parameter estimates affect the outcome variable with a high degree of statistical significance. Transforming the estimates into odds ratios, we see that the likelihood of exemption 1 filings occurring in the D.C. courts is increased by all the independent variables at a statistically significant level. However, because the new variables may be biased by the increase of null observations (Pre-9/11 multiplied by a deferential opinion is '0'), I need a model design as a robustness check where I can remove the potential biasing effects of the treatment and the D.C. courts (now outcome variables) in the parameters. In other words, a potentially debiased model will examine the effects of deference as it varies over the number of disputes on the likelihood that a case is filed after 9/11 in a D.C.-based federal court. Because I predict that prior deference by courts is endogenous to the decision by a petitioner to choose the less deferential D.C.-based federal courts and because deference is a binary (indicator) variable, and further predict that the total number of prior exemption 1 cases will only affect forum choice after 9/11 through deference (and not simply as a result of time passing (e.g. 'Year')), I use an

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independent variable parameters and interact with treated population ($\beta_2$); drop new (y) variable (D.C. federal courts) from the independent variable coefficients and have it factor with the error terms; construct new variable without adding new data that is a count variable of the number of exemption 1 disputes per year; and form new interaction between deference and D.C.-based courts ($\beta_3$).

instrumental variable design that is appropriate for endogenous indicators. The results are displayed in Table 4b, where I exclude from instrumentation the 9/11 effects and D.C. filings (the outcome variable) to ensure an unbiased relationship.[26]

**Table 4b**: Logistic Instrumental Variable Model on Effects of Prior Judicial Deference on Likelihood of Filing in D.C. federal courts

Instrumental variables regression Number of obs = 290
Wald chi2(2) = 11.98
Prob > chi2 = 0.0025
Root MSE = 32.097

| Post 9/11 D.C. filings | Coef. | Std.Err. | z | P>z | [95%Conf. | Interval] |
|---|---|---|---|---|---|---|
| Pre 9/11 deference | -58.254 | 38.186 | -1.530 | 0.127 | -133.097 | 16.589 |
| Year | 0.578 | 0.168 | 3.450 | 0.001 | 0.250 | 0.907 |
| _cons | -1117.971 | 321.717 | -3.480 | 0.001 | -1748.525 | -487.418 |

Instrumented: Pre 9/11 deference
Instruments: Year, Pre-/Post- 9/11, D.C. filings (excluded)
Average marginal effects from average index function

| | Post 9/11 D.C. filings |
|---|---|
| Exemption 1 disputes/yr. | .01981787 |
| Pre 9/11 deference | -1.1544751 |
| Year | .01146051 |
| _cons | -22.155812 |

The relevant values are the average marginal effects coefficients and since the number of exemption 1 disputes affects the likelihood of a post 9/11 D.C.-based federal court filing only through prior deference (endogenous and already assumed to be correlated with the outcome variable), the key is whether the exogenous regressor, "Year", is statistically significant in order to evaluate the marginal effects of the increase in exemption 1 disputes as they influence deference. Here, we see a statistically significant relationship and positive marginal effects of exemption 1 disputes on the likelihood of a post 9/11 D.C.-based federal court filing. This affirms the relationships observed in model 4a while developing a model that would be consistent even when factoring out the outcome factors to avoid potential bias concerns.

These empirical results present a strong counter-hypothesis to Vermeule's. While further empirical investigation is justified by the results, the results of model 4, when considered within the relevant political science literature in bureaucratic politics and congressional oversight, provides strong support for the following inferences:

(1) Our administrative law empowers interest groups to engage in strategic behavior. Administrative law disputes arise due to the legislative empowerment of regulated parties and their organized interests with judicial review rights which ripen through agency petitions. Those interests pursue their claims strategically, which is to say, they consider the past behavior of legislators and judges in making predictions for selecting which issues in which forums to pursue. Strategic choice by litigants depends upon a range of statutory options, for if rules or procedures regulating government action were limited in scope, we would fail to see the evidence of strategic litigation we observed in Model 4.

[26] The command I rely on is a program called sspecialreg developed by Christopher Baum and his colleagues. *See e.g.* https://www.stata.com/meeting/sandiego12/materials/sd12_baum.pdf.

Our administrative law, rather than maintaining holes or gaps in the rules, can be characterized by an overdispersion of legal rules and procedures. That is to say, no one regulatory dispute is resolved by reliance on the totality of germane rules and will always be rule-underinclusive.

(2) Because of overdispersion in administrative rules and remedies (procedures), interest groups engage in agenda setting: selecting which procedures to present to courts, which limits the range of legal issues to be resolved by the courts. The role of interest groups, then, has a constraining effect on judicial discretion through agenda control. Thus, interest groups maintain substantial administrative-political power by determining the questions presented before and the relevant legal rules to be decided by judicial decisionmakers.

(3) Because interest groups play a crucial role in setting the administrative law agenda, the fact that interest groups are strategic in seeking judicial relief (i.e., filing in district court within the D.C. Circuit versus a circuit with less regulatory expertise) in addition to pulling the fire-alarms that trigger congressional monitoring of the bureaucracy means that congressional oversight, in addition to judicial monitoring, is an avenue through which rules of law remediate administrative infractions. Importantly, the fact that the administrative law agenda is set by interest groups also means that those same rules on the books which are overdispersed are also underenforced, for interest groups may simply never raise certain procedural arguments.

(4) Our administrative law anticipates and resolves the exception because it creates the agenda setting conditions whereby regulated parties can pull congressional oversight fire alarms whenever judicial remedies are unavailing (and *vice-versa*). Further, the competing monitoring of our administrative law from both the courts and Congress permits agency infractions to be evaluated in two senses of legal validity: formal, or technical, validity of rules and consequential, or justification-based, validity of rules. In our system, legality is maintained because overseers from Congress and the courts exercise discretion to enforce against rule infractions based upon public policy justifications. Hence the rule of law does not depend upon the ability to anticipate emergency situations and provide rules that cover the exception but instead thrives when legal decisionmakers have the flexibility to enforce rules strictly as well as on the basis of public policy and where legislative nullification attends to failing to foresee the consequences of a given rule infraction or providing a legal justification on policy grounds that drifts from the policy preferences of Congress or the president. As such, and because anticipating consequences is subsumed under the rules which structure our administrative law, rule consequentialism forces democratic accountability when agencies make predictions about which policy choices will lead to political oversight where congressional and presidential monitoring to punish infractions establishes governing standards over the bureaucracy. At the same time, agencies and the courts are bound by judicial precedents which are treated by agencies as legally valid statutory and regulatory interpretations.

In the next section, I provide context for these inferences with reference to the political science literature in addition to recent political matters. The references to the academic literature and analysis of key cases will provide color to the causal inferences supported in Tables 4a & b and visible in Figure 1.

## III. Political features of American administrative law

Vermeule argues that legality fails in the context of the exception because rules cannot anticipate emergency situations. However, the empirical evidence suggests an alternative causal story. Rather than an insufficiency of rules to structure judicial decision-making, our administrative law has an oversupply of procedures; this oversupply of rules governing agency action permits interest groups to use legal challenges as an opportunity to select and apply which rules shape judicial review and test the salience of certain rules in providing a basis for striking down disliked agency decisions; third, that our administrative law is the result of strategic agenda-setting by publicly interested groups signifies how judicial discretion may be effectively cabined consistent with democratic norms. In this section, I highlight the political science literature that colors these inferences while being responsive to Schmitt and I highlight recent matters of bureaucratic infractions as illustrations of how these inferences operate in practice.

### A. Interest groups as sovereign: regulatory litigants and political monitors.

In the study of American politics, pluralism argues that political power is decentralized, where the government establishes conditions for interest groups to shape the policy-making process. [27] Nevertheless, even under pluralistic political theories, the question of political power was answered by who retained authority over decision making.[28] In the last half-century, scholars rejected this concept of political power, identifying the political agenda itself as fundamental to political power and the ability to control what issues get placed on the decision making agenda as more important politically than who has the ultimate authority to choose between alternatives.[29] Thus interest groups become politically powerful to the extent they can shape decision making agendas. Political scientists have argued that "[c]ourts, regulatory agencies, and congressional committees all require the presentation of policy proposals in specialized and arcane language, and all have complicated rules of formal agenda access. Hence, agenda entrance barriers will favor those able to master these rules or pay for specialists who do. Even with many venues, there remain substantial barriers to entry into the pluralist heaven."[30] Furthermore, scholars have observed interest group agenda setting as influential over judicial decisions.[31]

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[27] DAVID TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951).

[28] *See e.g.* ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY at 83 (1956) (recognizing that democracies inform policy through contestation and participation and that social norms are more important than institutional ones, for "[i]n the absence of certain social prerequisites, no constitutional arrangements can produce a non-tyrannical republic."). Note, here, that Dahl, like Schmitt, rejects the idea that legal formalism is central to the survival of democracy. Further, Dahl foresaw the relevance of agenda setting over decision making. *See id*. at 131-32 ("the disputes over policy alternatives are nearly always disputes over a set of alternatives that have already been winnowed down to those within the broad area of basic agreement.").

[29] E.E. SCHATTSCHENIDER, THE SEMI-SOVEREIGN PEOPLE (1960); Peter Bachrach & Morton Baratz, *The two faces of power*, 56 Am. Pol. Sci. R. (1962) at 947-52.

[30] Frank R. Baumgartner & Bryan D. Jones, *Agenda Dynamics and Policy Subsystems*, 53 J. of Pol. (1991) at 1071.

[31] Gregory Caldeira & John Wright, *Organized interests and agenda-setting in the U.S. Supreme Court*, 82 Am. Pol. Sci. R. (1988) at 1109-27.

For Schmitt, addressing interest group pluralism was crucial to his philosophical project. Schmitt argued that legal positivism, in discrediting the legal validity of state sovereignty,[32] legitimized the diffusion of political authority from a unitary authority to a "pluralist party-state" legally empowered to be "hostile" to the state.[33] Interest group scholars have argued that "[w]e may conceive of pluralist systems of governance as systems of institutionally-linked policy venues [which] give the opportunity for losers in one policy venue to search for more favorable venues elsewhere . . . [q]uestions of the distribution of political and economic power cannot therefore be considered without a discussion of the relative abilities of policy actors to manipulate image and venue."[34] Not only was Schmitt aware of Americanist scholarship on pluralism but he foresaw the American administrative law system where ideological groups are granted authority to obtain judicial review of actions of the executive branch.[35]

Schmitt's response to liberal pluralism is the claim that in times of emergency "the exception" reveals "the subject of sovereignty" as a single executive decision-maker.[36] For Schmitt, this sort of pluralism seeks to dissolve the "plural political unities" that represented the European nation-states, or, in the American context, the central governing role of the states, in favor of a pluralism defined as anti-state and with "universal and monistic concepts" concerning the unrestricted nature of participation in civil society.[37] Notably Schmitt did not reject the idea of civil society groups, for "[p]olitical unity can never be understood as absolutely monistic and destructive of all other social groups."[38] The issue is whether such pluralist groups had governing legitimacy.[39] Pluralists "aim not only to negate the state as the highest comprehensive unity, but above all to negate its ethical claim to be a different and higher sort of social relation

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[32] Schmitt, POLITICAL THEOLOGY, *supra* note 8 at 21 ("Kelsen solved the problem of the concept of sovereignty by negating it . . . That is in fact the old liberal negation of the state vis-à-vis law and the disregard of the independent problem of the realization of law").

[33] Schmitt, GUARDIAN OF THE CONSTITUTION, *supra* note **Error! Bookmark not defined.** at *id*.

[34] Baumgartner & Jones, *supra* note 30 at 1071.

[35] CARL SCHMITT, THE SITUATION OF EUROPEAN JURISPRUDENCE, 63 (1950).

[36] Schmitt, POLITICAL THEOLOGY, *supra* note 8 at 6. In fact it appears Schmitt was aware of early Americanist theories of pluralism. *See* Schmitt, THE CONCEPT OF THE POLITICAL, *supra* note 41 at 40-45.

[37] CARL SCHMITT, POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR-GENF-VERSAILLES, 1923–1939 (1988) at 161 (hereinafter "POSITIONS AND TERMS"). *See also* Schmitt, THE CONCEPT OF THE POLITICAL, *supra* note 41 at 44 ("[t]hat the state is an entity and in fact the decisive entity rests upon its political character. A pluralist theory is either the theory of state which arrives at the unity of state by a federalism of social associations or a theory of the dissolution or rebuttal of the state. If, in fact, it challenges the entity and places the political association on an equal level with the others, for example, religious or economic associations, it must, above all, answer the question as to the specific content of the political . . . . The state simply transforms itself into an association which competes with other associations; it becomes a society among some other societies which exist within or outside the state. That is the pluralism of this theory of state. Its entire ingenuity is directed against earlier exaggerations of the state, against its majesty and its personality, against its claim to possess the monopoly of the highest unity, while it remains unclear what, according to this pluralist theory of state, the political entity should be").

[38] Carl Schmitt, *State Ethics and the Pluralist State*, in JACOBSON AND SCHLINK, WEIMAR: A JURISPRUDENCE OF CRISIS (1930) at 306.

[39] *Id*. ("When constitutional lawyers speak of the "omnipotence" of the sovereign— the king or the parliament— their baroquely exaggerated formulas should be understood as owing to the fact that in the state of the sixteenth to eighteenth centuries the issue was overcoming the pluralist chaos of the churches and estates. One makes one's task too easy if one adheres to such idioms. . . . State unity was always a unity from social pluralities. At various times and in various countries it was very different but always complex and, in a certain sense, intrinsically pluralist. A reference to this self-evident complexity can perhaps refute an extravagant monism but does not solve the problem of political unity.").

than any of the many other associations in which people live."[40] Schmitt's definition of politics (and therefore political power) is that it distinguishes between friend and enemy, where political friendship is found in the state's exclusive ability to unify the differences celebrated by civil society and political enmity is found in "recognizing the opponent as a just enemy on an equal plane with oneself. This way one has the basis for a limitation of conflict."[41]

Interest group pluralism, which Schmitt readily conceded informed modern governance, limited the political power of a state by endorsing a politics of contestation rather than sovereignty. Schmitt argued that without an ability to distinguish legality from legitimacy, e.g., to have a governing theory about when a sovereign entity was empowered to suspend the legal order when essential to preserving it, the state was perpetually threatened.[42] Schmitt stated, "[t]he existence of the state is undoubted proof of its superiority over the validity of the legal norm."[43] Thus Schmitt might argue that political power wielded in the form of interest group agenda setting, rather than sovereign decisiveness, is illegitimate.[44]

Our administrative law, however, is not only not "Schmittian" – it maintains legality and legitimacy because it empowers interest groups with the power to enforce and change legal rules. The political science literature has well-anticipated Schmitt's objections to pluralism by showing how Congress empowers interest groups by ensuring administrative procedures can be enforced to benefit the interest groups, thus reflecting the consequentialist nature of administrative legality. Scholars have found that "by controlling the details of procedures and participation, *political actors stack the deck in favor of constituents who are the intended beneficiaries of the bargain struck by the coalition which created the agency*."[45] That rules are both procedural as well as interest-beneficial informs this deck-stacking behavior and the inference that rules are overdispersed.

Vermeule argues that "[b]lack holes arise because legislators and executive officials will never agree to subject all executive action to thick legal standards . . . they could not do so even if they tried[.]"[46] Yet public law scholars have found that "elected representatives can be expected to be unsure about the substantive details of their most desired policy, even though they

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[40] *Id*. at 301; *accord id*. at 307 ("[a]mong pluralist theorists of the state as nearly everywhere, an error prevails that generally persists in uncritical unconsciousness— that the political signifies a specific substance, next to the substance of other 'social associations'; that it represents a specific content besides religion, economy, language, culture, and law; and that, therefore, the political group can be understood as standing coordinately next to the other groups— the church, combine, union, nation, cultural and legal communities of all sorts. Political unity thus becomes a special, new substantial unity, joining other unities. Any debates and discussions on the nature of the state and the political will become confused as long as the widespread idea prevails that a political sphere with its own content exists side by side with other spheres").

[41] CARL SCHMITT, THE CONCEPT OF THE POLITICAL, trans. George Schwab (1976) at 27 ("[t]he political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor."), *accord id.* at 53. *See also* CARL SCHMITT, NOMOS OF THE EARTH (1988) at 158-59.

[42] CARL SCHMITT, LEGALITY AND LEGITIMACY (1993) at 29.

[43] Schmitt, POLITICAL THEOLOGY, *supra* note 8 at 12.

[44] This is precisely what Schmitt argues in POSITIONS AND TERMS, *supra* note 38. Schmitt was aware of the position of Italian jurist Santi Romano who foresaw the decline of the legislative state when confronted with "a set of organizations and associations . . . [that] are endowed with a blooming life and an effective power [and that] tend to join and to connect with each other"). MARIANO CROCE & MARCO GOLDONI, THE LEGACY OF PLURALISM: THE CONTINENTAL JURISPRUDENCE OF SANTI ROMANO, CARL SCHMITT AND CONSTANTINO MORTATI (2020) at 2.

[45] Matthew McCubbins, Roger Noll, and Barry Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L., Econ. & Org. at 261 (1987) (hereinafter "McNollGast 1987").

[46] Vermeule, *supra* note 3 at 1133.

are certain about who should benefit and how the costs should be shared."[47] Because administrative procedure is not simply a formal requirement for, i.e., transparency, but a substantive benefit to an organized constituency, Congress can rely on the bureaucracy and courts to clarify the details of the law while using oversight to correct failures to enforce procedures consistent with the preferences of the intended beneficiary. Because administrative procedures "increase the efficacy of *ex post* sanctions," scholars have identified that elected officials enable the content of legal rules to be determined through the remedies pursued by regulated parties in addition to using political oversight to prevent bureaucratic drift from policy goals.[48] As Mathew McCubbins and his colleagues' models have shown, "the organic statute can be vague in policy objectives, seemingly giving an agency great policy discretion, but the administrative process can be designed to assure that the outcomes will be responsive to the constituents that the policy is intended to favor."[49] These scholars find that "[a]dministrative procedures have the advantage that their enforcement is left to constituents, who file suit for violations of prescribed procedure, and to the courts."[50]

Political scientists have converged on the theory that Congress's preferred form of political monitoring is authorizing interest groups with public rights. Because Congress cannot anticipate emergencies, it overdisperses public rights as benefits – that is, there are more procedures than there are resources needed to enforce those procedures. Empowered by public rights, interest groups drive administrative law by setting the judicial and political oversight agenda. Once rules are understood as both procedural and consequentialist in enforcement, legality in our administrative law can be understood to proceed from both judicial review (which articulates rules in statute and crafts rules through precedent) and political monitoring (which determines the risks to the bureaucracy for certain rule violations).

Those scholars who view administrative law as arising from Congress's overdispersion of constituent benefits (procedures) have not only explained judicial behavior in this context but also *ex post* congressional oversight as resulting from "a system of rules, procedures and informal practices that enable individual citizens and organized interest groups to examine administrative decisions . . . . to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts or Congress itself."[51] Scholars thus find that Congress provides procedural benefits to regulated constituents because of an expected electoral return, for those interest groups and individuals who set a given committee's oversight agenda will also assist in providing electoral rewards for the members of that committee.[52] Oversight, or political monitoring of the bureaucracy, derives from the same procedural enactments that inform administrative law agenda-setting before the judiciary, for "political leaders assign relative degrees of importance to the constituents whose interests are at stake in an administrative proceeding and thereby channel an agency's decisions toward the substantive outcomes that are most favored by those who are intended to be benefited by the policy."[53] And because the rules

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[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*. at 263.
[51] Matthew McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am. J. Pol. Sci. at 166 (1984).
[52] *Id*. at 168 ("a fire-alarm policy enables congressmen to spend less time on oversight, leaving more time for other profitable activities, or to spend the same time on more personally profitable oversight activities—on addressing complaints by potential supporters").
[53] McNollGast 1987, *supra* note 45 at 244.

themselves can be interpreted in terms of the benefits they assign, Congress has designed its oversight authority through procedures – what scholars call "a fire-alarm policy" where "potential supporters can in most cases bring to congressmen's attention any violations that harm them and for which they have received no adequate remedy through the executive or judicial branch".[54]

Although not directly addressed by the scholarly literature, implicit in "fire alarm" theories of congressional oversight and pluralistic theories of judicial agenda-setting is the fact that some legal procedures will be underenforced because interest groups will select other procedures to pursue that may be more promising in terms of an expected benefit or remedy. Because rules are both formal and consequential in value, our administrative law can maintain legality even when rules are formally violated because the political stakes of such violations may simply be too low for remediation by oversight or judicial redress. I illustrate this in the next section.

B. The consequential, versus formal, significance of rules and their infraction.

To show how scholarly support for pluralistic theories of administrative power operate in practice, I employ qualitative causal tracing methods on two recent legal phenomena involving oversight of the administration in the context of the administration's use of discretion in the context of national security and foreign relations – one from the Supreme Court and the other from Congress – to support the counter hypothesis to Vermeule articulated in Part II, *viz*., that our administrative law supports legality and legitimacy while underenforcing certain rules. In these two examples, the limitations on discretion employed by Congress and the Supreme Court actually violate blackletter rules of our administrative law. In the congressional context, the counterfactual might simply mean that congressional oversight is a political, rather than legal, kind of activity. Rather than the filling of a "grey hole" with standards that are more apparent than real, the procedural monitors disregarded a clear statement of law, effectively recognizing a black hole in the law where one did not previously exist.

1. Infringing a low value right

The rising action for the first impeachment of President Trump was a whistleblower's disclosure to the Intelligence Community Inspector General (ICIG). The ICIG's support among the congressional impeachment managers in the U.S. House of Representatives reflected a public mood supporting the procedures that enabled Congress and the public to be informed that the President engaged in a *quid pro quo* with the President of Ukraine for purposes of targeting a potential (and ultimate) political rival. In this context, there were administrative procedures empowering a detailee in the National Security Council within the Executive Office of the President to report information to the ICIG, there were administrative procedures authorizing the ICIG to document the information as a "whistleblower disclosure" and there were administrative procedures directing the ICIG to report the disclosure to Congress. Here, the legality of our administrative law where procedures empower interested parties and secure political benefits to Congress appear to work well. This example illustrates a concept of sovereignty that is possible when administrative procedures have consequentialist values in terms of political accountability.

[54] McCubbins & Schwartz, *supra* note 51 at 168.

I identify this example of success in American proceduralism because in this same instance of procedures securing political benefits, clear statement rules were violated. The ICIG acted directly contrary to the publicly stated notices on the information collection form for which the whistleblower made his disclosure. The "Disclosure of Urgent Concern" form version in force during the Ukraine complainant's August 12, 2019 disclosure was the May 24, 2018 form, which limited the ICIG to collecting only first-hand information for purposes of interpreting the Intelligence Community Whistleblower Protection Act.[55] Under a statute known as the Paperwork Reduction Act, "collections of information" from the federal government must be conducted on an OMB-approved form and the publicly noticed purpose of the collection is subject to public comment, thus having the force and effect of law and limiting the scope of the agency's power to collect information.[56]

The ICIG conceded that the information he received was secondhand. On September 30, 2019, the Intelligence Community Inspector General issued a press release addressing criticisms that the IG processed and reviewed a second-hand whistleblower complaint inconsistent with the ICIG's public interpretation of the Intelligence Community Whistleblower Protection Act.[57] At the time the whistleblower complaint was received, it was policy of the ICIG to interpret the IC Whistleblower Protection Act's requirement that information be "credible" to mean that the information be "first-hand information". "[S]econd-hand knowledge of wrongdoing" was insufficient under the policy.[58] The ICIG, recognizing the whistleblower complaint was based upon second-hand information, ignored his own policy and stated, "there is no such requirement set forth in the statute."[59]

In effect, the ICIG determined that the prior form, which had legal validity under the Paperwork Reduction Act, was "not in accordance with law" under the Administrative Procedure Act.[60] As is obvious, the role of setting aside agency action is with the courts, not an Inspector General. Further, amendments to the APA known as the Freedom of Information Act (FOIA) prevent the ICIG from changing the agency's interpretation of the Intelligence Community Whistleblower Protection Act *sua sponte*, for "interpretations of general applicability formulated and adopted by the agency" must be published in the Federal Register.[61] And the statute is explicit: "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a

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[55] 50 U.S.C. § 3033(k)(5); Letter from Chairman Ron Johnson, Chairman Charles Grassley and Senator Mike Lee to ICIG Michael Atkinson (Oct. 16, 2019), https://www.hsgac.senate.gov/imo/media/doc/2019-10-16%20RHJ%20to%20IC%20IG%20Atkinson%20re%20ICWPA%20Process.pdf; Office of the Inspector General of the Intelligence Community, News Release, *Office of the Inspector General of the Intelligence Community's Statement on Processing of Whistleblower Complaints*, (Sept. 30, 2019), https://www.dni.gov/files/ICIG/Documents/News/ICIG%20News/2019/September%2030%20-%20Statement%20on%20Processing%20of%20Whistleblower%20Complaints/ICIG%20Statement%20on%20Processing%20of%20Whistleblower%20Complaints.pdf.

[56] 44 U.S.C. § 3502(1) & (2).

[57] News Release, Office of the Inspector General of the Intelligence Community, *Office of the Inspectors General of the Intelligence Community's Statement on Processing of Whistleblower Complaints*, https://www.dni.gov/files/ICIG/Documents/News/ICIG%20News/2019/September%2030%20-%20Statement%20on%20Processing%20of%20Whistleblower%20Complaints/ICIG%20Statement%20on%20Processing%20of%20Whistleblower%20Complaints.pdf.

[58] *Id*. (referencing the Paperwork Reduction Act-approved ICIG May 24, 2018 submission form).

[59] *Id*.

[60] 5 U.S.C. § 706(2)(A).

[61] 5 U.S.C. § 552(a)(1)(D).

person may not in any manner . . . be adversely affected by, a matter required to be published in the Federal Register and not so published."[62]

The point is that the ICIG ignored if not directly violated a procedural right without immediate sanction. From a formal perspective of our administrative law, we can say that the harmed party, i.e., the President, lacked standing to remedy the infraction. But from a consequentialist perspective, we must say the obvious: in this case, the procedural requirements under the Paperwork Reduction Act and FOIA are low value rights. Even in the context of the procedural regulation of the federal government *writ large*, that is, the U.S. Constitution, a technical violation of the Constitution can be determined to be secondary to more consequentially valuable violations. – like those rising to high crimes or misdemeanors. For, as a technical matter, to authenticate second-hand information and authorize a complainant to disclose confidential presidential communications to Congress without informing the White House (which has legal equities in the information) is, in addition to being *ultra vires* and arbitrary and capricious, violative of the President's core confidentiality interests under the Constitution, which will always supersede any statutory basis for disclosure.[63]

This example not only illustrates the overdispersed and underenforced nature of our administrative law (where a given administrative action may be covered by multiple procedural requirements only some of which are followed or relied upon by a petitioner) but it also confirms the politically-dependent value of public rights. That our administrative law is conditioned on the electoral and partisan interests of Congress reflects its democratic legitimacy. The President ultimately exercised his administrative remedy: after he was acquitted from impeachment, he removed the ICIG from office.

2. If the remedy isn't briefed, it's not the law (for this case).

In 2012, the Department of Homeland Security established an immigration program known as Deferred Action for Childhood Arrivals (DACA). In 2017, after a change in presidential administration, the Department of Homeland Security rescinded DACA on grounds that DACA was a policy unauthorized by law. In the June 2020 decision of *Department of Homeland Security v. Regents of the University of California*,[64] Chief Justice Roberts wrote on behalf of the Supreme Court majority that when a federal agency issues a public statement regarding a decision-making policy, any agency action to rescind that policy must include an adequate explanation of the change or is otherwise arbitrary and capricious, and therefore invalid.[65] The Administrative Procedure Act (APA), section 552 of Title 5, subsection (a)(1)(D) (also known as the Freedom of Information Act) governs agency policy statements, like the

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[62] 5 U.S.C. § 552(a)(1).

[63] Daniel Epstein, *Kendall v. United States and the Inspector General Dilemma*, U. CHICAGO L. REV. ONLINE (2020), https://lawreviewblog.uchicago.edu/2020/06/22/ig-dilemma-epstein/.

[64] 140 S.Ct. 1891, 1905 (2020) (hereinafter "DACA").

[65] As a public law matter, this principle is wrong. As Justice Kavanaugh argued, the requirement of a "contemporaneous explanation" applies only to agency adjudications, not rulemakings. Roberts dismisses this point because "[t]he Government does not even raise this unheralded argument". For one, because federal judges in federal question cases are construing public laws, arguments raised or not raised are irrelevant to the judicial role of construing the law. Moreover, Roberts' reliance on *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* is misplaced. In *State Farm*, the Supreme Court determined a rescission of a rule was arbitrary and capricious when the statute authorizing the rule "required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court[.]" 463 U.S. 29, 43-44 (1983). Unlike the rule in *State Farm*, the DACA memo was a memo of enforcement discretion which required no rulemaking record.

Deferred Action against Childhood Arrivals (DACA) memorandum and its rescission, which are not interpretations of statutes requiring a rulemaking record. Chief Justice Roberts concurred with this view, concluding the DACA memorandum created a "program for conferring affirmative immigration relief."[66] These rules can be described as "policy rules" or "public guidance" and are regulated as "substantive rules of general applicability" or "statements of general policy" requiring publication in the Federal Register yet which do not need to go through the notice and comment process contemplated under section 553 of the APA. As specifically enumerated at subsection (a)(1)(E), "revision" or "repeal" of a policy rule requires only publication in the Federal Register – and nothing else. Section 553 of the APA, subsection (b), refers to this aspect of FOIA, specifically excluding from notice and comment rulemaking "general statements of policy".

This case is noteworthy because nowhere in Chief Justice Roberts' opinion did he address the clearly germane procedural remedy specified in 5 U.S.C. § 552. Instead, Roberts spent substantial ink distinguishing the rescinding of the DACA memorandum from an exercise of enforcement discretion to invent a non-textual requirement of the APA mandating that "reasoned decisionmaking" accompany any rescinding of a policy statement.[67] But political power in our administrative system does not rest with the decisionmaker but in the interest group empowered to set the terms of the decisionmaking agenda before the courts. Here, petitioners the United States did not brief the specific remedy of 5 U.S.C. § 552(a)(1) in response to the respondents.[68] As Chief Justice Roberts stated in footnote 4 of the opinion, "Justice Kavanaugh further argues that the contemporaneous explanation requirement applies only to agency adjudications, not rulemakings. . . . But he cites no authority limiting this basic principle—which the Court regularly articulates in the context of rulemakings—to adjudications. The Government does not even raise this unheralded argument."[69] This is a feature of our administrative law: if the interested parties do not search for, identify and raise a winning argument from the breadth of rule overdispersion (for whatever reason, perhaps there are only certain arguments strategic litigators seek to run), then the courts, lacking the political authority the interested party has on administrative matters, will not be bound to find the correct law. As a recent administrative law opinion stated, "we need not probe this undeveloped argument further, as '[m]entioning an argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones' is tantamount to failing to raise it."[70]

That agency rule changes must be announced publicly and in advance of a person's being affected[71] is a procedural requirement designed to avoid subjecting individuals to unfair surprise or regulatory burdens for which they could not possibly have advanced notice. As stated earlier, violation of this principle of administrative law made the first impeachment of President Donald Trump possible. [72] The "Disclosure of Urgent Concern" policy changed by the ICIG was

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[66] DACA, *supra* note 64 at 1906.
[67] Under 5 U.S.C. § 706(2)(A) (cited at *id*.).
[68] Reply Brief of the Petitioners, Department of Homeland Sec. v. Regents of the Univ. of California, 2019 U.S. S. Ct. Briefs LEXIS 5982.
[69] DACA, *supra* note 64 at 1909 n.3.
[70] *Maloney et al. v. Murphy, Administrator, General Services Administration*, No. 1:17-cv-02308 (D.C. Cir. Decided December 29, 2020) at 30 (citing *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) (internal citations omitted).
[71] Executive Orders 12892 and 13924, which rely upon 5 U.S.C. § 552(a)(1), are potentially invalid under *DHS v. Regents of the Univ. of Cal.* 591 U.S. (2020).
[72] Daniel Epstein, *Kendall v. United States and the Inspector General Dilemma*, U. CHICAGO L. REV. ONLINE (2020), https://lawreviewblog.uchicago.edu/2020/06/22/ig-dilemma-epstein/.

substantively similar to the Obama administration's 2012 DACA memorandum such that rescinding or changing the policy required public notice[73] and would now, post-*DHS v. Univ. of Cal.*, require a reasoned explanation in addition. In *University of California v. DHS*, we see, the courts fashioned a remedy to a technical violation that in the context of presidential impeachment was disregarded by administrative law in practice. Because legality is consequentialist, we can explain the divergent behavior beyond mere policy grounds, for the examples reflect that the ability for interest groups to obtain redress to infractions can be achieved even if irremediable under different circumstances.

## IV. Concluding thoughts: Rethinking emergencies – FDA and the coronavirus

Based on the counterhypothesis and the case studies, we can examine the current practice of enforcement discretion by the FDA during the current public health emergency. Because judicial review during emergencies may displace legal formalities in ways that cabin executive branch discretion, for instance, by arguing that policies of enforcement discretion may be rescinded only upon reasoned decision making, our administrative law presents these policies as discretionary rules exempt from notice and comment requirements.

Within a couple of months of the emergency declaration by the Secretary of Health and Human Services concerning the COVID-19 pandemic, the FDA began issuing policies of enforcement discretion where it indicated, during the pendency of the emergency declaration, it would not consider novel medical devices or modifications thereto in certain regulatory classifications to be adulterated or misbranded if they were not registered and approved through premarket approval applications.[74] The guidance documents state that the policies of enforcement discretion are "intended to remain in effect only for the duration of the public health emergency related to COVID-19 declared by the Department of Health and Human Services (HHS), including any renewals made by the HHS Secretary in accordance with section 319(a)(2) of the Public Health Service (PHS) Act."[75]

Under FDA's enforcement discretion, new devices under these regulatory classifications or modifications to previously approved devices do not need to go through the 510(k) premarket review process and will not be subject to enforcement for being marketed without prior approval. Of interest in the context of Vermeule and Schmitt is the fact that nowhere in the text of the Public Health Service Act is there any indication by Congress that the FDA has discretion to not enforce the law. Given *University of California v. DHS*, the FDA cannot simply rescind its policies of enforcement discretion after the emergency ends. It must provide some reasoned explanation informing its decision to terminate the temporary enforcement discretion. Further, the APA, as amended by FOIA, 5 U.S.C. § 552(a),(1)(D), states, "[e]ach agency shall separately state and currently publish in the Federal Register for the guidance of the public—substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency. . . .Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in

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[73] This is for obvious due process reasons – 5 U.S.C. § 552(a)(1) creates an affirmative defense for individuals subject to harm by policy changes that are not published in the Federal Register contemporaneous with the change.
[74] *See* Enforcement Discretion policies, https://www.federalregister.gov/documents/2020/05/12/2020-10146/guidance-documents-related-to-coronavirus-disease-2019-covid-19-availability.
[75] *Id.*

the Federal Register and not so published." In this sense, quasi-due process concerns attach where companies that relied on enforcement discretion are entitled to published notice of FDA's expected change in policy post-emergency.

Consistent with the Administrative Procedure Act, as interpreted by Executive Orders 13892 and 13924, when the FDA made the policy choice to announce temporary policies of non-enforcement and released those policies to the public, it effectively made rules with the force of law that are not invalidated upon expiration of the public health emergency, for the Public Health Service Act provides no basis for such automatic expirations. In fact, the Food, Drug, and Cosmetic Act specifically authorizes the Secretary to determine to exempt certain Class I and II devices from approval and parties affected by any attempt to rescind the policies of enforcement discretion can uniquely point a textual reason why policies of enforcement discretion cannot be rescinded by fiat and are not, in fact, committed to the Secretary's discretion.[76]

But despite what might appear to the legal positivist as "clear rules" binding the FDA, our administrative law is consequentialist. The Administrative Procedure Act exempts from review "agency action [which] is committed to agency discretion by law."[77] Whether the courts (or Congress) determine FDA's refusal to provide a "reasoned explanation" for some decision to bring enforcement against previously exempt entities is dispositive revolves less on an eagerness to construct grey holes in the law for purposes of deference than a feature of our administrative law as depending upon agenda setting activities and the consequential value of a rule at a given time and context. This is how our administrative law achieves both legality and legitimacy.

[76] *See* 21 U.S.C. § 360(l)(2) ("the Secretary shall identify, through publication in the Federal Register, any type of class I device that the Secretary determines no longer requires a report under subsection (k) to provide reasonable assurance of safety and effectiveness. Upon such publication—(A) each type of class I device so identified shall be exempt from the requirement for a report under subsection (k); and (B) the classification regulation applicable to each such type of device shall be deemed amended to incorporate such exemption)" and 21 U.S.C. § 360(m)(2) ("the Secretary may exempt a class II device from the requirement to submit a report under subsection (k), upon the Secretary's own initiative or a petition of an interested person, if the Secretary determines that such report is not necessary to assure the safety and effectiveness of the device").

[77] 5 U.S.C. § 701(a)(2).