

## REGULATING DURING EMERGENCIES

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**ABSTRACT**—Presidents frequently attempt to use emergencies to push through controversial rules. We argue that the law surrounding “notice and comment” for proposed rules should be altered to reduce the risk that Presidents will exploit emergencies to entrench rules without adequate public input. Specifically, we argue that the comment periods for proposed rules should be extended during emergencies and that courts should admit extrarecord evidence in subsequent administrative litigation when agencies refuse to afford the public reasonable extensions in the comment periods.

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### INTRODUCTION

The COVID-19 pandemic has indisputably been a national emergency for the United States. But it is certainly not the only emergency that has consumed this nation’s attention. Before the pandemic, there were 9/11 and the ensuing War on Terror;<sup>1</sup> Hurricanes Katrina, Maria, and Harvey;<sup>2</sup> and the 2009 H1N1 influenza pandemic,<sup>3</sup> to name a few. Before that, there were the Civil War, two World Wars, and a massive economic depression. Looking ahead, climate change will certainly entail continual, widespread emergencies in the United States akin to the drought and wildfires that brought much of the Australian economy and daily life to a close from 2019 to 2020.<sup>4</sup>

These national emergencies have all prompted wide-ranging presidential action. Such presidential action has frequently led courts and commentators to consider the limits of presidential power, particularly in

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<sup>1</sup> For 9/11 and the War on Terror, see Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 85 Fed. Reg. 56,467 (Sept. 10, 2020).

<sup>2</sup> COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., HURRICANE KATRINA: A NATION STILL UNPREPARED, S. REP. NO. 109-322, at 69–70, 73 (2006) (declaring Hurricane Katrina an “incident of national significance” and a “public-health emergency”); Puerto Rico; Emergency and Related Determinations, 82 Fed. Reg. 45,874, 45,875 (Sept. 18, 2017) (declaring an emergency for the Commonwealth of Puerto Rico due to Hurricane Maria); *Disaster Declared in Texas Following Hurricane Harvey*, U.S. DEP’T OF DEF. NEWS (Aug. 25, 2017), <https://www.defense.gov/Explore/News/Article/Article/1292599/disaster-declared-in-texas-following-hurricane-harvey> [<https://perma.cc/C5CR-PG3F>] (declaring Hurricane Harvey “a major disaster”).

<sup>3</sup> Declaration of a National Emergency with Respect to the 2009 H1N1 Influenza Pandemic, Proclamation No. 8443, 74 Fed. Reg. 55,439, 55,439 (Oct. 23, 2009).

<sup>4</sup> See, e.g., Graham Readfearn, *Inside Australia’s Climate Emergency: The New Fire Zone*, GUARDIAN (Feb. 12, 2020), <https://www.theguardian.com/environment/ng-interactive/2020/feb/12/living-in-the-climate-emergency-australias-new-fire-zone> [<https://perma.cc/5UD7-F8WB>] (depicting how fire has encompassed previously non-arid regions).

times of emergency.<sup>5</sup> For the purposes of this Essay, we will not attempt to revisit this debate. Rather than focusing on these questions of presidential rulemaking *power*, we examine the relatively overlooked but crucial question of the risk that national emergencies pose to the integrity of the rulemaking *process* and the role of the Supreme Court and Congress to protect the integrity of that process.

Stated bluntly, most Presidents use emergencies to try to push through controversial rules whether related to the relevant emergency or not. Emergencies provide an opportunity to achieve what otherwise could not be achieved. While serving as President Obama’s Chief of Staff, Rahm Emanuel famously remarked that no crisis should be allowed to go to waste.<sup>6</sup> That posture may make sense for a sitting President; but as a matter of good democratic governance, the procedural protections for the integrity of the rulemaking process should not be weakened for rules unrelated to any purported emergency.<sup>7</sup> Nor, for that matter, should such procedural protections be weakened for rules that are emergency-related but reach far beyond the relevant emergency in effect, either substantively or temporally.

Section I.A of this Essay begins by examining the rulemaking process under the Administrative Procedure Act (APA) and its notice-and-comment requirements.<sup>8</sup> These requirements provide that all proposed rules should be published, that anyone can evaluate them and submit comments, and that the agency must consider and explicitly respond to the comments.<sup>9</sup> We describe how the notice-and-comment process can be understood as serving two (not inconsistent) goals—a technocratic goal and a deliberative democratic goal. Section I.B of this Essay then addresses the notice-and-comment process during emergencies and how a state of emergency can undermine both of

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<sup>5</sup> For an extensive discussion of how the courts have grappled with presidential claims of emergency power over time, see generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 946–47 (2008) (examining how the different branches of government have considered and treated presidential power).

<sup>6</sup> See Jerry Bellune, *Never Let a Crisis Go to Waste*, LEXINGTON CNTY. CHRON. & DISPATCH-NEWS (Mar. 26, 2020, 12:00 AM), <https://www.lexingtonchronicle.com/business/never-let-crisis-go-waste> [<https://perma.cc/3R28-M4WP>] (“President Obama’s chief of staff Rahm Emanuel famously said in 2008, ‘You never want a serious crisis to go to waste. I mean, it’s an opportunity to do things that you think you could not do before.’”).

<sup>7</sup> See, e.g., Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1793–94 (2010) (discussing the democratic risks posed by presidential abuses during emergencies); Brandon J. Johnson, *Executives in Crisis: An Examination of Formal and Informal Emergency Powers*, 42 U. PA. J. INT’L L. 341, 347–48 (2020) (same); see also Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1030 (2004); Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1370 (2013).

<sup>8</sup> Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559).

<sup>9</sup> 5 U.S.C. § 553(b)–(c).

these goals. In particular, we focus on how emergency conditions impact the capacity of the public to provide meaningful comments, especially to rules having nothing to do with the emergency at hand, and how administrations may—and often do—take advantage of emergency conditions to push such unrelated rules at precisely the moment when the public is too distracted to pay much attention. As a case study of this phenomenon, we use the Trump Administration’s Environmental Protection Agency (EPA) scientific evidence rule. This rule attempted to limit the public health evidence that regulators could use to fashion and justify rules. This rule was dramatically expanded at the outset of the COVID-19 pandemic when the public was understandably preoccupied. Finally, Part II of this Essay proposes two solutions—one statutory and one judicial—that would mitigate the harms of such rulemaking and help ensure that emergency conditions are not abused by administrations seeking to take advantage of public distraction.

## I. THE PROBLEM OF INADEQUATE NOTICE AND COMMENT IN RULEMAKINGS DURING “EMERGENCIES”

### A. *Why Notice and Comment Matters in Our Democracy*

Before delving into how notice and comment differs during emergencies, we begin this Section by reviewing the traditional notice-and-comment process under the APA and suggesting that notice and comment contributes to the well-functioning of a democracy. Under the APA, proposed legislative rules—understood as rules that will bind future agency action—generally must be subject to public notice and comment before the agency can promulgate them as final rules.<sup>10</sup> The requirement for the notice-and-comment procedure sets legislative rules in contrast with other sorts of agency actions, such as policy declarations or purely interpretative rules: Legislative rules are less easily reversed than nonlegislative rules precisely because of the notice-and-comment procedure and are thus legally binding.<sup>11</sup> For example, a new presidential administration can withdraw agency guidance documents or position papers or alter the agency’s stated posture in ongoing adjudications on the first day of a presidency without legal constraints.<sup>12</sup> By contrast, an agency can only withdraw a legislative rule by

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<sup>10</sup> *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96–97 (2015) (holding that legislative rules, in contrast to interpretive rules, are subject to notice-and-comment constraints and have the “force and effect of law”) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979)).

<sup>11</sup> *See id.*

<sup>12</sup> *See, e.g.*, Susan Milligan, *Two Steps Back, One Step Forward*, U.S. NEWS & WORLD REP. (Jan. 29, 2021) <https://www.usnews.com/news/the-report/articles/2021-01-29/biden-spends-first-week-issuing-orders-reversing-trumps-orders> [<https://perma.cc/5WAD-B9M7>] (discussing a rapid flurry of Biden reversals of Trump Executive Orders).

proposing a new rule withdrawing the previous legislative rule.<sup>13</sup> Such a new proposed rule also must (typically) satisfy notice-and-comment requirements and is subject to being challenged in court under the APA as “arbitrary and capricious.”<sup>14</sup> Indeed, courts have suggested that in order for an agency to justify why it is switching policies with a new rule, it must provide a reasoned explanation as to why the stated grounds for the previous rule should no longer be accorded decisive weight.<sup>15</sup> Legislative rules are predicated on factual mistakes, reflect values outside our political tradition, and/or run counter to the considered opinion of the polity. Consequently, while all sorts of agency actions matter and deserve attention, legislative rules are particularly important as they are the most durable and, thus, the most difficult to correct.

Notice-and-comment requirements have been criticized as slowing agency responses to circumstances in the real world to the point that the requirements can contribute to the ossification of agency actions.<sup>16</sup> But these requirements are important to a well-functioning democracy, serving to ensure that rules are based on technically sound analysis and that they are at least somewhat responsive to the values of the polity. To take the technical soundness point first, the primary rationale for judicial deference to agencies regarding the substance of their rules is that agencies, unlike courts, have the specialized technical expertise in the relevant subject matter.<sup>17</sup> But what assurance is there that the agencies are actually deploying that technical expertise and reflecting it in their rules? That cannot simply be assumed. When rules are proposed with adequate notice, groups and individuals within the public can review the agency’s stated technical justifications and point to gaps or errors in data or analysis. Take, for instance, the Trump Administration’s proposed fuel economy rule which sought to undo the fuel economy requirements promulgated under the Obama Administration after

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<sup>13</sup> See *Perez*, 575 U.S. at 101 (holding that the APA “mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance”); *Motor Vehicle Mfrs. Ass’n. of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (holding that “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance”).

<sup>14</sup> See *Motor Vehicle Mfrs.*, 463 U.S. at 42; TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 15 (2017) (“[A]n agency rule that implements a policy change by amending or repealing an existing rule is also subject to arbitrary and capricious review.”).

<sup>15</sup> See David A. Dana & Michael Barsa, *Judicial Review in an Age of Hyper-Polarization and Alternative Facts*, 9 SAN DIEGO J. CLIMATE & ENERGY L. 231, 234–39 (2018) (reviewing the relevant case law on policy shifts by agencies).

<sup>16</sup> See, e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992).

<sup>17</sup> See Dana & Barsa, *supra* note 15, at 233.

a 2018 review by the EPA.<sup>18</sup> Sometimes, as with the Trump Administration’s proposed fuel economy rule, public comments will be so forceful that the agency may feel compelled to redo its technical analysis, at least in part.<sup>19</sup> Moreover, technical criticisms from the public in the administrative record—as well as the agency’s lack of persuasive response to them—allows courts to reject an agency’s inadequate proffered justification for a rule and vacate or remand the rule. The result is that the agency can exercise the technical expertise that the public rightly demands it exercise in good faith.<sup>20</sup>

Technical expertise aside, the notice-and-comment process also helps to ensure that rulemakings reflect public deliberation over the nation’s values, at least to a degree. Notice and comment makes rulemaking more democratic—more public-inclusive—than would otherwise be the case. Agencies often fashion rules based on broad delegations of authority from Congress. Absent specific instructions from Congress, and without a notice-and-comment process, the public—including state and local governments, NGOs, and business groups, to name a few—might have no real sense of what an agency is planning to do until it is done in the form of a binding rule which can harm its interests. Notice-and-comment periods afford the public an opportunity to argue that the proposed rule embodies unsound, or even immoral, policy and is inconsistent with a reasonable understanding of the agency’s legislative mandate.<sup>21</sup> In many cases, as critical comments pour in, the press will feature stories about controversial proposed rules, which in turn may engender more public debate. And even if the agency does not modify the proposed rule in response to the public comments, judges, in reviewing the rule in an APA challenge, may access those comments and the

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<sup>18</sup> *U.S. EPA and DOT Propose Fuel Economy Standards for MY 2021-2026 Vehicles*, EPA (Aug. 2, 2018), <https://archive.epa.gov/epa/newsreleases/us-epa-and-dot-propose-fuel-economy-standards-my-2021-2026-vehicles.html> [<https://perma.cc/SC5S-PUZP>]; Coral Davenport, *U.S. to Announce Rollback of Auto Pollution Rules, a Key Effort to Fight Climate Change*, N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/30/climate/trump-fuel-economy.html> [<https://perma.cc/PTN4-HLX4>].

<sup>19</sup> See Robinson Meyer, *The Trump Administration Flunked Its Math Homework*, ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/science/archive/2018/10/trumps-clean-car-rollback-is-riddled-with-math-errors-clouding-its-legal-future/574249> [<https://perma.cc/V2LT-L46W>].

<sup>20</sup> See, e.g., *Carlson v. Postal Regul. Comm’n*, 938 F.3d 337, 340, 345 (D.C. Cir. 2019) (vacating a postal service rule on the grounds that the agency had failed to engage in reasoned explanation for its proposal as illustrated by its failure to address objections raised by commentators).

<sup>21</sup> See, e.g., *District of Columbia v. U.S. Dep’t of Agric.*, 496 F. Supp. 3d 213, 228 (D.D.C. 2020) (stating that “a purpose of notice-and-comment provisions under the APA . . . is ‘to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is likely to give real consideration to alternative ideas’” and “to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review”) (alteration in original) (first quoting Nat’l Ass’n of Clean Water Agencies v. EPA, 734 F.3d 1115, 1148 (D.C. Cir. 2013); then quoting *Int’l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)).

agency's responses and may be influenced by the extent the agency took account of public concerns.<sup>22</sup> Overall, notice-and-comment rulemaking allows for a degree of public inclusion and debate and, hence, democratic legitimacy that otherwise would be lacking in the administrative process.<sup>23</sup>

## B. Emergencies and Notice-and-Comment Rulemaking

### 1. Defining Emergencies

Before addressing notice-and-comment rulemaking during “emergencies,” we must define emergency, which itself is no simple task. The Supreme Court has seemed to acknowledge that the President has an inherent power to declare and act upon an emergency, particularly but not exclusively, in the President's role as commander-in-chief. Government must go on even during emergency periods like wars and pandemics. But there has long been a concern that the President will abuse this inherent power (however defined) and exceed its constitutional limits. In the most famous Supreme Court case on this issue, the *Youngstown* steel seizure case, the Court held that the President lacked constitutional authority to order steel mills to reopen during the Korean War.<sup>24</sup> However, commenters have struggled to define the standard set by *Youngstown* and determine when a President may do what she otherwise constitutionally could not do in the name of meeting the immediate demands of an emergency.<sup>25</sup>

This much is clear: Under current law, while the President has some constitutionally given emergency powers,<sup>26</sup> especially in her role as commander-in-chief, Congress also has some constitutional authority to constrain the exercise of those powers. Through statutes, Congress can

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<sup>22</sup> See, e.g., Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 307–08 (2016) (explaining that “requiring an agency to consider a broad range of viewpoints before adopting a rule makes it more likely the agency will come up with the ‘best’ possible rule” as the agency “benefits from the experience and input of comments by the public,” and also explaining that “[p]roviding for direct, meaningful public involvement through prepromulgation notice and comment procedures inserts an element of democracy into the rulemaking process and thereby legitimates resulting rules”).

<sup>23</sup> For an account of the administrative rulemaking process as aimed at facilitating democratic deliberation on the part of agencies, see Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 857 (2012) (explaining that “a ‘deliberative model’ of administrative legitimacy focuses on the obligation of public officials to engage in reasoned deliberation on which courses of action will promote the public good” and requires that agency officials “engage in a decision-making process that considers all of the relevant interests and perspectives, and they must provide reasoned explanations for their decisions that could reasonably be accepted by free and equal citizens with fundamentally competing perspectives”) (footnote omitted).

<sup>24</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 587 (1952).

<sup>25</sup> See generally Barron & Lederman, *supra* note at 5 (arguing that the President may constitutionally exercise her war powers against congressional limitations).

<sup>26</sup> See *id.* at 695 (addressing the ambiguity in the Supreme Court jurisprudence).

define what constitutes an emergency, what special powers the President may lawfully exercise in such an emergency, and for what purposes the President may lawfully exercise those powers. Relevant statutes that represent Congress's efforts to legislatively define and constrain the President's emergency powers include the Stafford Act,<sup>27</sup> the public health emergencies provision of the Public Health Services Act,<sup>28</sup> and the National Emergencies Act (NEA).<sup>29</sup>

For their parts, the Stafford Act and the Public Health Services Act provide some meaningful, reasonably specific limits on when and under what circumstances the President may declare an emergency. These Acts also provide states and localities funding through the Federal Emergency Management Agency (FEMA) and other sources. In some cases, they waive legal requirements and intervene in the marketplace to address the emergency.<sup>30</sup>

The NEA does little in practice to constrain the President in acting under the rubric of emergency. For example, at least for declarations of major disasters under the Stafford Act, the President must await requests by governors before acting.<sup>31</sup> By contrast, the NEA gives the President extremely broad power to declare an emergency solely on the President's own initiative.<sup>32</sup> Moreover, the principal constraint in the NEA—the requirement that the President renew emergencies periodically,<sup>33</sup> subject to Congressional override—has proven illusory: Dozens of emergencies remain in effect today—several times more than when the Act was passed—and “[m]ost have been renewed for years on end.”<sup>34</sup> Congress has never successfully voted to end an NEA emergency.<sup>35</sup>

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<sup>27</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (codified as amended at 42 U.S.C. §§ 5121–5202).

<sup>28</sup> 42 U.S.C. § 247d.

<sup>29</sup> National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651).

<sup>30</sup> See *Overview of Stafford Act Support to States*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/pdf/emergency/nrf/nrf-stafford.pdf> [<https://perma.cc/W92G-QF5A>].

<sup>31</sup> 42 U.S.C. § 5170(a); see also *How a Disaster Gets Declared*, FED. EMERGENCY MGMT. AGENCY (Sept. 3, 2021), <https://www.fema.gov/disaster/how-declared> [<https://perma.cc/CW32-EZZD>] (explaining that “[a]ll requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State” (quoting 42 U.S.C. § 5170(a)).

<sup>32</sup> 50 U.S.C. § 1621.

<sup>33</sup> 50 U.S.C. § 1601.

<sup>34</sup> See Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (Feb. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418> [<https://perma.cc/95XZ-PZEG>].

<sup>35</sup> *Id.*



Thus, there are at least three relevant and justified ways to understand “emergency”: (1) as a common-sense concept, as in the case of the COVID-19 pandemic, which cannot be understood as anything but a national emergency regardless of constitutional or statutory definitions; (2) as a constitutional concept, as in the President’s constitutional authority to declare a circumstance an emergency and take corresponding actions; and (3) as a statutory concept, as in the statutory requirements for a declaration of emergency set out in the Stafford Act or NEA.<sup>36</sup>

## 2. Notice and Comment During Emergencies

Regardless of how one understands “emergency,” no President has argued that emergency conditions justify disregarding notice-and-comment requirements altogether. Yet statutorily, while the Stafford Act and the NEA do not address the issue of notice-and-comment requirements, the APA contains a “good cause” exception to notice-and-comment requirements that would seemingly allow a President to eschew notice and comment if an emergency—whether declared under a statute or not—so justified. Specifically, the APA provides that notice and comment is not required “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>37</sup> Regardless of this wording, agencies often invoke good cause without providing much or any explanation as to why forgoing notice and comment is necessary, and they often do so outside of, and unrelated to, anything that could be defined as an emergency, whatever definition of emergency one is employing.<sup>38</sup> The courts, postpromulgation, at times have held that agencies failed to support their assertion of good cause when they

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<sup>36</sup> See Robert T. Stafford Disaster Relief and Emergency Assistance Act Fact Sheet, ASS’N OF STATE & TERRITORIAL HEALTH OFFS. (May 2013), <https://www.astho.org/programs/preparedness/public-health-emergency-law/emergency-authority-and-immunity-toolkit/robert-t--stafford-disaster-relief-and-emergency-assistance-act-fact-sheet> [<https://perma.cc/JA4B-3Z86>] (explaining that the Stafford Act defines emergencies as “any event for which federal assistance is needed to supplement state/local efforts to save lives, protect public health and safety, protect property, or avert the threat of a catastrophe”); see also 42 U.S.C. § 5122(1) (providing the same definition of emergency). See generally JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB10267, DEFINITION OF NATIONAL EMERGENCY UNDER THE NATIONAL EMERGENCIES ACT (2019) (surveying the various definitions of national emergencies under the National Emergencies Act and how courts have defined emergencies because “[t]he National Emergencies Act . . . does not define what may constitute a national emergency”).

<sup>37</sup> 5 U.S.C. § 553(b)(3)(B).

<sup>38</sup> See Kyle Schneider, Note, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 239–40, 248–57 (2021) (noting that “many agencies invoke the exception for a wide range of agency actions” and that “[c]ourts inconsistently interpret both what constitutes good cause and what deference to give agency assertions of good cause” and describing cases) (footnote omitted).

adopted a rule without notice and comment.<sup>39</sup> But they have generally not vacated the rules on the grounds that the agency later sought out comments even if the agency declined to modify the rule in any substantive way in response to the comments.<sup>40</sup> Thus, current judicial practice incentivizes agencies to invoke the good-cause exception and thereby avoid notice and comment. It is a testament to the general norm in favor of notice and comment that they do not invoke the exception more than they do.

In our view, the fix for abuse of the good-cause exception needs to be statutory as the text of the current exception provides no limiting mechanism. Because of the lack of statutory limits, the courts are also powerless in limiting agency power in this regard. But the statutory fix can be very simple: an amendment to the APA providing that any rule adopted under the good-cause exception expires in, for example, six months or a year. An automatic expiration on a rule makes the rule much less useful to an agency, thereby removing the incentive to avoid notice-and-comment requirements except when they truly seem impracticable under the circumstances.

A more difficult issue—and one academic commentators have not previously addressed—is whether notice-and-comment procedures need to be adapted during emergencies. For example, should agencies take account of how emergency conditions impact the capacity of the public to provide meaningful comments and raise concerns about the rule in the polity and society as a whole within the standard comment period provided for by the agency? The notice-and-comment process can only serve its purposes if the constituent groups in the public—be they NGOs, local governments, or academic experts—realistically can absorb and respond to the proposed rule in the time provided. But during an intense national emergency like the COVID-19 pandemic, the capacity of these constituent groups to attend to proposed rules—especially ones having nothing to do with the ongoing emergency, which naturally occupies the forefront of everyone’s attention—is substantially limited.<sup>41</sup>

Moreover, if we assume that the President and agencies understand as much and are devoted to maximally promoting their ideological preferences, agencies themselves may take advantage of an emergency's distracting effects on the public. For example, agencies can propose more technically and politically questionable rules than they otherwise ever would have, knowing that the relevant constituent groups in the public will not be able to adequately respond. From a normative perspective, this is troubling. On the

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<sup>39</sup> See, e.g., *id.* at 279–80 (describing cases where courts invalidated rules promulgated without notice and comment under de novo review of the good cause exception).

<sup>40</sup> See Hickman & Thomson, *supra* note 22, at 291.

<sup>41</sup> See *infra* notes 44–48 and accompanying text.

one hand, when an agency promulgates rules in full compliance with its published notice-and-comment procedures, it is complying with the letter of the law. But when it does so *knowing* the comment period is insufficient as a practical matter, the agency is not complying with the spirit or the purpose of the law, which is to engage the public in more meaningful ways. Sometimes courts overturn agency rules when they were promulgated with insufficient notice-and-comment time.<sup>42</sup> But if the rules are upheld by the courts because agencies provided technically and statutorily enough time for notice and comment, then agencies should be understood as having distorted the administrative process as it should operate in a well-ordered democracy.

This argument was made forcefully by an array of groups, including state and local governments, in the spring of 2020 as the severity of the pandemic began to become clear. The pandemic was (and currently remains) a national emergency in both the common-sense definition of the term and by statutory definition: In March of 2020, President Trump declared the pandemic a national emergency in every state and territory under the NEA, the Public Health Service Act, and the Stafford Act.<sup>43</sup> Governors in every state confirmed the declaration by issuing emergency declarations and seeking federal emergency recognition and assistance.<sup>44</sup> During this time, members of Congress wrote President Trump asking for a moratorium in rulemaking,<sup>45</sup> as did NGOs.<sup>46</sup> Additionally, and as part of a genuinely

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<sup>42</sup> See *supra* note 38 and accompanying text.

<sup>43</sup> Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020); Letter from President Donald J. Trump to Chad F. Wolf, Acting Sec’y, Dep’t of Homeland Sec., Steven T. Mnuchin, Sec’y, Dep’t of Treasury, Alex M. Azar II, Sec’y, Dep’t of Health & Hum. Servs. & Pete T. Gaynor, Adm’r, Fed. Emergency Mgmt. Agency (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/03/LetterFromThePresident.pdf> [<https://perma.cc/59GS-M6HY>] [hereinafter Letter from President Donald J. Trump].

<sup>44</sup> See *COVID-19 Resources for State Leaders: Executive Orders*, THE COUNCIL OF STATE GOV’TS., <https://web.csg.org/covid19/executive-orders> [<https://perma.cc/6MLL-RAGS>] (listing orders declaring national emergencies by state).

<sup>45</sup> Letter from Members of Congress to Russell T. Vought, Acting Dir., U.S. Off. of Mgmt. & Budget (Apr. 8, 2020), [https://www.bennet.senate.gov/public/\\_cache/files/4/8/4886b15b-c3a5-4d96-ae6b-b77325797fa6/7D0732946C1C20E16DFC31ECD8548C8D.united-states-senate-letter-to-omb-acting-director-vought.pdf](https://www.bennet.senate.gov/public/_cache/files/4/8/4886b15b-c3a5-4d96-ae6b-b77325797fa6/7D0732946C1C20E16DFC31ECD8548C8D.united-states-senate-letter-to-omb-acting-director-vought.pdf) [<https://perma.cc/JWA9-37K7>]; Michael Karlik, *Bennet and Senate Democrats Ask Trump Administration to Pause Rulemaking*, COLO. POL. (May 15, 2020), [https://www.coloradopolitics.com/news/bennet-and-senate-democrats-ask-trump-administration-to-pause-rulemaking/article\\_b8ff3304-7db0-11ea-b217-83c5f384f577.html](https://www.coloradopolitics.com/news/bennet-and-senate-democrats-ask-trump-administration-to-pause-rulemaking/article_b8ff3304-7db0-11ea-b217-83c5f384f577.html) [<https://perma.cc/VP52-Z7U7>]; Chris Marr, *Governors, Mayors Ask Trump to Halt Regulatory Comment Clock (1)*, BLOOMBERG L. (Mar. 20, 2020, 2:24 PM), <https://news.bloomberglaw.com/daily-labor-report/governors-mayors-urge-trump-to-pause-regulatory-comment-clock> [<https://perma.cc/29PU-4MF8>].

<sup>46</sup> Letter from NGOs to Russell T. Vought, Acting Dir., U.S. Off. of Mgmt. & Budget (Mar. 19, 2020), <https://aboutblaw.com/PDw> [<https://perma.cc/8RW6-SHE4>]; Letter from Ctr. for Progressive Reform to Russell T. Vought, Acting Dir., U.S. Off. of Mgmt. & Budget (Mar. 18, 2020), <https://aboutblaw.com/PDv> [<https://perma.cc/HS5S-WSHS>].

bipartisan effort, the National Governors Association and other associations of state and local governments requested reasonable extensions to comment periods:

On behalf of the nation's states, cities, and counties, we write to request a formal pause, beginning on March 11, for all open public comment periods concerning both active rulemakings and nonrulemaking notices across every federal department or agency. . . .

. . . .

Consistent and meaningful engagement and consultation between intergovernmental partners is vital in the development and implementation of effective policies, programs and regulations. Therefore, state and local governments urge you to extend agency comment periods for a reasonable period of time, which will allow our state and local policymakers to focus on addressing the nation's immediate pandemic response needs and ensure their ability to devote proper consideration of agency regulations.<sup>47</sup>

When the Trump Administration proposed a slurry of rules unrelated to the pandemic all at once rather than slowing the pace of rulemaking, various groups also requested extensions to comment periods for proposed rulemaking. Indeed, as has been documented, Trump Administration agencies intentionally sped up the rulemaking process for nonpandemic-related rules.<sup>48</sup> Almost without exception, agencies denied the requests for extending comment periods,<sup>49</sup> which left members of the public with little choice but to respond to the proposed rulemakings as best they could in the time provided. Of course, parties affected by the proposed rulemaking could go to court and argue that an agency's refusal to provide extra comment time or other opportunities for public input during a true national emergency was unlawful. But the courts have not been receptive to arguments that an agency

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<sup>47</sup> *State and Local Government Organizations Seek Pause on Public Comments on Rulemaking Processes*, NAT'L GOVERNORS ASS'N (Mar. 20, 2020), <https://www.nga.org/advocacy-communications/letters-nga/state-and-local-government-organizations-seek-pause-on-public-comments-on-rulemaking-processes> [<https://perma.cc/2JFR-Q7X2>] (explaining that "our members are facing massive challenges in responding to, and as a result of, this global pandemic").

<sup>48</sup> Eric Lipton, *A Regulatory Rush by Federal Agencies to Secure Trump's Legacy*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/10/16/us/politics/regulatory-rush-federal-agencies-trump.html> [<https://perma.cc/W66G-6ZZ9>]; Toluse Olorunnipa, *Trump Forges Ahead with Broader Agenda Even as Coronavirus Upends the Country*, WASH. POST (Apr. 9, 2020, 5:00 AM), [https://www.washingtonpost.com/politics/trump-coronavirus-immigration-environment-inspectors-general/2020/04/08/bc1590e2-79b9-11ea-b6ff-597f170df8f8\\_story.html](https://www.washingtonpost.com/politics/trump-coronavirus-immigration-environment-inspectors-general/2020/04/08/bc1590e2-79b9-11ea-b6ff-597f170df8f8_story.html) [<https://perma.cc/566J-XYJR>].

<sup>49</sup> See, e.g., Mark Schoeff Jr., *DOL Denies Requests to Extend Comment Deadline on Advice Proposal*, INVESTMENTNEWS (Aug. 6, 2020), <https://www.investmentnews.com/dol-denies-comment-deadline-extension-195851> [<https://perma.cc/53EF-SZ7F>] (denying request to extend the deadline for public comment for a rule that would exempt investment fiduciaries to receive compensation).

has a legal obligation to provide anyone in the public any more time than is required under the standard agency rules.<sup>50</sup>

If relief in the form of court-mandated extensions is not realistic—and it does not appear to be—then is there a solution or solutions to the problem of substantively insufficient notice and comment during emergencies as we have recently been experiencing? The need for such a solution is well-illustrated by the Trump Administration’s effort to promulgate a rule and then expand a rule during the pandemic that would have hamstrung health and safety regulation and potentially cost thousands of lives. In 2018, the EPA published a proposed rule, Strengthening Transparency in Regulatory Science, also known as the scientific evidence rule, that would effectively preclude regulators from relying on a range of well-regarded, indeed foundational, public health studies in setting public health standards.<sup>51</sup> The reaction from the scientific community, among others, was intense and included a withering critique of the EPA’s analysis.<sup>52</sup> Then in March 2020, the EPA published a supplemental notice of proposed rulemaking that would vastly increase the scope of the rule as originally proposed in 2018 and, with it, the costs to public health.<sup>53</sup> Commentators strenuously argued for

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<sup>50</sup> See, e.g., *Conn. Light & Power Co. v. Nuclear Regul. Comm’n*, 673 F.2d 525, 534 (D.C. Cir. 1982) (“Neither statute nor regulation mandates that the agency do more [than the agency’s choice of comment period] . . . We shall not gainsay the [agency’s] conclusion . . .”).

<sup>51</sup> Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,768, 18,772 (proposed Apr. 30, 2018) (to be codified at 40 C.F.R. pt. 30) (“The proposed rule includes a provision allowing the Administrator to exempt significant regulatory decisions on a case-by-case basis if he or she determines that compliance is impracticable because it is not feasible to ensure that all dose response data and models underlying pivotal regulatory science are publicly available in a fashion that is consistent with law, protects privacy and confidentiality . . .”).

<sup>52</sup> Rebecca Worby, *What Scientists Are Saying About the EPA’s ‘Secret Science’ Rule*, PAC STANDARD (Sept. 23, 2018), <https://psmag.com/environment/what-scientists-are-saying-about-epa-secret-science-rule> [<https://perma.cc/HG7Z-MA9Z>]; see, e.g., State & Local Att’ys Gen., Sec’y of Pa. Dep’t of Env’t Prot. & Att’ys, Comment Letter on Proposal to Limit Use of Scientific Evidence in Rulemaking 1–2 (Aug. 16, 2018), [https://www.law.nyu.edu/sites/default/files/multistate\\_comments.pdf](https://www.law.nyu.edu/sites/default/files/multistate_comments.pdf) [<https://perma.cc/BC5K-N4EP>] (criticizing the rule for precluding “relevant, probative scientific studies, models, or other information” only because the information is not publicly available); Jeremy Berg, Philip Campbell, Veronique Kiermer, Natasha Raikhel & Deborah Sweet, *Joint Statement on EPA Proposed Rule and Public Availability of Data*, SCIENCE (May 4, 2018) <https://science.sciencemag.org/content/360/6388/eaau0116> [<https://perma.cc/NM3L-XQTY>] (supporting relying on data that is not publicly available); Robinson Meyer, *Even Geologists Hate the EPA’s New Science Rule*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/science/archive/2018/07/scott-pruitts-secret-science-rule-could-still-become-law/565325> [<https://perma.cc/P5U7-MYZ7>] (discussing the difficulties of medical professionals and researchers to publish information about patients because of patient privacy and its effect on the rule).

<sup>53</sup> See Laura Bloomer, *More Legal Questions in EPA’s Supplemental Regulatory Science Proposal*, HARV. ENV’T & ENERGY L. PROGRAM (Apr. 27, 2020), <https://eelp.law.harvard.edu/2020/04/more-legal-questions-in-epas-supplemental-regulatory-science-proposal> [<https://perma.cc/JZ6D-4V7P>] (explaining the history of the rulemaking, including the sweeping expansion of the rule first promulgated during the pandemic).

extensions to the notice-and-comment period to accommodate the fact that affected groups and governments lacked the resources to properly analyze the agency proposal and submit comments given the demands posed by the pandemic.<sup>54</sup> The EPA ultimately backed down to an extent and allowed some extension in time, but those extensions should have been automatic and more generous.<sup>55</sup> In early January 2021, as a result of the lack of time to comment on and advocate against the proposal, the Trump EPA was able to publish the final rule with almost no modifications to reflect comments.<sup>56</sup> Now the rule is technically in effect and the EPA under President Biden must determine how to freeze, work around, or otherwise undo the rule.<sup>57</sup> However, if Trump had been re-elected, the lack of an extended comment period as scientists and others demanded might have made a critical difference in any court challenge to the rule: The fewer and less developed critical comments there are in the administrative record, the easier it is for the EPA to convince a court that it took account of all relevant information presented to it and acted reasonably such that the court should defer to the agency and uphold the rule as lawful.<sup>58</sup>

## II. TWO POSSIBLE REFORMS

### A. *A Statute Extending Comment Periods During Emergencies*

Beginning with a discussion of a potential statutory solution, Part II of this Essay explores the two solutions we have proposed to help mitigate the potential harm of rulemaking during emergencies when notice-and-comment periods may necessitate extension due to the public's limited capacity during emergencies. The first way we propose to address this risk of insufficient comment periods during emergencies is through an *ex ante* federal statute

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<sup>54</sup> See, e.g., Earthjustice, Comment Letter on EPA's "Strengthening Transparency in Regulatory Science" Supplemental Notice of Proposed Rulemaking 14–15 (May 18, 2020), <https://www.ametsoc.org/index.cfm/ams/about-ams/ams-position-letters/multi-organization-letter-providing-comments-on-the-epa-proposed-rule-strengthening-transparency-in-regulatory-science> [<https://perma.cc/78T3-TJZM>].

<sup>55</sup> See Rachel Frazin, *EPA Gives Public More Time to Comment on 'Secret Science' Rule*, HILL (Apr. 2, 2020, 4:55 PM), <https://thehill.com/policy/energy-environment/490898-epa-gives-public-more-time-to-comment-on-secret-science-rule> [<https://perma.cc/H95V-979Y>]; Letter from Representative Eddie Bernice Johnson, Chairwoman, Comm. on Sci., Space, & Tech., to Andrew Wheeler, Adm'r, EPA (May 6, 2020), <https://science.house.gov/imo/media/doc/LTR%20-%20EJB%20to%20Wheeler%20re%20SNPRM%205.6.pdf> [<https://perma.cc/U57V-8PTQ>] (requesting a further extension of the public comment period).

<sup>56</sup> See Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469 (Jan. 6, 2021) (to be codified at 40 C.F.R. pt. 30).

<sup>57</sup> See Stephen Lee & Jennifer Hijazi, *Biden Team in a Bind over Reversing EPA's 'Secret Science' Rule*, BLOOMBERG L. (Jan. 6, 2021, 11:57 AM), <https://news.bloomberglaw.com/environment-and-energy/biden-team-in-a-bind-over-reversing-epas-secret-science-rule> [<https://perma.cc/YHD8-S75Q>].

<sup>58</sup> See *supra* notes 40–46 and accompanying text.

that would apply to future emergencies regardless of the political party in power. Such a statute could be structured in a variety of ways. It could be very specific, as in requiring an automatic thirty- or sixty-day extension of comment periods during an emergency as defined by the statute, at least for rules that are not addressing government efforts to confront the emergency. Or it could be more general, providing something like “all agencies shall provide reasonable additional time for comments for any nonemergency-related rule proposed during a period of national emergency.” The advantage of the first approach would be clarity and the avoidance of possible litigation over what is “reasonable.” Even under this statute, moreover, there could be a provision for an agency to seek court permission not to extend the comment period if the agency could show that an extension was unwarranted or would be contrary to the public interest.<sup>59</sup> The advantage of the second approach would be flexibility, while the use of the word “shall” would still incentivize agencies to allow extensions more than under the current legal regime. On an expressive level, such a statute would communicate a legislative recognition that notice-and-comment procedures are important and, therefore, that formal or literal compliance with them is insufficient if the substantive purposes of notice and comment cannot be achieved.

There are at least two difficult issues or potential objections to this proposed solution: (1) how would “emergency” be defined in the statute and, in particular, how *could it be* defined so that the statute is not inappropriately used to delay regulation for no good reason, and (2) would the statute encourage agencies to avoid its applicability by straining to label every proposed rule as related to combatting the emergency? We address each issue in turn.

There are several options for how to define emergency within this proposed statutory solution. The most obvious trigger for an automatic comment period extension would be the declaration of an emergency under one of the federal statutes that provide for such declarations. Because the threshold for the President declaring a national emergency under the NEA is so low and the statute is now so overused, its definition of emergency should probably not serve as the basis for an automatic comment extension.<sup>60</sup> By contrast, there has only been one national emergency declared under the

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<sup>59</sup> See *supra* Section I.B.2.

<sup>60</sup> For proposals to address inadequate limits on the President under the National Emergencies Act, see Elizabeth Goitein, *The Law Governing National Emergencies Needs Fixing*, BRENNAN CTR FOR JUST. (July 31, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/law-governing-national-emergencies-needs-fixing> [<https://perma.cc/9P6K-7ZPY>]; N.Y.C. BAR, REPORT BY THE TASK FORCE ON THE RULE OF LAW: THE NATIONAL EMERGENCIES ACT MUST BE REVISED 1–2 (2020), <https://s3.amazonaws.com/documents.nycbar.org/files/2020683-ArticleOneActNEA.pdf> [<https://perma.cc/8BFB-KAM2>].

Stafford Act: the current pandemic.<sup>61</sup> Additionally, the Stafford Act has some criteria for what constitutes an emergency.<sup>62</sup> The trigger for an extension on the comment period could be the designation of a national disaster in the majority of states under the Stafford Act. Another alternative is to leverage a declaration of national emergency (or emergency in a majority of the states) under the Public Health Service Act as a trigger for extending the comment period. Regardless of the statutory definition leveraged and in order to help ensure that the comment extensions are appropriately used since some declared national emergencies may continue for a long time—again, the COVID-19 pandemic is an example—it might be prudent to limit comment extensions to rules proposed within 90 or 180 days of the initial declaration of emergency. A further refinement in the statute might be to provide for extensions of comment periods for rules that predominantly or exclusively affect a particular state while that state was confronting an emergency, as evidenced by the declaration of an emergency in the state under the Stafford Act or Public Health Service Act.

Such statutory triggers for extending comment periods, however, might be underinclusive—for example, not capturing major terrorist attacks or initiation of war. It could also be overinclusive in that some national or widescale emergencies may not rise to a level that justifies across-the-board extensions to comment periods. Thus, an alternative approach would be to effectively delegate the decision to extend comment periods to the National Governors Association and other bipartisan state and local government associations<sup>63</sup> such that an extension period would be triggered once requested by the organizations without significant dissent among the membership. This bipartisan aspect of the trigger would be important to avoid having the comment period extension be used by those who simply oppose the party in power and want to slow down their regulatory initiatives however possible.

It is entirely possible that agencies, to avoid a statutory extension of the comment period, would seek to characterize their proposed rules as

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<sup>61</sup> See Letter from President Donald J. Trump, *supra* note 43. For an overview of the Stafford Act, which governs natural disaster emergency declarations, see Robert T. Stafford Disaster Relief and Emergency Assistance Act Fact Sheet, *supra* note 36.

<sup>62</sup> Under the Act, “[e]mergencies are defined as any event for which federal assistance is needed to supplement state/local efforts to save lives, protect public health and safety, protect property, or avert the threat of a catastrophe. Pandemic influenza and other communicable diseases are defined as emergencies eligible for coverage under the Stafford Act.” Robert T. Stafford Disaster Relief and Emergency Assistance Act Fact Sheet, *supra* note 36; see also 42 U.S.C. § 5122(1) (defining an emergency as “any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States”).

<sup>63</sup> See *supra* notes 45–48 and accompanying text.



emergency-related and hence not subject to the extension.<sup>64</sup> To prevent this, the statute could require an agency to explain why a rule is reasonably related to the emergency and hence not subject to an extended comment period in its proposal. Moreover, some rules simply cannot be characterized as reasonably related to an emergency: For example, a Department of Interior proposed rule to open up federal land to more oil and gas drilling over the next decade simply has no reasonable relationship to the current pandemic.<sup>65</sup>

### B. *Modifying the Administrative Record Rule*

A statute is not the only way to address this risk. Courts can guard against executive abuse by adding to the court-made exceptions to the administrative record rule. That rule generally precludes judicial consideration of new information and arguments once the administrative record is closed, but exceptions already proliferate.

The administrative record rule grew out of lawsuits against agencies under the APA. Under the APA's judicial review provisions, "the court shall review the whole record or those parts of it cited by a party."<sup>66</sup> The question that has bedeviled courts relates to the meaning of "the whole record." In the influential case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Supreme Court emphasized that "review is to be based on the full administrative record that was before the Secretary at the time he made his decision."<sup>67</sup> The Court was cognizant, even then, of not allowing an agency to fashion some post hoc set of documents in order to influence judicial review. The Court made this concern explicit in *Camp v. Pitts* when it noted that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."<sup>68</sup>

In the years following *Overton Park* and *Pitts*, courts have used this doctrine not only to provide a minimum guarantee of agency disclosure but also to provide a maximum cap on what an agency must produce for

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<sup>64</sup> See Connor Raso, *Emergency Rulemaking in Response to COVID-19*, BROOKINGS (Aug. 20, 2020), <https://www.brookings.edu/research/emergency-rulemaking-in-response-to-covid-19> [<https://perma.cc/ZYZ5-DKZT>] (reviewing so-called "emergency" rules and whether they were really related to the COVID-19 emergency).

<sup>65</sup> For a list of federal natural resources rules and actions expedited as a result of the COVID-19 emergency, see Letter from Katharine Sinclair MacGregor, Deputy Sec'y, U.S. Dep't of the Interior, to Larry Kudlow, Dir., Nat'l Econ. Council (July 15, 2020), [https://biologicaldiversity.org/programs/public\\_lands/pdfs/Department-of-the-Interior-Response-to-EO-13927.pdf](https://biologicaldiversity.org/programs/public_lands/pdfs/Department-of-the-Interior-Response-to-EO-13927.pdf) [<https://perma.cc/NV8D-N8WX>].

<sup>66</sup> 5 U.S.C. § 706.

<sup>67</sup> 401 U.S. 402, 420 (1971).

<sup>68</sup> 411 U.S. 138, 142 (1973).

purposes of judicial review. In *Florida Power & Light Co. v. Lorion*, for example, the Supreme Court held that “[t]he reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed, and to reach its own conclusions based on such an inquiry[,]” but instead must rely on the “record the agency presents to the reviewing court.”<sup>69</sup> Because the agency itself controls the record that it presents to the reviewing court, the possibility of abuse is apparent. Indeed, “agencies are able to manipulate the decision-making process by providing justifications—crafted to survive legal challenges—as a mere pretext to cover their actual justifications, thereby avoiding meaningful judicial review.”<sup>70</sup> And for the most part, courts have declined to look beyond the official record that the agency presents to scrutinize the basis for agency decision-making. As one commentary put it: “the overwhelming majority of courts have declined to use *Overton Park*’s exception to look beyond the administrative record.”<sup>71</sup>

However, some courts have been cognizant of the draconian nature of the rule expounded in *Florida Light* and the possibilities of continued abuse by agencies. Such courts have fashioned several exceptions to the record rule that allow plaintiffs to supplement the record with additional information or documents or even to conduct discovery or take depositions of agency officials.<sup>72</sup> In extreme cases, such as the recent case involving the citizenship question on the official United States census form, courts have ordered further inquiry into the basis for agency decision-making where the official record offers a mere pretext.<sup>73</sup> Some commentators have called for further judicial scrutiny of pretextual agency decision-making.<sup>74</sup>

In broader terms, courts have fashioned exceptions to the record rule under several circumstances, such as when it must determine whether the agency considered all relevant factors, where plaintiffs can show bad faith on the part of the agency, or where the agency relied on documents, not in

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<sup>69</sup> 470 U.S. 729, 743–44 (1985).

<sup>70</sup> Laura Boyer, Comment, *Expanding the Administrative Record: Using Pretext to Show “Bad Faith or Improper Behavior,”* 92 U. COLO. L. REV. 613, 617 (2021).

<sup>71</sup> James D. Cromley & J. Michael Showalter, *Going Beyond: When Can Courts Look Past the Record in an APA Review?*, GEO. ENV’T L. REV. (Aug. 15, 2019), <https://www.law.georgetown.edu/environmental-law-review/blog/going-beyond-when-can-courts-look-past-the-record-in-an-apa-review> [<https://perma.cc/XDC5-Q844>].

<sup>72</sup> See, e.g., *Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs*, No. 20-cv-103, 2020 U.S. Dist. LEXIS 172979, at \*23–29 (D.D.C. Sept. 22, 2020) (reviewing legal standards and cases).

<sup>73</sup> See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2576 (2019) (“Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.”).

<sup>74</sup> See generally Boyer, *supra* note 70 (raising the concern that limited judicial review of pretextual decision-making leads to undermining of courts’ legitimacy and compromise of separation of powers).

the record.<sup>75</sup> These exceptions are not uniform across circuits. For example, the Ninth, Tenth, and Eleventh Circuits, and arguably the D.C. Circuit as well, have been more willing to consider extrarecord evidence and have taken a less absolutist posture toward the administrative record rule than the Sixth or Federal Circuits.<sup>76</sup> An influential commentary noted eight general categories that various courts use to allow evidence beyond what the agency deems to be the official record.<sup>77</sup> As commentators have noted for some time, it is difficult to tell what truly remains of the administrative record rule.<sup>78</sup>

Notwithstanding the aforementioned holdouts, this trend of recognizing exceptions to the record rule seems to be only accelerating. Especially in the wake of recent Supreme Court cases, such as *Department of Commerce v. New York*, some commentators have predicted and argued for a continued expansion of the administrative record to allow courts to consider more than simply what the agency deems to be “the record.”<sup>79</sup> As one commentator put it: “recently, some district courts have begun to apply an expansive reading of the record rule in reviewing informal agency action” and will consider “any materials considered by agency personnel involved in the decision-making process (not just the ultimate decisionmaker), including ‘internal

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<sup>75</sup> *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (noting that “[i]n limited circumstances, district courts are permitted to admit extra-record evidence: (1) if admission is necessary to determine ‘whether the agency has considered all relevant factors and has explained its decision,’ (2) if ‘the agency has relied on documents not in the record,’ (3) ‘when supplementing the record is necessary to explain technical terms or complex subject matter,’ or (4) ‘when plaintiffs make a showing of agency bad faith.’”) (quoting *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)).

<sup>76</sup> See Travis O. Brandon, *Reforming the Extra-Record Evidence Rule in Arbitrary and Capricious Review of Informal Agency Actions: A New Procedural Approach*, 21 LEWIS & CLARK L. REV. 981, 991–93, 998, 1001 (2017) (reviewing the complex nature of each circuit’s exceptions).

<sup>77</sup> Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 344 (1984) (listing the eight categories as “(1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage”).

<sup>78</sup> *Id.* at 358–59.

<sup>79</sup> See Peter Constable Alter, Note, *A Record of What? The Proper Scope of an Administrative Record for Informal Agency Action*, 10 U.C. IRVINE L. REV. 1045, 1049 (2020); Aram A. Gavoor & Steven A. Platt, *Recent Developments: Administrative Records After Department of Commerce v. New York*, 72 ADMIN. L. REV. 87, 98 (2020) (“We predict that unless the Court signals the *Department of Commerce* opinion as a one-off case, APA record supplementation by traditional discovery tools and otherwise will proliferate in the lower courts.”) (footnote omitted).

comments, draft reports, inter- or intra-agency emails, revisions, memoranda, or meeting notes that inform an agency's final decision."<sup>80</sup>

The point is not whether an expanded records rule is warranted. For our purposes, the point is that courts already carve out numerous exceptions to the administrative record rule and do so in a flexible, common-sense manner. It would hardly be much of a stretch for courts to recognize an additional exception when an administrative agency pushes rules during a time of emergency. Indeed, many of the concerns motivating the existing exceptions—rooted both in the possibility of abuse by an agency interested in artificially narrowing the administrative record and the possibility that a court may not have all the relevant information before it when it makes its decision—are also present in the case of rushed rulemaking during emergencies. This is especially true when petitioners are unable to introduce highly relevant technical arguments and data because the notice-and-comment period was not extended to allow the time needed to gather and present critiques of the proposed rule. By fashioning such an exception, courts would effectively undo the damage done by the failure of the executive branch to afford the public the time it needed to develop and present the data. This will in turn allow a court to genuinely determine the rationality of the rule.

For example, in the case of the Trump-era scientific evidence rule discussed above, a court might allow introduction of evidence concerning the damaging effects of the rule even if such evidence had not been submitted to the agency during the notice-and-comment period. A court might be especially inclined to do so if the parties had notified the agency during the notice-and-comment period that they were working on a scientific critique but would be unable to submit it by the deadline due to the ongoing pandemic emergency. In such a case, the agency would at least have had notice of the deadline problem and an opportunity to extend the deadline in light of the emergency. And if the agency chose not to extend the deadline, it would in a sense have brought any problems of *ex post* evidence upon itself. At the very least, a court could take all of these factors into account in fashioning an appropriate remedy much in the same way courts currently do with respect to other extrarecord evidence.

Of course, *ex post* accommodation of extrarecord evidence would not address one of the problems with regulating during emergencies. Emergencies create a political environment in which some regulations are promulgated that in a less distorted and thus normatively “better” political

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<sup>80</sup> See Alter, *supra* note 79, at 1048–49 (alteration omitted) (quoting Inst. for Fisheries Res. v. Burwell, No. 16-cv-01574-VC, 2017 WL 89003, at \*1 (N.D. Cal. Jan. 10, 2017)).

environment would not have been promulgated in the first place. Therefore, this *ex post* solution cannot stop a rule from being promulgated in the first place. However, our court-based proposal does not pose the risk of strategic uses of extension periods to slow down regulation by opponents of that regulation.

A court-based proposal may indeed be the most realistic path toward some recognition of the problem we describe—that of rulemaking during emergencies—especially given the existing trend of courts considering extrarecord evidence for myriad other reasons. The flexibility of the existing exceptions, combined with courts’ increased willingness to scrutinize agency decision-making by looking beyond the official agency-created record, make our court-based proposal both a modest extension of current law and a potentially powerful tool to curb agency abuse of emergencies.

#### CONCLUSION

The current pandemic has highlighted the need for Congress and federal courts to rein in agencies’ attempts to use emergencies to push through controversial rules. Both the legislative and judicial branches can play an important role in ensuring the integrity of the rulemaking process when that integrity is threatened by the decreased public participation that an emergency creates. While there may certainly be risks associated with either Congress or the courts stepping in, these risks can be amply mitigated and do not outweigh the significant benefits to the technocratic and deliberative democratic goals of the rulemaking process. Indeed, such reforms would be one of the most productive ways to not let the current emergency “go to waste.”