ARTICLE

FOREIGN HARD LOOK REVIEW

GANESH SITARAMAN*

For decades, courts and scholars have been engaged in a protracted and largely polarized debate over a seemingly simple question: how should courts address cases that implicate foreign affairs? On the one hand are those who seek expansive deference to the Executive's conduct of foreign affairs. On the other are those who argue that the courts must enforce the rule of law in foreign affairs cases lest they abdicate their responsibility to keep the Executive in check. This Article provides an alternative approach to the judicial role in foreign relations cases—one that navigates between judicial abdication and judicial entanglement. It argues that administrative law's doctrine of hard look review can be usefully applied to many situations of executive foreign policymaking. Foreign hard look review would allow the courts to exercise their duty to prevent arbitrary and capricious decisionmaking while still preserving the Executive's expertise in foreign affairs. In areas of foreign relations law as diverse as the political question doctrine, the President's completion power, national security deference, the Executive's power to violate customary international law, and the making of executive agreements and other international obligations, foreign hard look review provides a way for courts to fulfill their constitutional role without encumbering the Executive's making of foreign policy.

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* Assistant Professor of Law, Vanderbilt Law School. Thanks to Bob Allen, John Coyle, Deborah Dinner, Noah Feldman, Jack Goldsmith, Daryl Levinson, Jason Marisam, Anne Joseph O'Connell, Chris Robertson, Cristina Rodriguez, Kevin Stack, Matt Stephenson, and Ingrid Wuerth for helpful conversations and comments.

INTRODUCTION

Perhaps the central question in foreign relations and national security law is whether and how courts should treat cases that implicate foreign relations and national security: Should courts review the National Guard's training and equipment standards to ensure they do not lead to excessive force?[1] Can the Secretary of State impose area restrictions on passport use?[2] Should courts give deference to State Department determinations that Iraq does not torture its prisoners?[3] Can the Attorney General detain refugees indefinitely in violation of customary international law?[4] More generally, should the political question doctrine apply when it comes to executive actions in foreign affairs or national security? Should courts provide deference to decisions solely because they touch on national security? How should courts treat executive agreements that have not been ratified by Congress?

In the face of these and related questions, courts and scholars have been engaged in a protracted, polarized, and decades-long debate. In one camp are those who seek expansive deference to the Executive's conduct of foreign affairs.[5] The Executive alone, they argue, can act with secrecy and

1. Gilligan v. Morgan, 413 U.S. 1, 6 (1973).
2. Zemel v. Rusk, 381 U.S. 1, 3 (1965).
3. Munaf v. Geren, 553 U.S. 674, 680 (2008).
4. Garcia-Mir v. Meese, 788 F.2d 1446, 1448 (11th Cir. 1986).
5. *See, e.g.*, Abourezk v. Reagan, 785 F.2d 1043, 1063 (D.C. Cir. 1986) (Bork, J., dissenting) ("[D]eference applies with special force where the subject of that analysis is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs"); *see also* Julian Ku & John Yoo, Hamdan v. Rumsfeld: *The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179,

dispatch; the Executive alone has the necessary expertise and knowledge to address many issues; and the Executive alone speaks with a single voice to the peoples of the world.[6] Moreover, they argue, expansive deference is supported by textual, structural, and historical understandings of the Constitution and by practices throughout history.[7] In another camp are those who argue that the courts must enforce the rule of law in foreign affairs cases lest they abdicate their responsibility to keep the Executive in check.[8] They hold that there is no broad rule requiring deference or abstention and that courts routinely address far more complex issues.[9] Like their opponents, members of this camp argue that their view is supported by the text, structure, and original understanding of the Constitution and by historical practice over two centuries.[10] The debate has become so

180 (2006); John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747, 748 (1997); John Yoo, *Politics as Law? The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 853 (2001) [hereinafter Yoo, *Politics as Law*].

6. *See, e.g.*, The FEDERALIST NO. 70 (Alexander Hamilton); *see also* Ku & Yoo, *supra* note 5, at 199–201 (noting that the judiciary has no expertise and is slow and fragmented, unlike the Executive which has expertise, can act with speed, and has the flexibility to shift to changing conditions).

7. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001); Saikrishna B. Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (2003); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994); *see also* Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348 (2005) (noting the Court's "customary policy of deference to the President in matters of foreign affairs"); *see also* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 651 (2000) ("Courts have given deference to the executive branch in foreign affairs matters throughout the nation's history").

8. *See* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 4–5 (1992); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY, 313–21 (1990); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 148 (1990); Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 813 (1989); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 675–80 (2002).

9. Charney, *supra* note 8, at 813 ("[T]here is no basis for a broad rule permitting deference or abstention in cases touching on international law and policy."); Spiro, *supra* note 8, at 679 ("Courts rule all the time in much more complex (not to mention dull) areas of law; it is hard to argue that the average federal judge, even in the era before globalization, was less informed on matters of foreign affairs than on such issues as energy regulation, bankruptcy law, or the federal pension regime.").

10. On the text, structure, and history of the Constitution, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996). For a discussion of congressional power, and relatedly, judicial involvement, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); David J. Barron & Martin S.

entrenched that one set of scholars has declared that "constitutional law arguments have not moved significantly . . . [and] both sides have added to their historical evidence and their textual and structural arguments without really convincing each other to adjust their positions."[11] At its core, this debate is a constitutional one, grounded in separation of powers concerns and adapted to the purported uniqueness of foreign affairs.

So framed, the debate has largely missed the fact that foreign affairs issues raise precisely the same set of competing constitutional and functional values that characterize policymaking in domestic affairs. In foreign policy as in domestic policy, expertise, energy, and efficiency are prized. And in foreign policy as in domestic policy, checks and balances and accountability are essential. Thinking about foreign relations law not as a species of constitutional law, but instead as akin to an area of domestic regulatory law, such as environmental law or food and drug law, opens up the possibility of a third way for the judicial role in foreign relations cases—the principles and processes of administrative law.

Although many argue that foreign affairs are different from domestic affairs, administrative law and foreign relations law actually share some important structural similarities that enable doctrinal transplant. First, both administrative law and foreign relations law seek to balance competing constitutional values of efficiency and expertise, checks and balances, and democratic accountability and procedural legitimacy. Although some argue that foreign relations are distinct from domestic affairs because speed and secrecy are essential in foreign relations, in fact, a substantial amount of foreign relations policymaking does not involve speed or secrecy, and some domestic situations actually *do* require speed and secrecy. Invocations of speed and secrecy are over- and under-inclusive, and should not be used as a trump card when more narrowly tailored, pragmatic design solutions are possible. Second, Congress has delegated foreign affairs and national security rulemaking authority to the Executive Branch by statute, just as it has in the domestic regulatory context. The structure of much of executive foreign policymaking is similar to the domestic policymaking: a congressional delegation of authority to an Executive Branch department and an executive action to establish a rule or policy. Third, despite widespread belief that the Administrative Procedure Act (APA) exempts foreign policy and military issues from its procedural requirements, the APA actually includes foreign affairs and military institutions as "agencies"

Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941 (2008).

11. Robert J. Delahunty & John C. Yoo, *Thinking About Presidents*, 90 CORNELL L. REV. 1153, 1163 (2005).

and does not exempt them from important provisions, such as arbitrary and capricious review.

This is not, of course, to say that the legal structure of foreign affairs policymaking is exactly the same as it is in domestic affairs. The absence of notice-and-comment rulemaking procedures in foreign affairs means that public participation is not mandated in foreign relations decisionmaking.[12] Foreign relations policymaking tends to be less scientific or technical and grounded more in politics or policy questions. And "ossification"—the slowing of policymaking because of cumbersome procedures—may be more troubling in foreign affairs than it is in domestic affairs because of risks to national security. But these differences are limited and can be addressed through careful doctrinal design and thoughtful choice of remedies. As a matter of separation of powers goals and statutory design, foreign and domestic affairs are far more similar than is often assumed.

This Article looks to administrative law to provide an alternative approach to the judicial role in foreign relations cases. It suggests that courts can apply foreign hard look review, the foreign relations law's counterpart to administrative law's doctrine of hard look review, to many instances of executive foreign policymaking.[13] Under administrative law's doctrine of hard look review, a court will review agency action for "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[14] In particular, the reviewing court considers whether

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[15]

In short, courts ensure that an agency has taken a "hard look" at the issue in question. As a check on executive power, hard look review prevents arbitrary and capricious actions, actions unsupported by logical reasoning or evidence, and actions that violate procedures or fail to

12. Administrative Procedure Act (APA), 5 U.S.C. § 553(a)(1) (2012).

13. This approach is distinct from some recent assessments of judicial deference to *factual* findings in the national security and military context. *See* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441 (2005).

14. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted). Hard look review is a term commonly used interchangeably with arbitrary and capricious review, which is statutorily required by the APA § 706(2)(A).

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

consider relevant alternatives. At the same time, hard look review preserves the Executive's advantages in policymaking: courts are not to substitute their judgment for that of agency experts, but only to police the decisionmaking process to ensure that the decision was made rationally and fairly.

Foreign hard look review is similar. It applies in situations in which there is a congressional statute delegating authority to the Executive Branch, and the Executive acts pursuant to its statutory authority. As in domestic hard look review, courts would review executive actions using the arbitrary and capricious review standard of the APA to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." [16] Separate constitutional review would still be possible, as it is in domestic policymaking, but the focus of foreign hard look review is to apply traditional administrative law processes to situations in which the Executive acts pursuant to statute.

Transporting domestic hard look review into foreign affairs has some important implications. It means courts can provide meaningful review in a substantial set of cases usually decided under the political question doctrine. It means courts need not provide expansive deference to the Executive whenever national security or foreign affairs issues are raised. It provides a way for courts to determine when actions of Executive Branch officials can be seen as "controlling" and therefore able to violate customary international law. And it provides a path for review of executive agreements and other international obligations—one that does not go so far as recent calls for a new framework statute that would act as an "APA for International Law."[17] In these cases, and in many other situations in which the Executive makes foreign policy, foreign hard look review provides a pragmatic, process-based approach that lies between judicial abdication and judicial entanglement.

In many ways, foreign hard look review is a companion to the argument that *Chevron*[18] deference can be applied to certain foreign relations law questions. Professor Curtis Bradley first argued that *Chevron* deference might be helpfully applied to executive interpretations of ambiguous statutory and treaty provisions in foreign affairs cases.[19] Professors Eric Posner and Cass Sunstein later argued for expanding *Chevron* deference in

16. *Overton Park*, at 416.

17. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 242 (2009).

18. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

19. Bradley, *supra* note 7.

foreign affairs so executive interpretations of ambiguous provisions could conflict with international law or apply extraterritorially.[20] Responding to these proposals, some commentators called for a lesser degree of deference, *Skidmore*[21] deference, in treaty interpretation,[22] and others argued that *Chevron* deference is unwarranted when it comes to laws designed to constrain the Executive.[23]

Despite the ongoing debate about the role of *Chevron* in foreign affairs cases, that doctrine is only a partial answer to the question of the courts' role in foreign relations cases. By its own terms, *Chevron* applies only to the Executive's reasonable interpretation of ambiguous statutes. Yet the Executive has expansive authority in foreign relations beyond interpreting statutes. The Executive can create international agreements that preempt state law without congressional approval. A controlling executive act can violate customary international law, without congressional authorization. And the Executive can promulgate rules, regulations, and policies that are not merely interpretations of a statute and go unreviewed by courts because they are considered political questions or framed as implicating national security or foreign affairs. Even though many of these activities are parallel to run-of-the-mill domestic policymaking processes governed by administrative law, when it comes to these and many other questions in the foreign affairs context, the intractable constitutional debate between executive discretion and judicial accountability has crowded out other, more pragmatic solutions.

To show the relevance and usefulness of importing hard look review from administrative law into foreign relations law, this Article proceeds in three parts. Part I considers hard look review in the domestic context. It outlines the doctrine as it stands in administrative law and evaluates its

20. Eric A. Posner & Cass R. Sunstein, Chevronizing *Foreign Relations Law*, 116 YALE L.J. 1170 (2007); *see also* Oren Eisner, Note, *Extending* Chevron *Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 CORNELL L. REV. 411 (2001). Professor Bradley had previously argued that *Chevron* would not apply to comity doctrines because they were not delegated by Congress. *See* Bradley, *supra* note 7.

21. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

22. Evan Criddle, Scholarship Comment, Chevron *Deference and Treaty Interpretation*, 112 YALE L.J. 1927 (2003).

23. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007) (arguing against *Chevron* deference when the Executive provides interpretations of international law that have the status of supreme federal law, are made partly outside the Executive, and condition the exercise of executive power). In a recent article, Deborah Pearlstein argues that *Chevron* is an unstable doctrine and that its use in foreign relations requires an underlying theory of judicial interpretive power. *See* Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783 (2011).

benefits and weaknesses, highlighting hard look's commitment to acting as a third way between abdication and entanglement. Part II shows that hard look review is transportable into the foreign affairs context and explores the doctrinal contours of foreign hard look review. Part II first demonstrates that both administrative law and foreign relations law seek to balance the same goals: the expertise and efficiency of executive action, checks and balances on government authority, and the legitimacy of government action. It also argues that the purported differences between foreign and domestic policymaking—speed and secrecy—are largely overblown. It then shows that foreign hard look review has statutory foundations in the APA. Finally, Part II considers the doctrinal elements of foreign hard look review. After outlining the elements of domestic hard look review, it describes how differences between domestic and foreign policymaking would manifest in judicial application of the doctrine, and addresses major criticisms, such as the possibility of ossifying foreign policymaking. Part III applies foreign hard look review to a series of issues in foreign relations law, including the political question doctrine, the President's completion power, national security deference, the Executive's power to violate customary international law, and the creation of ex ante congressional-executive agreements. These examples were chosen to demonstrate the breadth of applicability for foreign hard look review, in both real cases that courts face—and in recent scholarly debates. In each case, it presents an overview of the issue and ongoing controversies and provides examples of how foreign hard look review might be helpful. A brief conclusion follows.

This Article contributes to a small but emerging trend of scholars drawing on administrative law principles to help address problems and issues in foreign relations and national security law that were hitherto seen as *sui generis*.[24] Because both domestic regulatory law and foreign relations law are ultimately substantive areas of law that are structured by separation of powers principles, themes and doctrines in administrative law can illuminate foreign relations law and suggest design strategies for foreign relations challenges. While debates in foreign relations law have largely adhered to questions of text, structure, and history, administrative law debates have moved from those traditional questions to pragmatic and functional debates on how best to design institutions that are both effective for modern times and true to the Constitution's commitment to checks and

24. *See, e.g.*, Bradley, *supra* note 7 at 653; Posner & Sunstein, *supra* note 20; Hathaway, *supra* note 17; Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009); John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2283 (2009).

balances. In doing so, this Article hopes to contribute to the trend of understanding foreign relations questions as ordinary policymaking in which constitutional commitments can be upheld through pragmatic, process-based institutional design.[25]

I. DOMESTIC HARD LOOK REVIEW

The doctrinal foundation for foreign hard look review is administrative law's doctrine of hard look review. This Part outlines the basic requirements of hard look review in administrative law, and evaluates the possible benefits and drawbacks of the doctrine. What emerges is a doctrine that is designed to be pragmatic, flexible, and nuanced. It considers a number of factors in order to ensure agency action is well-reasoned, while simultaneously seeking not to infringe on the Executive's expertise, efficiency, and role in policymaking. The result is an intermediate standard between judicial abdication and judicial entanglement that can be helpfully applied to foreign relations issues.

A. The Development of Hard Look Review

Under § 706(2)(A) of the APA, a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[26] In the wake of the New Deal and the creation of the administrative state, the arbitrary and capricious standard was relatively lenient, as New Deal judges rarely found that agencies had "acted like a lunatic,"[27] thus requiring reversal. Trust in agency expertise meant a narrow role for judicial review.[28] But by the late 1960s and early 1970s, the

25. This Article is the first to provide a comprehensive defense of the transportability of hard look review into the foreign relations context, and it is the first to apply it to a wide variety of areas within foreign relations law and scholarship. A few scholars have mentioned the relevance of hard look review in specialized areas touching on foreign relations, but the scope of their discussions has been considerably narrower. *See* Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 586 n.35, 627 (2010) (noting in a footnote and paragraph the similarity of judicial review in domestic intelligence gathering and arbitrary and capricious review); Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279 (1991) (considering only asylum cases); Note, *Prisoners of Foreign Policy: An Argument for Ideological Neutrality in Asylum*, 104 HARV. L. REV. 1878, 1890 n.81 (1991) (mentioning hard look review for asylum cases in a footnote); Chesney, *supra* note 13 (exploring natural security fact deference claims); Masur, *supra* note 13 (discussing deference to *factual* findings in national security law).

26. APA, 5 U.S.C. § 706(2)(A) (2012).

27. Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 454 (1986).

28. *See generally* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938). *See also* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1282–84

model of judicial review over expert-led agencies had changed significantly. Foremost in the minds of courts and commentators was the importance of interest groups to the regulatory process. Some interpreted interest groups as simply shifting the legislative process from Congress to agencies,[29] while others worried that agencies had been captured by regulated or constituent industries.[30] In both cases, the rise of interest groups suggested that the faith in expert agency policymakers was misplaced and therefore that courts should take a more active role in policing agency decisions.

In addition to the rise of interest group influence, other trends signaled an increase in judicial review. Informal rulemaking, or notice-and-comment rulemaking, became more common.[31] The reduced procedures of informal rulemaking called into question the legitimacy of agency action, and judicial review provided a procedural backstop that would enhance sound decisionmaking, and with it, the legitimacy of agency regulations. Additionally, as the regulatory state was increasingly seen as conferring rights on individuals, judicial review became necessary to protect those individual interests.[32] Finally, some commentators saw increased judicial review as simply another manifestation of a broader trend toward judicial activism.[33]

Whatever the cause, during the 1960s and 1970s, courts took a greater role in reviewing agency actions. In scholarship and D.C. Circuit cases, Judge Harold Leventhal argued that administrative law gave the judiciary "a supervisory function of review of agency decisions."[34] This supervisory role involves "enforcing the requirement of reasonable procedure, fair notice and opportunity to the parties to present their case, and it includes examining the evidence and fact findings to see both that the evidentiary fact findings are supported by the record and that they provide a rational

(1984); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1678 (1975).

29. Stewart, *supra* note 28, at 1683.

30. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 450 (1987); Frug, *supra* note 28, at 1334; STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 348 (6th ed. 2006); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997).

31. Merrill, *supra* note 30, at 1060.

32. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964); *see also* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320–94 (1965).

33. *See* Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2600 (2002) [hereinafter Warren, *Active Judging*]; Antonin Scalia, *Vermont Yankee, the APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 359 (1978).

34. Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 11–12 (1974).

basis for inferences of ultimate fact."[35]

In a series of cases, Judge Leventhal expounded this idea as guaranteeing that agencies had taken a "hard look" at the issues involved.[36] In *Greater Boston Television Corp. v. FCC*, Judge Leventhal announced that courts would "assure that the agency has given reasoned consideration to all the material facts and issues."[37]

> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards. . . . If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency's path may reasonably be discerned, though of course the court must not be left to guess as to the agency's findings or reasons.[38]

Hard look review "combine[d] judicial supervision with a salutary principle of judicial restraint."[39] But far from seeing the supervisory role of the reviewing court as antagonistic, Judge Leventhal held that courts and agencies were involved in a "'partnership' in furtherance of the public interest" that was collaborative.[40] This "collaborative" spirit ensured that agency action would promote the public interest, rather than "impermissible whim, improper influence, or misplaced zeal."[41] The overall result would be greater public confidence in government decisionmakers and policies.

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35. *Id.*

36. Pikes Peak Broad. Co. v. FCC, 422 F.2d 671, 682 (D.C. Cir. 1969) ("We are satisfied that the Commission gave petitioners' predictions a hard look."). Over time, hard look review has shifted to mean that *courts* will take a hard look at agency action. Leventhal's original formulation, however, is truer to the doctrine's purpose and scope. Additionally, there is some debate whether Leventhal or Bazelon was the true originator of hard look review, though Leventhal is generally credited with creating the doctrine. *Compare* CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT 39 (1999) ("[H]ard-look judicial review originated from the pen of Judge Harold Leventhal"), *with* Abner J. Mikva, *The Real Judge Bazelon*, 82 GEO. L.J. 1, 4 (1993) ("[Bazelon] was the author of the 'hard look' doctrine in our court.").

37. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

38. *Id.* (footnotes omitted).

39. *Id.*

40. *Id.*

41. *Id.* at 852.

Though it did not use the phrase, the Supreme Court largely ratified hard look review in its decision in *Overton Park*, in which the Secretary of the Treasury's decision to build a highway through parkland was challenged for the Secretary's failure to make formal findings and provide a reasoned explanation for his decision.[42] The Court described the nature of the arbitrary and capricious test as requiring courts to consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."[43]

Following *Overton Park*, in *Motor Vehicles Manufacturing v. State Farm Insurance*, the Supreme Court further described the scope of review for agency actions challenged as arbitrary and capricious:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[44]

Though it again did not use the "hard look" phrasing, *State Farm* established that courts would play a significant role in reviewing agency action as arbitrary and capricious.[45] As Professor Sunstein has noted, hard look review established that "[t]he idea of autonomous administration is outdated" and that judicial involvement would be necessary in supervising

42. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

43. *Id.* at 416 (citations omitted).

44. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted).

45. Though the Court has not adopted such language, I use the terms arbitrary and capricious review and hard look review interchangeably, as is conventional in the literature.

administrative actions.[46]

Since *State Farm*, the hard look review doctrine has remained remarkably stable, with the Court fleshing out its contours but not revising the core of the doctrine in almost thirty years.[47] Among other things, courts have rejected agency actions for relying on undocumented tests[48] and failing to give reasons for regulating individual substances.[49] But they have also upheld decisions when agencies do not consider areas of law outside the agency's subject matter[50] and agency rules made in the face of scientific and factual uncertainty.[51]

B. EVALUATING HARD LOOK REVIEW

Greater Boston Television, *Overton Park*, and *State Farm* all establish hard look review as a pragmatic doctrine that enables the judiciary to police administrative actions and discretion while still respecting the Executive Branch's expertise and efficiency in policymaking. Seeking to navigate between the extremes of entanglement and abdication, it is no surprise that hard look review has met with considerable criticism. Perhaps the three most prominent criticisms are that it "ossifies" the regulatory process, falls prey to judicial competence and separation of powers problems, and is simply a mask for policy preferences.

A 1992 article by Professor Thomas McGarity popularized the idea that hard look review had contributed to a slowing, even "ossification," of agency action.[52] A one-page "concise general statement of basis and purpose" for establishing all primary and secondary standards under the Clean Air Act in 1971 had become a 36-page document with a 100-page staff paper and a multi-volume criteria document—for each individual

46. Sunstein, *supra* note 30, at 483.

47. *Cf.* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 764 (2008) (noting that the Court has not been involved in revising the doctrine in twenty-five years).

48. Troy Corp. v. Browner, 120 F.3d 277, 286 (D.C. Cir. 1997).

49. AFL-CIO v. OSHA, 965 F.2d 962, 986–87 (11th Cir. 1992).

50. Pension Benefit Guarr. Corp. v. The LTV Corp., 496 U.S. 633, 656 (1990).

51. Balt. Gas & Electric Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 104 (1983).

52. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992). McGarity recognized that other factors had contributed to ossification, including an underfunded bureaucracy, successful notice to interest groups, the need to involve technical experts, congressional requirements such as the Regulatory Flexibility Act and National Environmental Policy Act (NEPA), presidential requirements through Office of Management and Budget (OMB) including regulatory impact analysis, trade, family, federalism, and takings impacts; and other statutes such as Freedom of Information Act (FOIA) and the Federal Advisory Committee Act (FACA). *See id.* at 1396–1408.

standard.[53] And the time it took to promulgate regulations had shifted from an average of six months to five years.[54]

Professor McGarity and other commentators on ossification focused on four factors: hard look review created a status quo bias that discouraged agencies from regulating for fear of judicial rebuke;[55] it reduced an agency's flexibility and ability to experiment;[56] it created significant decision costs in terms of time and effort to create records, a particular problem given agencies' limited resources;[57] and it pushed agencies to adopt less formal interpretive rules and policy statements more frequently, documents that involve limited or no transparency and public participation in their formulation, and to shift from rulemaking to adjudication to establish regulatory positions.[58]

In the next few years, some scholars proposed various ways to deossify the regulatory process,[59] others advocated for ossification in limited contexts,[60] and Professors McGarity and Seidenfeld engaged in an

53. *Id.* at 1387.

54. *Id.* at 1387–88.

55. *See* R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 246 (1992); STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 58 (1993); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 282 (1989); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1280–81 (1999); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG., 257, 284–89, 294, 297–98 (1987); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65, 67 (1995); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 383 (1986); McGarity, *supra* note 52, at 1395, 1419–20; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 486, 498 (1997); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts To Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 765 (1994); *see also* Note, *Rationalizing Hard Look Review After the Fact*, 122 HARV. L. REV. 1909, 1914–15 (2009) [hereinafter *Rationalizing Hard Look Review*]; Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 764 & n.43 (2006).

56. McGarity, *supra* note 52, at 1392, 1452.

57. *See Rationalizing Hard Look Review*, *supra* note 55, at 1914–15; Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 557 (1997); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 395 (2000); McGarity, *supra* note 52, at 1393; Seidenfeld, *supra* note 55, at 486.

58. *Rationalizing Hard Look Review*, *supra* note 55, at 1916–17; Jordan, *supra* note 57, at 395; McGarity, *supra* note 52, at 1393; Seidenfeld, *supra* note 55, at 487.

59. *See* McGarity, *supra* note 52, at 1437–61; Pierce, *supra* note 55, at 65.

60. Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667 (1996) (discussing the benefits of ossification for policy statements).

important debate on whether hard look review's benefits in preventing arbitrariness and encouraging deliberation outweighed the costs of ossification.[61] More recently, empirical studies have shown that "the administrative state is not significantly ossified."[62] First, relatively few rules are blocked by judicial review. From 1981 to 2002, five major agencies promulgated over 15,000 rules, resulting in only 300 decisions on arbitrary and capricious grounds—a total of 0.2%.[63] Second, the duration of the rulemaking process is not as long as was once thought: the median time for a rule to go from proposed to final status is less than a year, and the average is under two years.[64] Finally, even when agencies fail hard look review, they successfully recover and implement their desired policies 80% of the time.[65] On average, agencies recover in two years and half of all policies are implemented successfully within one year.[66] In other words, hard look review appears in retrospect to have stayed relatively true to a "searching and careful" form of review, but one that still enables agencies to exercise their judgment and implement desired policies.

Nonetheless, commentators' concerns go further than ossification. Another family of arguments holds that hard look review raises separation of powers and judicial competence problems. Searching judicial review risks frustrating congressional goals and the political process.[67] More prominently, just as judges lack the expertise necessary to make difficult and often technical policy decisions, so too are they incompetent to evaluate the substantive merits of an agency's technical decisions.[68] Finally,

61. Seidenfeld, *supra* note 55 (arguing that hard look review prevents arbitrariness and ensures deliberation); McGarity, *supra* note 52; Mark Seidenfeld, *Hard Look Review in a World of Techno-Bureaucratic Decisionmaking: A Reply to Professor McGarity*, 75 TEX. L. REV. 559 (1997).

62. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 896 (2008); *see also* Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1125–31 (2002); Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified"?*, 20 J. PUB. ADMIN. RES. & THEORY 261 (2010).

63. Coglianese, *supra* note 62, at 1129 n.86 (basing data on National Highway Traffic Safety Administration, Environment Protection Agency, Occupational Safety and Health Administration, Occupational Safety and Health Administration, Food and Drug Administration, and Consumer Product Safety Commission rules).

64. Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, 23 J.L. & POL. 393, 415 (2007) (discussing median and average times); O'Connell, *supra* note 62, at 964 (discussing average time).

65. Jordan, *supra* note 57, at 440.

66. *Id.* at 440–41.

67. *See* Miles & Sunstein, *supra* note 47, at 762; McGarity, *supra* note 52, at 1391, 1452.

68. *See* Stephenson, *supra* note 55, at 763 & n.39; Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1507 (1983); Breyer, *Judicial Review*, *supra* note 55, at 388–90, 394; Mashaw & Harfst, *supra* note 55, at 277; Miles & Sunstein, *supra* note 47,

if judges are to be "partners" in the regulatory process, hard look imposes substantial decision costs in terms of time, effort, and energy spent to learn enough to review agency action. In a judicial system with many demands, these costs may not be worth bearing.[69]

Defenders respond that hard look review actually supports the rule of law and the separation of powers by enforcing the will of Congress against agencies.[70] As Professor Stewart put it, "[j]udicial invalidation of arbitrary and capricious agency action can be seen as part and parcel of the court's responsibility to contain agency conduct within the bounds authorized by the legislature."[71] In addition to judicial enforcement, hard look review's requirements enable Congress to monitor agency decisionmaking and then revise statutes accordingly.[72] Moreover, hard look review can promote the legitimacy of government action. As a result of rigorous but narrow review, the public can have "confidence in the process as well as the judgments of its decision-makers,"[73] and those who lose out in the regulatory process will be more willing to accept defeat because their interests were considered in a fair process.[74] By "enhancing the integrity of the administrative process,"[75] hard look review thus provides a "crucial legitimating function."[76]

Relatedly, hard look review provides an important check on discretionary power. In addition to the basic argument that arbitrary

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at 762; McGarity, *supra* note 52, at 1452; Seidenfeld, *supra* note 55, at 496–97.

69. *See Rationalizing Hard Look Review*, *supra* note 55, at 1914–16.

70. *See* Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51, 53 (1984) (Hard look can "promote, rather than impair, the original purposes of the separation of powers.") [hereinafter Sunstein, *In Defense*]; McGarity, *supra* note 52, at 1452; Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 212 (1983) [hereinafter Sunstein, *Deregulation*].

71. Stewart, *supra* note 28, at 1783 n.539. Indeed, Judge Levanthal saw the rule of law as central to the shape of hard look review. *See* Leventhal, *supra* note 34, at 511 ("In *Greater Boston Television Corp. v. FCC*, I sought to delineate the 'requirements of the Rule of Law, as established by Administrative Law doctrine.'"); *see also* Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 2 (1985) (noting that Leventhal believed a court's first duty was to enforcing Congress's will); Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970).

72. *See, e.g.*, Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 995–96 (2007).

73. Greater Bos. Television Corp., 444 F.2d at 852; *see also* Stephenson, *supra* note 55, at 763 n.37; Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 665–66 (1997).

74. David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 825 (1977).

75. Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976) (Bazelon, J., concurring).

76. Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 642 (1997); *see also* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 10–11 (1978).

decisions are unfair and irrational,[77] hard look ensures that experts remain a "servant of government" rather than "'a monster which rules with no practical limits.'"[78] Judicial review is particularly important because government agencies are not regulated and because informal agency pronouncements, such as policy statements and interpretive documents, are only checked during judicial review.[79] Significantly, this added check protects individual rights.[80]

A final set of criticisms is that hard look review is simply a mask for the policy preferences of agencies and judges. Knowing that hard look review is coming, agencies will simply lie, manipulating data and inventing reasons to justify a predetermined policy outcome. Given the complexity of the process, issues, and facts, courts will have a hard time identifying what is genuinely reasoned decisionmaking and what was effectively a post hoc rationalization created for the court's benefit.[81] Judges are no better. The discretion inherent in arbitrary and capricious review enables judges to "substitute their views of appropriate statutory policies and analytical methodologies for those of the agency."[82] Indeed, Professors Miles and Sunstein have recently found that a judge's likelihood of validating an agency decision is "significantly affected by whether the agency's decision is liberal or conservative," with Democratic-appointed judges validating at a 10% higher rate than Republican-appointed judges.[83] Such blatant partisanship calls into question whether hard look review is really a narrow form of review for clear error.

Despite these charges, many believe that hard look review actually improves the agency's performance in decisionmaking. This argument takes three forms. Some argue that hard look review helps to prevent

77. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 466, 496 (2003); Stephenson, *supra* note 55, at 761 & n.31; McGarity, *supra* note 52, at 1452; Ronald M. Levin, *Judicial Review and the Uncertain Appeal of Certainty on Appeal*, 44 DUKE L.J. 1081, 1100 (1995); William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59–60 (1975); Sargentich, *supra* note 76, at 631; Seidenfeld, *supra* note 55, at 514, 520–21; Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1077 (1995); Sunstein, *In Defense*, *supra* note 70, at 53.

78. *Greater Bos. Television Corp.*, 444 F.2d 841, 850 (D.C. Cir. 1970).

79. *See* Seidenfeld, *supra* note 55, at 560 (noting that agencies are unlike corporations in that they are not regulated); Anthony & Codevilla, *supra* note 60, at 680 (commenting that judicial review is the first time when many agency decisions are tested).

80. Sargentich, *supra* note 76, at 601.

81. *See* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 151–52 (1988); *see also* Stephenson, *supra* note 55, at 763 & n.38.

82. McGarity, *supra* note 52, at 549; Stephenson, *supra* note 55, at 765.

83. Miles & Sunstein, *supra* note 47, at 767.

unconscious or conscious biases. Hard look can help protect against cognitive biases such as tunnel vision or overconfidence,[84] ideology or "misplaced zeal,"[85] "parochial views of a particular subgroup within the agency,"[86] and the idiosyncratic views of the agency's staff.[87] Others believe hard look review can improve agency performance by acting as a check against interest group capture.[88] Through hard look, courts ensure that agencies make rational decisions instead of following the desires of particular interest groups. And a final group believes hard look review will improve agency performance by forcing decisionmakers to consider all the relevant issues and reason logically toward their final decision.[89] As Judge Bazelon put it, "by giving careful, intense attention to the particular situation before them, they can bring to light important problems that would otherwise remain hidden, simply because no one else had the time—or the incentive—to look at the matter closely."[90] Some scholars add that hard look review promotes deliberative democracy in government.[91]

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84. *See* Stephenson, *supra* note 55, at 761–62 & n.32; McGarity, *supra* note 52, at 1452; Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 588–89, 596–97, 600 (2002); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 496–99, 509–10, 547–48 (2002).

85. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

86. Stephenson, *supra* note 55, at 762 n.32; Seidenfeld, *supra* 55, at 508, 510.

87. *See* Seidenfeld, *supra* note 55, at 491 n.44; *see also* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1085 (1986); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 6 (1994).

88. *See* Stephenson, *supra* note 55, 761–62 & n.32; *see also* Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 675 (1992); Sunstein, *supra* note 30, at 469–70; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63 (1985); Seidenfeld, *supra* note 55, at 491; Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 412–13 (1987); Sunstein, *Deregulation*, *supra* note 70, at 183; *Rationalizing Hard Look Review*, *supra* note 55, at 1914–15.

89. *See* Sunstein, *Deregulation*, *supra* note 70, at 183; Stephenson, *supra* note 55, at 762; McGarity, *supra* note 52, at 1451–52; *Rationalizing Hard Look Review*, *supra* note 55, at 1914 (suggesting that hard look review reduces error costs through better decisionmaking processes); Martha Minow, *Questioning Our Policies: Judge David L. Bazelon's Legacy for Mental Health Law*, 82 GEO. L.J. 7, 10 (1993) (noting that Bazelon believed judges could always improve societal decisionmaking by perfecting processes that would force decisionmakers to address all relevant issues.).

90. David L. Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society*, 46 N.Y.U. L. REV. 653, 655 (1971).

91. Rossi, *supra* note 55, at 768, 811, 818–20; Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1570 (1992); Sunstein, *Interest Groups*, *supra* note 88, at 61–63.

Though agency deliberation is not popular deliberation, it nonetheless aligns with the republican ideal of a small group of public officials engaged in careful and thorough discussion of policy alternatives and values.[92]

As the debates on the desirability of hard look review show, the doctrine seeks to navigate administrative law's competing values. Critics focus on the doctrine's encroachment on the values of efficiency and expertise, holding that courts do not have the competence to address complex technical issues and that judicial review ossifies an otherwise efficient policymaking process. Defenders argue that hard look review promotes administrative law's commitment to checks and balances, ensuring the rule of law and separation of powers by providing a check on discretion and arbitrary action, and they hold that it supports expertise by creating incentives for reasoned decisionmaking. Despite divided opinions on whether hard look review goes too far, the doctrine's origins and aspirations embrace a judicial role that provides a check on executive action, while simultaneously enabling the Executive Branch to exercise its expertise and energy in efficiently making policy.

II. FOREIGN HARD LOOK REVIEW

Given hard look review's pragmatic approach to navigating the relationship between executive policymaking and judicial review, the doctrine can be helpful to addressing challenges in foreign affairs and national security policymaking. This Part first argues that the purposes behind hard look review in the domestic context are as applicable in the foreign relations context, and that the purported differences between foreign and domestic affairs are overblown. Moving from principles to statutory authority, it shows that there is no blanket prohibition on applying administrative law to foreign affairs and military issues, despite the conventional wisdom that the APA exempts foreign affairs issues. Rather, the APA, in many cases, already applies. Finally, this Part considers the doctrinal design and application of foreign hard look review, with a focus on how it would differ from domestic hard look review and how to mitigate potential problems such as ossification.

A. Foreign Relations Law as Administrative Law

Courts and commentators are generally deferential to executive power in foreign affairs, because they believe that foreign affairs are unique.[93] Yet,

92. Seidenfeld, *supra* note 55, at 490; Seidenfeld, *supra* note 91, at 1570.

93. *See, e.g.*, Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 946 (2004).

foreign affairs issues raise many of the same set of competing constitutional and functional values that characterize policymaking in domestic affairs. Like administrative law, foreign relations law has long sought to balance the competing goals of managerial liberalism, checks and balances, and accountability. Moreover, purported differences, such as the need for speed and secrecy in foreign affairs, are largely overblown.

Managerial liberalism sees bureaucratic government as providing expertise, energy, and efficiency in policymaking through strong executive power. The expertise argument holds that administrative agencies are a community of experts with specialized knowledge in public policy issues.[94] Courts and Congress are comparatively incompetent or unsuited to addressing complex, technical issues, so discretion and authority must be granted to the Executive.[95] Following on Alexander Hamilton's comment in *Federalist No. 70* that "[e]nergy in the Executive is a leading character in the definition of good government,"[96] managerial liberalism holds that expansive executive power allows for the exercise of leadership, judgment, creativity, and energy.[97] The President, as Professors Strauss and Sunstein argue, is able to "energize and direct regulatory policy," something that is particularly important when "there is a national consensus that regulatory policy should be moved in particular directions."[98] Creating a vibrant and coordinated public policy is the task of a strong manager.[99] Finally, managerial liberalism embraces executive authority as the most efficient structure for policymaking.[100] Broad delegations to the Executive Branch are welfare enhancing for society because they reduce the total sum of decision costs, agency costs, and error costs.[101] As in administrative law, foreign relations law incorporates arguments about strong executive power in order to gain the benefits of expertise, energy, and efficiency in policymaking. Like domestic policy issues, foreign policy is complex, and courts and congress may have limited information compared to foreign

94. *See* Frug, *supra* note 28, at 1318; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 82 (1985); Cynthia R. Farina, *Undoing the New Deal through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 228 (1998).

95. Frug, *supra* note 28, at 1321 ("[T]hey all lack the ability to second-guess the complex judgments that enter into such decisionmaking.").

96. THE FEDERALIST NO. 70 (Alexander Hamilton).

97. Frug, *supra* note 28, at 1319.

98. Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 190 (1986).

99. Sunstein, *supra* note 30, at 453; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994); Farina, *supra* note 94, at 228.

100. Mashaw, *supra* note 94, at 82; Sunstein, *supra* note 30, at 453; Lessig & Sunstein, *supra* note 99, at 2, 4; Farina, *supra* note 94, at 228.

101. Mashaw, *supra* note 94, at 92.

policy experts in the Executive Branch.[102] Likewise, crafting American foreign policy requires energy in order to conduct vigorous diplomacy and wage war effectively. The Executive, commentators note, "enjoys a comparative advantage of energy, focus, and information in foreign affairs,"[103] and commentators frequently cite to Alexander Hamilton's belief that energy in the Executive is essential in foreign relations, and particularly, in war.[104] Finally, the Executive Branch has the flexibility, discretion, and ability to act with speed that enables it to make foreign policy most efficiently.[105]

In addition to promoting expertise, energy, and efficiency, both administrative law and foreign relations law have traditions of constraining power. The separation of powers, of course, does not suggest pure separation, but rather a balance of powers in order to prevent the accumulation of power in any one branch of government.[106] The Constitution accomplishes this through both the dispersal of power and selected checks on power.[107] Administrative law scholars have long recognized that there must be limits on experts' discretion,[108] particularly given that agencies can be captured by well-organized interest groups.[109] Among the many mechanisms for checking power, the New Dealers established procedural requirements for rulemaking, the internal separation of regulators and adjudicators, and judicial review of agency action.[110]

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102. *See* Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2519 (2006); Ku & Yoo, *supra* note 5, at 199, 201; United States. v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) ("[H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials.").

103. Martin S. Flaherty, *The Most Dangerous Branch Abroad*, 30 HARV. J.L. & PUB. POL'Y 153, 155 (2006); *see also* H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS 141 (2002) (noting executive energy in foreign affairs); Yoo, *Politics as Law*, *supra* note 5, at 894 (citing energy, secrecy, and dispatch).

104. *See, e.g.*, JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 120 (2006).

105. *See* Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1758 (2007); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 123 (1999).

106. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1132, 1154 (2000).

107. *Id.* at 1151. Indeed, the goal of separating functions is preventing the concentration of power. *See id.* at 1183.

108. Frug, *supra* note 28, at 1331, 1334.

109. Sunstein, *supra* note 30, at 449.

110. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 991 (2006); Sunstein, *supra* note 30, at 448 (noting that the debate between progressives and conservatives over the APA led to a "working compromise in which broad delegations of

Through a variety of institutions checking its power, the bureaucracy could be effectively controlled so as not to become unmoored from popular preferences or to drift into arbitrariness.[111] The result is to promote adherence to the rule of law.[112] As Professor Christopher Edley puts it, "[t]he sense that this discretion must be controlled continues to animate administrative law. As the bureaucracy's role has grown, so have the risks and benefits associated with official action."[113] Likewise, foreign relations law has a tradition of checking executive power as part of achieving a balanced constitutional system. Professor Martin Flaherty, for example, argues that dividing power prevents abuses and preserves "balance among the branches to ensure that individual excesses do not become systemic."[114] One judicial tradition seeks to enforce the rule of law against executive aggrandizement.[115] Commentators advocate for increased congressional involvement in foreign relations issues.[116] And the Supreme Court has enforced limitations on executive power and sang the virtues of a balanced separation of powers system in foreign affairs.[117]

A third central value in administrative law is promoting accountability.[118] Some argue for strong presidential control of the administrative state because the President is the "only official in government with a national constituency" and is best positioned to be "responsive to the interests of the public as a whole."[119] Indeed Professors Strauss and Sunstein have even argued that the more majoritarianism and

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power were tolerated as long as they were accompanied by extensive procedural safeguards. Those safeguards surrounded the administrative process with some of the trappings of adjudication, provided for an internal separation of agency functions, and allowed regulated industries a variety of ways to challenge administrative decisions.").

111. Sunstein, *supra* note 30, at 483; Lessig & Sunstein, *supra* note 99, at 94; Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988–99 (1997); Bressman, *supra* note 77.

112. *See* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 7 (1990); *see also* Matthew G. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 63 (2008).

113. EDLEY, *supra* note 112, at 4–7.

114. Martin S. Flaherty, Globalization and Executive Power (unpublished manuscript on file with the Iowa Law Review quoted in Chesney, *supra* note 105, at 1728 n.17).

115. *See* Bradley, *supra* note 7, at 650.

116. BENJAMIN WITTES, LAW AND THE LONG WAR (2008); KOH, *supra* note 8.

117. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("[The President] has no monopoly of 'war powers.'"); Boumediene v. Bush, 553 U.S. 723, 797 (2008) ("Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch.").

118. *See* Mashaw, *supra* note 94, at 82; Bressman, *supra* note 77.

119. Strauss & Sunstein, *supra* note 98, at 190; *see also* Sunstein, *supra* note 30, at 453.

political responsiveness matters, the more presidential control is important. [120] Others however, disagree, arguing that democratic accountability is better served through congressional oversight and participation, [121] through judicial oversight as a check on Executive power, [122] or through the participation of a variety of institutions and actors. [123] Nonetheless, they all agree that accountability is one of administrative law's central values. The same is true in foreign relations law. The Executive Branch's power is often justified as being accountable to the whole population, [124] and therefore as being more responsive to changes in popular opinion. [125] Others make more measured claims, seeking accountability through deliberation and inter-branch cooperation. Professor Harold Koh, for example, has said that "we must reject notions of either executive or congressional supremacy in foreign affairs in favor of more formal institutional procedures for power sharing, designed clearly to define constitutional responsibility and to locate institutional accountability." [126]

Despite these broad similarities in foreign and domestic policymaking, conventional wisdom suggests that foreign affairs are different in some specific ways; namely, foreign affairs are said to implicate issues of secrecy and speed that are distinct from domestic affairs and therefore require greater executive authority. [127] Functional arguments for executive

120. Strauss & Sunstein, *supra* note 98, at 183.

121. Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1255 (2006) (arguing that Congress may be more responsive than the President); Flaherty, *supra* note 10 (same); *see also* Jack Michael Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 139–40, 143–44 (2006).

122. Bressman, *supra* note 77, at 472–74.

123. *See, e.g.*, Farina, *supra* note 111, at 988–99.

124. *See, e.g.*, Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777 (2008).

125. Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 196–97 (2004) (arguing that the Executive is more accountable and should have more power over customary international law and human rights issues).

126. KOH, *supra* note 8, at 6–7; Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1290 (1988) (discussing accountability failures during Iran Contra); *see also* Lori Fisler Damrosch, *Constitutional Control of Military Actions: A Comparative Dimension*, 85 AM. J. INT'L L. 92, 92 (1991) ("The Persian Gulf crisis has shown all too vividly what dangers lie in the persistence of processes that put awesome amounts of force at the disposition of single individuals, and how much is at stake in developing and nurturing structures of deliberation and accountability.").

127. Foreign affairs are also often said to be different from domestic affairs in that they implicate uniformity concerns. These issues will not be taken up here, however, as the uniformity concerns are addressed to questions of federalism that are beyond the scope of this Article.

authority are frequently rooted in Alexander Hamilton's famous statement that "[d]ecision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[128] Indeed, commentators from all political perspectives have embraced the argument that foreign affairs require secrecy and speed, qualities that the Executive has in abundance.[129]

However, it is not clear that secrecy and speed should be blanket trumps that defeat any attempt for legal constraints or procedural requirements, even in the foreign affairs context. First, secrecy and speed are not implicated in all foreign affairs issues. The classic examples of the need for secrecy are treaty negotiations and intelligence issues.[130] But many issues in foreign affairs do not require secrecy—immigration issues, border policies, and even many military training programs. Likewise, speed is often considered necessary in matters of war and crisis, but many foreign affairs issues do not feature the need for immediate action. Negotiating treaties and executive agreements, for example, can often be a slow and long process, and generally does not require "rapid decisionmaking."[131] Given that secrecy and speed are only implicated in some cases, it may be better to consider particular arenas where these values are salient as requiring

128. THE FEDERALIST NO. 70 (Alexander Hamilton).

129. KOH, *supra* note 8, at 119 (noting that the President's "decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match"); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 16 (2007) (noting that "both Congress and the judiciary defer to the executive during emergencies because of the executive's institutional advantages in speed, secrecy, and decisiveness"); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1676 (2002) ("[U]nitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch."); BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 45–47, 61, 109 (2006) (arguing for the need for speed in decision-making); Ku & Yoo, *supra* note 125, at 193 (discussing that executive is structured for speed and secrecy in foreign affairs); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1984, 201 (1984) ("[T]he *unity* of the office, its capacity for *secrecy* and *dispatch*, and its superior sources of *information*; to which should be added the fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time.").

130. *See, e.g.*, THE FEDERALIST NO. 64 (John Jay) ("It seldom happens in the negotiation of treaties, of whatever nature, but that perfect SECRECY and immediate DESPATCH are sometimes requisite. . . . [T]here doubtless are many . . . who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly."); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 277 (2010).

131. *See* Hathaway, *supra* note 17, at 238.

greater flexibility, rather than assuming that the entire field requires a design driven by these characteristics. Second, the need for speed and secrecy is not limited solely to foreign affairs questions. Secrecy is utilized in domestic policy. The law enforcement privilege, for example, "protects against the disclosure of confidential sources and law enforcement techniques, safeguards the privacy of those involved in a criminal investigation, and otherwise prevents interference with a criminal investigation."[132] In finance, the Federal Deposit Insurance Commission (FDIC) keeps a list of troubled banks that are at risk of failing—the list is secret in order to prevent a run on the banks.[133] Similarly, speed is needed in crises, whether foreign or domestic. As Professors Posner and Vermeule have shown, crisis implicating "foreign" and "domestic" concerns actually have a similar anatomy in terms of the government's response.[134] The similarity across domestic and foreign policy issues suggests that it may be better to distinguish between policymaking in ordinary and extraordinary times, and between situations that require secrecy and those that do not. Simply assuming that foreign affairs issues always implicate secrecy and security (and that domestic affairs do not) is both over- and under-inclusive. The result is a skewing of the balance of constitutional values of efficiency, checks and balances, and accountability.[135] Finally, it may be that speed and secrecy are often undesirable as a policy matter. Professor Martin Flaherty has argued that the Executive's expansive powers of "secrecy and dispatch" in addressing terrorism would enable it to "(1) rush to conclusions based on little evidence; (2) focus on readily detainable individuals rather than undertaking more difficult and comprehensive intelligence; and (3) cut legal corners in a way that diminishes the United States's standing, and therefore its effectiveness, abroad."[136] Similarly, Deborah Pearlstein uses organizational theory to challenge the functional case for executive authority, arguing that standard procedures and checks actually improve decisionmaking.[137] In other words, it may be that the premise of the argument is inaccurate: expansive discretion may actually result in worse

132. Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1579 (2002).

133. *See* Jacob Leibenluft, *What's a Bank Run? And How do You Get on the FDIC's Secret Problem List?*, SLATE.COM, July 18, 2008, http://www.slate.com/id/2195524/.

134. Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009).

135. To be sure, one could argue that these over- and under-inclusive categories are the most efficient set of categories or the most easily administered. It is beyond the scope of this Article to consider the categorization more broadly.

136. Flaherty, *supra* note 103, at 170.

137. Pearlstein, *supra* note 24.

decisionmaking.

The point here is not to argue that speed and secrecy are never important or that domestic and foreign affairs are always similar. Rather, it is simply to show that both administrative law and foreign relations law seek to balance the competing constitutional values of efficiency, checks and balances, and accountability, and that, as a result, approaches to balancing these values that have been developed in administrative law are transferrable to issues that implicate foreign affairs.

B. The Statutory Foundations of Foreign Hard Look Review

The shared structural principles between administrative and foreign relations law suggest that doctrines seeking to negotiate those structural values may be transferrable across those areas of law. But the case for using hard look review in foreign relations cases is even deeper: the APA, despite the conventional wisdom, suggests that hard look review does in fact apply in foreign affairs and military cases.

Although some scholars have suggested that the APA exempts "[a]ll foreign affairs matters,"[138] foreign affairs and military issues fall under the APA's purview. In four different places, the APA considers the role of foreign and military issues, and in each case only places limited exceptions on the APA's applicability. In defining "agency," the APA includes "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."[139] Exempted from the definition of "agency," among other things, are "the governments of the territories or possessions of the United States," "courts martial and military commissions," and "military authority exercised in the field in time of war or in occupied territory."[140] What is particularly notable is the breadth of the definition and the nature of the exceptions. The definition by implication includes virtually every government authority, and the exceptions relevant to foreign affairs are limited to fields of battle, occupied territories, possessions of the United States, and military justice. Indeed, military authority exercised outside of the field of battle *even during wartime* is

138. *See, e.g.*, Hathaway, *supra* note 17, at 221, 241–42 ("The APA applies extensively to nearly every agency decision, but it expressly exempts foreign affairs . . . matters — including the process of making international law").

139. APA, 5 U.S.C. § 551 (1) (2012).

140. APA, 5 U.S.C. § 551 (1)(C), (F), (G) (2012). Notably, the APA does *not* create an exemption for the President, even though it expressly exempts Congress and the courts, *see* § 551(1)(A)–(B). Still, the Supreme Court has held twice that the President is not an agency. *See* Dalton v. Specter, 511 U.S. 462, 470 (1994); Franklin v. Massachusetts, 505 U.S. 788, 796 (1992).

not exempted from the statutory definition of agency.[141]

Three other provisions create limited exceptions for foreign affairs or military issues. Section 552b(a)(1) exempts from notice, publicity, and Freedom of Information Act (FOIA) requests issues of "national defense or foreign policy" that are "specifically authorized under criteria established by an Executive order to be kept secret . . . [and are] in fact properly classified pursuant to such Executive order."[142] As a result, the notice, publicity, and FOIA provisions apply to all foreign affairs or national security issues that are not classified as secret. Under §§ 553 and 554, agencies must follow defined procedures during notice and comment rulemaking and formal adjudications. Foreign affairs and military issues are exempted from these provisions.[143] The importance of these provisions, however, depends on what the definition of a "military or foreign affairs" function is.[144] Legislative history and the Attorney General's Manual read the military and foreign affairs exception narrowly,[145] but when cases have sought to define the scope of this provision, they are "inconsistent" and often turn on "the strength of government interests and how central foreign policy was to the administrative action."[146] Strikingly, in the early 1970s, commentators and the Administrative Conference of the United States recommended removing the exception for rulemaking.[147] In response, the Department of Defense actually adopted a policy of using notice and comment procedures for regulations, barring a "substantial and direct

141. One commentator has recently argued that the phrases "in the field" and "time of war" should be interpreted much more broadly because they were understood more broadly during the World War II era. Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673 (2010). However, Kovacs also argues that prior to World War II and after World War II, the terms were understood narrowly, see *id.* at 712 & n.296, and that the narrow interpretation has been embraced by the courts, *id.* at 712–25.

142. APA, § 552b(c)(1)(A)–(B).

143. APA, § 553(a)(1) (rulemaking); APA, § 554(a)(4) (adjudications). Note that military justice issues, such as court martials and military commissions, are addressed under a different statutory scheme—the Uniform Code of Military Justice.

144. For a discussion of this issue, see Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1112–13 (2009).

145. *See* S. Rep. No. 79-752, at 13 (1945), *reprinted in* Administrative Procedure Act: Legislative History 1944–46, at 185, 199 (1946); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26–27 (1947).

146. Vermeule, *supra* note 144, at 1112.

147. Admin. Conf. of U.S., Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements, 39 Fed. Reg. 4847 (Feb. 7, 1974); *see also* Arthur Earl Bonfield, *Military and Foreign Affairs Function Rule-making Under the APA*, 71 MICH. L. REV. 221, 222 (1972–1973).

impact" of the public or the Defense Department."[148]

What these statutory provisions show is that the APA does not provide a blanket exemption for foreign or military affairs, leaving § 706(2)(A)'s provision for arbitrary and capricious review applicable. Because the definition of agency extends to foreign and defense agencies, judicial review of agency actions—including rules, orders, licenses, sanctions, relief, or the failure to act[149]—are not only appropriate, but actually required. Arbitrary and capricious review under § 706 also applies to informal agency policies, such as policy guidance documents and manuals[150] and to agency actions taken pursuant to authority granted by Executive Order.[151] In other words, foreign hard look review would apply in situations in which there is a congressional statute authorizing action by or delegating authority to the Executive Branch. Where the delegation is to the agency directly or to the President and then delegated from the President to an agency, foreign hard look review would apply. The question of whether arbitrary and capricious review can apply directly to presidential actions as a constitutional requirement is beyond the scope of this Article, [152] though some commentators have argued that administrative law rules should apply to presidential action taken pursuant to statutory authorization.[153] In essence, a substantial amount of Executive Branch actions can and should be reviewed even if they implicate foreign affairs or military issues.

148. 32 C.F.R. pt. 336 (2002); *see* Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 GREEN BAG 2D 379, 386 n.43 (2003).

149. APA, § 551(13) (defining agency action).

150. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

151. Courts have held that agencies established by Executive Order (EO) are "authorities" under the APA. *See, e.g.*, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally, 337 F. Supp. 737, 761 (D.D.C. 1971) (finding that the Cost of Living Council, established by EO 11,615, was an agency for APA purposes). Courts have also evaluated agency actions under EOs. In *National Wildlife Federation v. Adams*, 629 F.2d 587 (9th Cir. 1980), for example, the Ninth Circuit reviewed the Federal Highway Administration's (FHWA's) actions under the APA's arbitrary and capricious provision, finding that FHWA had complied with an EO. *Id.* at 592–93. For further discussion, see Note, *Enforcing Executive Orders: Judicial Review of Agency Action under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659 (1987).

152. *Cf.* Bressman, *supra* note 77 (arguing for increased focus on arbitrariness review as a way to improve the legitimacy of the presidential control model of administration). For the Supreme Court's views on whether the President is bound by the APA, see Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (noting that textual silence in the APA regarding applicability to the President is not enough to subject the President to those provisions, given separation of powers principles).

153. Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005); *see also* Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171 (2009).

While the APA does not exempt foreign and military affairs issues from § 706(2)(A) review, two other APA provisions may potentially restrain courts from review in these areas. Under § 701(a)(1) and (a)(2), agency actions are unreviewable when "statutes preclude judicial review" and when "agency action is committed to agency discretion by law."[154] Despite the strong presumption in favor of judicial review,[155] statutes can expressly or impliedly preclude judicial review, with courts relying on text, "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved" to determine when review is precluded.[156] Courts will restrict judicial review only with "clear and convincing evidence of a contrary legislative intent."[157] Indeed, so strong is the presumption of review that even in cases of express preclusion, courts have interpreted seemingly clear language precluding review to allow limited judicial review.[158] Under § 701(a)(1), then, many foreign affairs and national security cases might be precluded from review if the statute expressly or impliedly bars review.

Agency actions are also unreviewable if "committed to agency discretion by law," though this text is in tension with § 706's review of actions that are "arbitrary, capricious, or *an abuse of discretion.*"[159] The Court's position on what actions are committed to agency discretion by law has been complex. In *Overton Park*, the Court held that this exemption only applied when "there is no law to apply."[160] Later, in *Webster v. Doe*, in which a CIA employee was dismissed for his homosexuality, the Court focused more on text and structure. It granted broad deference to the CIA Director's statutory authority to "deem such [employment] termination necessary or advisable" and further rooted deference in the structure of the National Security Act of 1947's treatment of intelligence issues.[161] However, the Court allowed review of Doe's constitutional claims.[162] Thus, under

154. APA, § 701(a)(1)–(2).

155. Abbott Labs. v. Gardner, 387 U.S. 136 (1967).

156. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984).

157. Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 671 (1986) (quoting Abbott Labs. v. Gardner, 387 U.S. at 141) (internal quotation marks omitted).

158. *See* Lindahl v. Office of Pers. Mgmt., 470 U.S. 768 (1985) (precluding review of only factual decisions of Office of Personnel Management regarding disability); *see also* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 1201 (9th ed. 1995).

159. See STRAUSS ET AL., *supra* note 158, at 1216 for a discussion of scholarly debate on this tension; *see also* APA, § 701(a), 706(2)(A).

160. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

161. 50 U.S.C. § 403(c) (2012); *see* Webster v. Doe, 486 U.S. 592, 594 (1988) (internal citations omitted).

162. *See Webster*, 486 U.S. at 593.

Webster, reviewability depends on a case-by-case reading of the statute in question. At the same time, the national security context of *Webster* suggests that the Court might in practice deem national security cases unreviewable, absent a constitutional challenge.[163]

For foreign hard look review to apply, courts would need to resist finding agency discretion whenever cases touch on foreign affairs and national security. Courts may not be inclined to do this. Take, for instance, *Merida Delgado v. Gonzales*.[164] Delgado, a Panamanian citizen, had been enrolled in flight school, where one of his classmates was 9/11 conspirator Zacharias Moussaoui. Under a post-9/11 statute, the Attorney General could direct federally regulated flight schools (like Delgado's) to stop lessons for individuals the Attorney General deems a risk to national security. Delgado challenged his ban from further flight lessons, and the Tenth Circuit found the Attorney General's decision "committed to agency discretion by law" and thus unreviewable because there was "no basis" on which to judge the decision.[165] As Professor Adrian Vermeule has noted, the court could have pursued "garden-variety review for arbitrariness" to see if the Attorney General had considered facts and alternatives and provided a reasoned decision.[166] Instead, however, the court noted that "[i]t is rarely appropriate for courts to intervene in matters closely related to national security."[167]

C. Designing Foreign Hard Look Review

Administrative law and foreign relations law share similar goals and a similar statutory structure. As a result, it is possible to think about applying hard look review to issues in foreign affairs. But the practice of foreign hard look review will be—and should be—in some ways different from its domestic counterpart. This section first discusses the elements of domestic hard look review in greater detail and then explores design issues for foreign hard look review.

163. Dissenting, Justice Scalia argued that "discretion by law" referred to common law restraints on reviewability such as the political question doctrine, sovereign immunity, and prudential judicial doctrines. This approach would further limit judicial review, relying on common law and prudential concerns in addition to statutory language and structure. *See id.* at 608–09 (Scalia, J., dissenting).

164. 428 F.3d 916 (10th Cir. 2005).

165. *Id.* at 920.

166. Vermeule, *supra* note 144, at 1114.

167. *Merida Delgado*, 428 F.3d at 920.

1. The Elements of Domestic Hard Look Review

Despite the stability of hard look review over almost three decades, there is still confusion about what exactly hard look review entails.[168] Courts and commentators formulate the doctrine in different ways, identifying between two and nine possible elements of the doctrine.[169] Starting from *State Farm*'s discussion of arbitrary and capricious review, six elements emerge as central for understanding the scope and operation of hard look review in the domestic policy context: consideration of relevant factors; an explanation of the decision that is related to the evidence; consideration of alternatives; justification for departures from past practices; implausible decisions or clear errors; and participation by relevant groups, a factor that was not adopted as part of arbitrary and capricious review in either *Overton Park* or *State Farm*.[170]

168. *See, e.g.*, Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 248 (D.C. Cir. 2008) ("[O]n occasion, the courts' arbitrary-and-capricious review itself appears arbitrary and capricious.") (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part); McGarity, *supra* note 52, at 1411 (noting that although *State Farm* narrowed hard look's factors, "[t]he practical application of the hard look doctrine has varied widely from circuit to circuit and from case to case within circuits.").

169. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (identifying relevant factors and clear error of judgment as elements); Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 50 (1983) (identifying as elements that the agency examine relevant data, explain its actions, consider relevant factors, not fail to have considered an important aspect, not made a clear error of judgment, not considered the wrong factors, not acted counter to the evidence, not made an implausible decision, and considered alternatives); Breyer, *Judicial Review*, *supra* note 55, at 383 (identifying as elements examining relevant evidence, explaining decisions in detail, departures from past practice, and considering alternatives); Leventhal, *supra* note 34, at 511–12 (identifying as elements reasonable procedure, notice and opportunity for parties to present, examination of evidence and facts for support, deference to policy expertise); McGarity, *supra* note 52, at 540–42, 1410 (identifying as elements in *Overton Park*: analytical method, the right criteria, relevant factors, range of regulatory options, appropriate policies to inform uncertainty, and support in the record; and identifying as factors in *State Farm*: the wrong factors, missing important factors, acting counter to the evidence, and implausible decisions); *Rationalizing Hard Look Review*, *supra* note 55, at 1914 (identifying explanations of behavior, viable alternatives, departure from past practices, and policy choices that are reasonable on the merits as *State Farm* elements); Seidenfeld, *supra* note 55, at 491 (identifying as elements detailed explanations, relevant factors, plausible alternatives, departures from past practice, participation, and adequate justifications and reasoning); Sunstein, *Deregulation*, *supra* note 70, at 181–82 (identifying as elements detailed explanations, departures from past practices, participation by interests, consideration of alternatives, and justification in light of the evidence).

170. Though some have argued that *Overton Park* can be interpreted as signaling a "re-enfranchisement" of groups that were excluded from the regulatory process by (in that case, environmental groups), the Court did not evaluate group participation as part of arbitrary and capricious review. Indeed, the Court may have expanded access to groups through an

Relevant Factors. Drawing on *Overton Park*'s suggestion that reviewing the agency's explanation requires "consider[ing] whether the decision was based on a consideration of the relevant factors,"[171] *State Farm* commands that agencies must not rely on "factors which Congress has not intended it to consider" and must consider "important aspect[s] of the problem."[172] As straightforward as considering "all the material facts and issues"[173] may seem, a challenge arises in determining which factors are important enough for serious consideration.[174] Any agency decision will touch on an inordinate number of peripheral factors that contribute to understanding the problem, and therefore "any competent lawyer . . . [could] identify issues that an agency arguably discussed inadequately."[175] As a result, "A court is often left with a choice between deferring totally to the agency's characterization of an issue as tangential and insisting that the agency take the utmost care in resolving every aspect of every problem raised by a proposed rule."[176]

Explanation/Related to Evidence. After considering all the relevant factors, agencies are supposed to reason from the evidence and provide a "rational connection between the facts found and the choice made."[177] The explanation cannot "run[] counter to the evidence before the agency,"[178] and it must be "sufficient to enable [the court] to conclude that the [agency's action] was the product of reasoned decisionmaking."[179] Under this element, courts have found that agency decisions are not supported by evidence in the record,[180] though they also recognize that a "decision of less

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expansion of standing doctrine during the 1970s, but this doctrinal shift was not incorporated into arbitrary and capricious review in either *Overton Park* or *State Farm*. *See* Macey, *supra* note 88, at 685–87.

171. *Overton Park*, 401 U.S. at 416.

172. *State Farm*, 463 U.S. at 43; *see also* McGarity, *supra* note 52, at 540; Seidenfeld, *supra* note 55, at 491; Md. People's Counsel v. FERC, 761 F.2d 780, 785–86 (D.C. Cir. 1985).

173. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

174. *See* Seidenfeld, *supra* note 55, at 496–97; Stewart, *supra* note 28, at 1782;

175. Pierce, *supra* note 55, at 69; Seidenfeld, *supra* note 55, at 496–97. Seidenfeld suggests that this problem could be addressed by courts looking to see what organizations participating in the rulemaking process focused on as factors, rather than allowing litigants to raise issues post hoc. *See id.* at 514.

176. Seidenfeld, *supra* note 55, at 497. Some commentators have suggested that this discretion provides courts with the flexibility to reverse agency actions with which it disagrees. *See* Stewart, *supra* note 28, at 1782.

177. *State Farm*, 463 U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

178. *Id.*; *see also Greater Bos. Telephone Corp.*, 444 F.2d at 851; Owner-Operator Indep. Drivers Ass'n. v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 203 (D.C. Cir. 2007).

179. *State Farm*, 463 U.S. at 52.

180. *See, e.g.*, California v. FCC, 905 F.2d 1217, 1231–38 (9th Cir. 1990); *see also*

than ideal clarity" can be upheld if the "agency's path may reasonably be discerned."[181]

More complex situations arise when courts must evaluate an agency's methodology, modeling of possible effects or trends, scientific or technical judgments, and policy judgments. Courts allow agencies to pick particular methodologies or use simplified computer models, as long as they justify the choice of method or model and the assumptions built into it.[182] Agencies are required to "explain the assumptions and methodology used in preparing the model," and they must, if challenged, "provide a 'complete analytic defense.'"[183] Courts also weigh whether the agency "is conscious of the limits of the model," though they will only reverse a model if it is "so oversimplified that the agency's conclusions from it are unreasonable."[184] As with the choice of model, courts will generally defer to the agency's scientific and technical expertise or to policy choices.[185] In reviewing scientific and technical materials, courts also recognize that "scientific 'facts' are not certain, but only theories with high probabilities of validity."[186]

Considered Alternatives. *State Farm* required National Highway Traffic Safety Administration (NHTSA) to consider using the airbag instead of a passive seatbelt restraint, arguing that it was a "technical alternative within the ambit of the existing Standard."[187] Courts and commentators have extrapolated that agencies must "consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such

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Seidenfeld, *supra* note 55, at 492.

181. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285–86 (1974).

182. *See Owner-Operator Indep. Drivers Ass'n*, 494 F.3d at 205 ("Although we apply a deferential standard of review to an agency's use of a statistical model, we cannot uphold a rule based on such a model when an important aspect of its methodology was wholly unexplained.").

183. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 535 (D.C. Cir. 1983) (quoting Am. Public Gas Ass'n v. FPC, 567 F.2d 1016, 1039 (D.C. Cir. 1977)).

184. *Id.*

185. *See* Leventhal, *supra* note 34, at 511; Am. Coke & Coal Chems. Inst. v. EPA, 452 F.3d 930, 941 (D.C. Cir. 2006) (noting that courts defer to the Environmental Protection Agency in "matters of scientific and statistical judgment within the agency's sphere of special competence and statutory jurisdiction"); Globalstar, Inc. v. FCC, 564 F.3d 476, 483 (D.C. Cir. 2009) (stating that when the Federal Communication Commission (FCC) is "'fostering innovative methods of exploiting the spectrum,' it 'functions as a policymaker' and is 'accorded the greatest deference by a reviewing court.'") (citations omitted).

186. Ethyl Corp. v. EPA, 541 F.2d 1, 25 n.52 (D.C. Cir. 1976).

187. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 50–51 (1983).

alternatives."[188] Though *State Farm* left open the question of *which* alternatives agencies must consider, the D.C. Circuit has held that agencies must evaluate "significant and viable" alternatives,[189] but not "every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been."[190] In addition, what constitutes a viable alternative may change during the agency's decisionmaking process, "as they become better known and understood."[191] Still, the "failure of an agency to consider obvious alternatives has led uniformly to reversal."[192]

Justified Departures from Past Practices. *State Farm* also requires that "an agency changing its course . . . supply a reasoned analysis for the change."[193] The D.C. Circuit has recognized that agencies may desire to change a policy because factual situations are different,[194] the agency is taking into account factors that were previously not contemplated,[195] its view of the public interest has changed,[196] or there has been a broader change in circumstances.[197] However, even though an agency can depart from its past practices, precedents, and policies, it must adequately explain its change through reasoned analysis.[198] In explaining a change, the agency

188. City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (quoting Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1511 (D.C. Cir. 1984)); *Rationalizing Hard Look Review*, *supra* note 55, at 1914 n. 34; Seidenfeld, *supra* note 55, at 491.

189. Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1511 n.54 (D.C. Cir. 1984).

190. *Id.* (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 551 (1978)); *see also* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 242 (D.C. Cir. 2008).

191. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 552–53 (1978).

192. Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986); *see also* Nat'l Black Media Coal. v. FCC, 775 F.2d 342, 357 (D.C. Cir. 1985); Pub. Citizen v. Steed, 733 F.2d 93, 103–05 (D.C. Cir. 1984).

193. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42, 57 (1983); *see also* Seidenfeld, *supra* note 55, at 492.

194. Gilbert v. NLRB, 56 F.3d 1438, 1445 (D.C. Cir. 1995) (noting that "where the circumstances of the prior cases are sufficiently different from those of the case before the court, an agency is justified in declining to follow them"); *see also* Hall v. McLaughlin, 864 F.2d 868, 873 (D.C. Cir. 1989) ("[I]f the court itself finds the past decisions to involve materially different situations, the agency's burden of explanation about any alleged 'departures' is considerably less.").

195. Envtl. Action v. FERC, 996 F.2d 401, 411 (D.C. Cir. 1993) (an agency "may distinguish precedent simply by emphasizing the importance of considerations not previously contemplated").

196. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

197. *Id.*

198. Dillmon v. Nat'l Transp. Safety Bd., 588 F.3d 1085, 1089–90 (D.C. Cir. 2009);

need not explain that the new policy is better than the old, but it must "display awareness that it *is* changing position" and not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[199] Failure to provide an adequate explanation for changes will be found arbitrary and capricious.[200]

Implausible/Clear Error. In addition to evaluating whether the agency had considered relevant factors, explained departures from past practices, assessed significant and viable alternatives, and provided reasoned explanations that connected the final decision to the evidence, courts are required to undertake a substantive review of the agency's decision. *Overton Park* characterized this review as determining "whether there has been a clear error of judgment."[201] *State Farm* described it as determining whether the agency decision was "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[202] The implausible or clear error standard emphasizes that the arbitrary and capricious standard is "narrow and a court is not to substitute its judgment for that of the agency."[203]

Participation. Excluded from *Overton Park* and *State Farm* is the requirement that agencies consider the views of outside experts, the general public, and interest groups.[204] Judge David Bazelon's approach to hard look review sought to provide a "system of peer review and public oversight."[205] Early D.C. Circuit cases supported this approach, remanding decisions to enable opportunities for participation in agency decisionmaking,[206] but *Vermont Yankee*'s limitation on judicially imposed procedures ended the practice.[207] Though *State Farm* does not incorporate participation into its factors for arbitrary and capricious review, it is worth considering the arguments for

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Mich. Pub. Power Agency v. FERC, 405 F.3d 8, 12 (D.C. Cir. 2005); Japan Air Lines Co. v. Dole, 801 F.2d 483 (D.C. Cir. 1986); Airmark Corp. v. FAA, 758 F.2d 685, 691–92 (D.C. Cir. 1985).

199. FCC v. Fox Television Stations, 556 U.S. 502, 515 (2009).

200. Ramaprakash v. FAA, 346 F.3d 1121, 1124 (D.C. Cir. 2003).

201. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

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

203. *Id.*

204. Opportunity for participation is required as part of the notice and comment process, but is not included as a factor under the arbitrary and capricious review standard as explained in either *Overton Park* or *State Farm*. The distinction is important, as arbitrary and capricious review applies to policy and interpretive documents, even though adoption of those documents does not require participation.

205. David L. Bazelon, *The Impact of the Courts on Public Administration*, 52 IND. L.J. 101, 107 (1976–1977).

206. *See* Envtl. Def. Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

207. *See generally* Scalia, *supra* note 33.

including such a requirement.

The two most prominent justifications for a participation requirement in agency decisionmaking are pluralistic and epistemic. The conventional justification is that the regulatory process is pluralistic—that the regulatory process is simply a replacement for the legislative process, and therefore that the agency must "give adequate regard to each of the competing interests so that the resulting policy may reflect their due accommodation."[208] Central to the pluralist argument is the skepticism of expertise and the belief that even scientific or technical regulatory questions are fundamentally policy questions, and that policy decisions should incorporate public participation.[209]

The second justification, which Judge Bazelon expressed in articles and opinions, is epistemic. Participation allows a variety of people to "present new data or challenge the logic of the administrators' reasoning."[210] Participation both prevents "biased or parochial" views from becoming embedded in regulatory policy and also results in more thorough and exhaustive decisionmaking.[211] The epistemic justification is supported by arguments that many minds are better than one at making decisions, and studies showing that preventing informational cascades, extremism, and groupthink in deliberation requires participants who have different perspectives.[212]

What is perhaps most important about the epistemic justification is that it suggests that greater participation would be beneficial for reasoned decisionmaking even if the participants are *inside* the government. In other words, participation by a variety of internal government actors may still provide many of the epistemic benefits of participation, even though it does not provide pluralistic benefits. Indeed, scholars have shown that overlapping jurisdiction can promote more effective consideration of facts

208. Stewart, *supra* note 28, at 1757; *see also id.* at 1683 ("Today, the exercise of agency direction is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy."); *id.* at 1712 (regulation is "replicating the process of legislation"); Sunstein, *Deregulation*, *supra* note 70, at 186 (noting that participation is a surrogate for legislative control).

209. *See* Warren, *Active Judging*, *supra* note 33, at 2623–24.

210. Bazelon, *supra* note 205, at 107.

211. *See* Seidenfeld, *supra* note 55, at 510.

212. For a discussion of the possibilities and limitations of many minds arguments, see generally Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1 (2009). For a discussion of extremism, groupthink, and other decisional phenomena, see generally Edward L. Glaeser & Cass R. Sunstein, *Extremism and Social Learning*, 1 J. LEGAL ANALYSIS 263 (2009); CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (2006).

and data,[213] that other agencies often do present their perspectives to a regulating agency,[214] and that a system of internal checks and balances can be an effective way to check discretionary power and improve decisionmaking.[215] Moreover, some have argued that hard look review itself promotes participation within the agency, incorporating diverse perspectives that might exist, rather than just the views of a subgroup.[216]

2. The Mechanics of Foreign Hard Look Review

In transferring hard look review to foreign relations law, four issues are particularly important: how the doctrinal analysis changes from domestic to foreign hard look review, the implications of no notice and comment procedures in foreign and military affairs, ossification problems, and the possibility that foreign hard look review will be merely a façade of the rule of law.

Consider first the doctrinal elements. Some of the doctrinal factors are transferable without revision or likely difference: the requirements that the agency consider all relevant factors, explain departures from past practices, and provide a reasoned explanation for the decision could remain unchanged in foreign relations issues. Other doctrinal elements—the requirement to ensure that explanations are related to the evidence, the clear error standard, and considering alternatives—will be applied differently when they arise in foreign relations cases because foreign relations judgments will likely rely more on policy questions than on scientific analysis or technical evidence.

Take the requirement to ensure that explanations are related to the evidence. In domestic hard look review, an agency making a rule or setting a policy must gather evidence, provide and explain a methodology for analyzing the evidence or modeling the evidence, and then make a determination as to what the analysis suggests for crafting a rule. In this process, courts require the agency to explain their methodologies and modeling techniques.[217] In contrast, foreign relations issues are less likely to require the need for modeling or analyzing vast amounts of numerical or experiential data. Determining boundaries with foreign countries,

213. *See* O'Connell, *supra* note 24, at 1731 (describing how overlapping jurisdiction can improve intelligence gathering and analysis).

214. *See* J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2262 (2005).

215. *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

216. *See* Pedersen, *supra* note 77, 59–60; Seidenfeld, *supra* note 55, at 506–10.

217. *See, e.g.*, Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 535 (D.C. Cir. 1983).

negotiating status of forces agreements, or determining whether to exclude aliens are simply less scientific judgments than determining how dangerous a particular toxin is to human health. As the D.C. Circuit has recently noted, when an agency "functions as a policymaker," it is "accorded the greatest deference by a reviewing court."[218] Indeed, many of these policy decisions may ultimately be political: guided by the administration's philosophy and strategy toward foreign and national security policy. In the domestic context, courts have, on occasion, noted that agency decisions can legitimately be shaped by a change in regulatory philosophy brought on by a new presidential administration.[219] Some commentators have argued that these political concerns should be made explicit in agency decisionmaking—and embraced as acceptable.[220] In the foreign affairs context, these arguments are even stronger. Granting deference to policy or political judgments, however, does not imply unfettered discretion. Rather, the agency would still have to provide a reasoned justification in policy terms of its decision. A simple because the "President said so" would be arbitrary.[221] The requirements that agencies consider alternatives and that the decision is not in clear error follow a similar pattern. In those cases, the fact that decisions are more often guided by policy rather than science suggests that courts will be more deferential when applying these elements of foreign hard look review.

Second, and importantly, domestic hard look review operates in the

218. Globalstar, Inc. v. FCC, 564 F.3d 476, 483 (D.C. Cir. 2009) (citations omitted).

219. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 59–60 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party. . . . A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration."); *see also* United Auto Workers v. Chao, 361 F.3d 249, 256 (3d Cir. 2004) (Pollak, J., concurring) ("[W]hat is at issue in this case is a change in regulatory policy coincident with a change in administration").

220. *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009) (favoring the expansion of arbitrary and capricious review to encompass political factors considered by agencies during rulemaking); EDLEY, *supra* note 112, at 190, 192 (arguing that agencies should acknowledge political and ideological factors and that courts should consider those factors to be acceptable in appropriate circumstances); *cf.* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010) (arguing that agencies should disclose presidential and other executive oversight in order to improve transparency and prevent improper influences). For an argument that courts cannot consider political influence but agencies can, see Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012).

221. *See* Watts, *supra* note 220, at 55.

context of the APA's other requirements, most notably, notice-and-comment rulemaking; foreign hard look review would not, as foreign and military affairs are exempt from those procedures. This has two significant effects. First, a reviewing court will not see—and under *Vermont Yankee*'s prohibition on adding procedures, cannot require—as extensive a decision-making record as it would in a notice and comment case. Foreign hard look review is thus a pure form of arbitrary and capricious review, limited to only a basic review of the rationality of the decision. As a consequence, and coupled with the more policy-oriented and less scientific nature of foreign relations issues, agencies will not have to produce as extensive records.

The second effect is that outside groups will not have an opportunity to participate in the policymaking process, as they would in many domestic rulemaking situations. Although courts could not reintroduce a participation requirement under *Vermont Yankee*, they could, in practice, provide extra deference to an agency's voluntary choice to include other groups or institutions in policymaking. A voluntary approach would have the courts provide added deference to agencies that include participation in their decisionmaking; in other words, it would give the agency extra points for participation. Courts could consider participation along three dimensions: internal, external, and international. Agencies consulting internally with other government agencies would be given extra deference because they are increasing the diversity of information and perspectives they are considering, thus supporting the epistemic function of hard look review.[222] To a lesser extent, internal consultation supports the pluralistic goals of hard look review. Inasmuch as agency positions are driven by distinct cultures that align with different constituencies in society, consultation with other agencies might serve as a proxy for consultation with outside groups. Deference in cases of internal participation also provides a framework for situations in which speed and secrecy are necessary; in those cases, internal government consultation provides fewer risks of disclosure of secret information and enables interagency cooperation. Agency consultations with external groups likewise would get deference for supporting the pluralistic and epistemic goals of hard look review, but would not be mandated. Finally, in cases where the agency is engaged in international negotiations, it is effectively allowing participation by a foreign nation in determining policy. These cases should be granted

222. The interagency process has increasingly been explored by scholars. Recent contributions include Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183 (2013).

the highest amount of deference because the foreign nation would need to agree to any policy, thus constraining the agency's possible set of policies and making arbitrary action less likely.[223] As a corollary, the court could provide greater deference in cases in which the agency negotiates with many foreign countries (for example, multilateral treaties) and less deference when the United States negotiates with one country (bilateral treaties), has near complete control over a foreign country (occupied nations, for example), or acts unilaterally.

A voluntary participation system enables agency flexibility while incentivizing participation. Extra court deference provides an incentive for agencies to consult at the very least internally, if not externally. In particular, we would expect courts to provide the most consultation in the situations when it is most likely to be challenged through litigation because it would seek to insulate its action from the challenge.[224] Correlatively, the agency would be able to signal the importance of its decisions to the courts by providing for increased participation in important cases.[225] Finally, the voluntary system would not mandate participation, so agencies would have flexibility in cases in which negotiations are complex, resources are limited, secrecy or speed is essential, or policies are necessary in the long run but controversial in the short term.

The third major shift from domestic to foreign hard look review is considering the possibility that foreign hard look review will "ossify" foreign policy decisionmaking. This worry is somewhat mitigated by the fact that foreign hard look review will rely on policy determinations more than science, will not have an ex ante participation requirement, and will not require as substantial a record.[226] In addition, however, there are other mechanisms for protecting against ossification, some of which have been applied in the domestic context and others that could be applied in the foreign context. Three mechanisms stand out as particularly helpful in the

223. For a discussion of the international dimension in agency decisions, see Jason Marisam, *The Internationalization of Agency Actions,* 83 FORDHAM L. REV. (forthcoming). For the classic discussion of the negotiation challenge with international parties, see Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

224. *See* Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 529–31 (2006) (positing that agencies, when acting rationally, make tradeoffs as they seek judicial deference while minimizing their costs).

225. *See generally* Stephenson, *supra* note 55, at 756 (advocating that the judiciary's use of explanatory requirements in evaluating agency decisionmaking can serve as a mechanism indicating the merit of the agency's decision).

226. *See* McGarity, *supra* note 52, at 1443 (noting that a reduction in analytic and informational requirements would help deossify).

foreign relations context: remand without vacating, vacating with a delayed mandate, and allowing post hoc rationalizations. In the early to mid 1990s the D.C. Circuit started providing a remedy of remand without vacating.[227] If the court determined that an agency action was arbitrary and capricious, that there was a serious possibility the agency could provide a satisfactory explanation of its decision on remand, and that the consequences of vacating the agency action would be disruptive, the court would issue a remand without vacating the decision.[228] By allowing the agency to keep the rule, the court prevented disrupting the policy process and also forced deliberation. Indeed, one study shows that of the seven cases in a decade in which the remedy was used to address challenges to minor rules, the agency actually changed its substantive position in two cases after reconsidering its justifications.[229] For foreign hard look review, the remand without vacating remedy may prove particularly useful, as it would allow the Executive Branch agency to think more clearly about the policy reasons for its actions without disrupting the actual conduct of foreign affairs.

A second remedial strategy is to allow remand with a delayed issuance of a mandate. Under this remedy, the court has decided to vacate the agency's rule, but does not vacate until the mandate is issued later. If the agency can provide a justification before the mandate is issued, the rule remains in effect. If the agency fails to provide a satisfactory justification, the mandate is issued, and the rule is vacated.[230] This remedy is more stringent than the remand without vacating because it establishes that the rule will actually be vacated if the explanation is insufficient. In cases where the agency is unlikely to be able to provide a sufficient explanation or when the consequences of vacation are relatively minor, this remedy may prove useful. It would incentivize the agency to provide a particularly compelling explanation for its actions.

A third strategy would be to allow post hoc rationalizations when applying foreign hard look review.[231] In *SEC v. Chenery Corp.*,[232] the

227. *See* Pierce, *supra* note 55, at 75 (introducing the "alternative remedy" of remanding without vacating); Jordan, *supra* note 57, at 413–16 (providing a breakdown of cases that were remanded without vacating); Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993) (remanding without vacating to prevent the "disruptive consequences" of vacating); United Auto Workers v. OSHA, 938 F. 2d 1310, 1325–26 (D.C. Cir. 1991) (remanding without vacating to preserve safety controls); Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1273 (D.C. Cir. 1994) (remanding without vacating to prevent industry disruption).

228. Pierce, *supra* note 55, at 75.

229. Jordan, *supra* note 57, at 416.

230. *Id.* at 416–17.

231. *See Rationalizing Hard Look Review*, *supra* note 55 at 1920–24 (defending the use of post hoc rationalizations by agencies subject to judicial review to prevent ossification). Some

Supreme Court banned post hoc rationalizations, announcing that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."[233] Although the Court has recognized that it will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned,"[234] with the confluence of hard look review and the *Chenery* requirement, courts "uniformly reject an agency's ability to provide alternate explanations during litigation."[235] Removing this bar in foreign relations cases would reduce judicial decision costs by limiting judges' need to engage in extended investigations into the record of decisionmaking, while still requiring some reasoned justification. In situations where speed is needed, allowing post hoc rationalizations may be particularly effective, as it would enable decisionmaking at the time of crisis but, after the crisis has passed, require a reason for maintaining the policy. To be sure, allowing post hoc rationalizations reduces the benefits of hard look review by minimizing the agency's incentive to think seriously about its decisions and to provide reasoned explanations for them. But this may be less troubling than it first seems: not only should agencies be interested in providing reasoned justifications to prevent litigation in the first place, but courts have given "great weight" to post hoc executive rationalizations expressed as litigation positions in foreign relations cases.[236] Still, given its potential to eviscerate the ex ante benefits of foreign hard look review, it may be best to limit post hoc rationalizations to cases in which speed was essential. The remand without vacating and the delayed mandate remedies could be applied more broadly.

These deossification strategies may seem troubling because they go too

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commentators have argued that hard look review is actually composed of the arbitrary and capricious standard plus the ban on post hoc rationalizations. *See* Stack, *supra* note 72, at 972 ("The combination of a searching standard of review—the arbitrary and capricious standard, as widely read—with the *Chenery* principle is what characterizes the contemporary hard look doctrine of judicial review"). Formally, the *Chenery* requirement and the elements of arbitrary and capricious review described in *Overton Park*, *Greater Boston*, and *State Farm* are distinct, but the two doctrines are intimately related. Without a ban on post hoc rationalizations, as described in the text below, hard look review might become meaningless because courts would not actually be monitoring whether agencies took a hard look at the facts *prior* to making their decisions.

232. 318 U.S. 80 (1943).

233. *Id.* at 95.

234. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285–86 (1974).

235. *Rationalizing Hard Look Review*, *supra* note 55, at 1921.

236. *See* Mora v. New York, 524 F.3d 183, 204–05 (2d Cir. 2008) (providing "great weight" to the government's opinion in a joint amicus brief presented by the Justice and State Departments).

far in weakening foreign hard look review. Indeed, one stringent criticism is that foreign hard look review is simply window-dressing, a feel-good judicial action that amounts to no real review at all. In other words, is foreign hard look review just a sham, a façade of the rule of law? In a recent article, Professor Adrian Vermeule argues that during emergencies and crises, some administrative law doctrines, like hard look review, operate as "grey holes"[237]—doctrines that provide "some legal constraints on executive action . . . but the constraints are so insubstantial that they pretty well permit government to do as it pleases."[238] Professor Vermeule shows that after 9/11, courts applied hard look review to a series of administrative law cases touching on national security concerns in a way that recited the doctrinal requirements but in fact just deferred to executive action. In other words, they provided only a "soft look."[239] Citing decisions by the Treasury Department's Office of Foreign Assets Control (OFAC), Professor Vermeule shows that there is a spectrum from true hard look review to soft look review to a grey hole that is a mere façade of judicial review.[240] What is particularly important is that grey holes are inevitable in administrative law because of certain background features: the complexity and size of the administrative state, the impossibility of providing precise commands for every situation, the diversity of problems and situations that arise, legislators' broad delegations, and the judiciary's skepticism of its own abilities and fear of error.[241] Indeed, in crises or emergencies, grey holes may be frequent.

The inevitability of grey holes in administrative law does not mean, however, that doctrines like hard look review are unimportant. In ordinary times and with respect to many issues, the pathologies that result in grey holes will be absent, and hard look review can proceed as a robust or at least soft form of judicial review. In other words, it may be preferable to have judicial review available in at least some situations, even if it is unlikely to be robust in all situations.[242] In extreme situations, the migration of hard look review into a grey hole may still have some benefits, such as increasing

237. Vermeule, *supra* note 144, at 1118.

238. DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 42 (2006).

239. Vermeule, *supra* note 144, at 1118–19.

240. *Id.* at 1119–20.

241. *Id.* at 1134–35.

242. To be sure, one could argue that no review may be better than some review, so as not to legitimize the actions. *Cf.* Korematsu v. United States, 323 U.S. 214, 244–46 (1944) (Jackson, J., dissenting) (emphasizing the Court's "valid[ation of] the principal of racial discrimination in criminal procedure" by upholding EO 9066, which ordered the internment of Japanese-Americans during World War II).

information provided to the public. And there is always an outside chance that a court might find an action so egregious that they overturn it.[243] In other words, the existence of grey holes in administrative law generally means that courts may shy away from applying foreign hard look review in some cases, but it does not imply that all foreign relations cases will fall into these grey holes.

III. TAKING A HARD LOOK AT FOREIGN RELATIONS

Foreign hard look review provides an alternative to the extremes of judicial abdication and judicial entanglement. In doing so, it provides a pragmatic, process-based approach to addressing important doctrinal and scholarly debates in foreign relations law. This Part applies foreign hard look review to a variety of issues in foreign relations law that involve executive power over foreign affairs questions. In each case, it describes the debates and issues and shows how foreign hard look review provides a helpful way to understand or resolve them.

A. The Political Question Doctrine

Since at least *Marbury v. Madison*, courts have recognized their limited authority to address issues which are "in their nature political."[244] But despite its distinguished pedigree, the political question doctrine has been characterized as "confusing," [245] "murky and unsettled," [246] and even "jurisprudential chaos." [247] Sometimes the doctrine appears to be a constitutional requirement, driven by the textual commitment of authority to one of the political branches of government; other times, it is referred to as a prudential practice that enables courts to dodge complex, charged, or challenging issues.[248] Regardless of its foundations, courts invoking the doctrine find a case nonjusticiable, effectively deferring to the Executive Branch's actions. The doctrine is perhaps at its strongest when foreign

243. *See* Boumediene v. Bush, 553 U.S. 723 (2008) (declaring § 7 of the Military Commissions Act an unconstitutional suspension of the writ of habeas corpus).

244. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

245. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 144 (3d ed. 1999) ("In many ways, the political question doctrine is the most confusing of the justiciability doctrines.").

246. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring) ("That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court.").

247. FRANCK, *supra* note 8, at 8.

248. Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814, 814–15 (1989).

affairs are implicated, with courts fearing to tread on the Executive's prerogatives. Though some celebrate judicial abstention, many have attacked the doctrine as "judicial abdication."[249] In many situations, foreign hard look review may provide a way to navigate between judicial entanglement and judicial abdication. To be perfectly clear, foreign hard look review would not extend to situations in which the political question doctrine is used to address a constitutional issue arising between two branches of government and raising separation of powers concerns. Rather, it is limited to situations in which there is statutory authority delegated to the Executive and the courts nonetheless cite the political question doctrine to avoid more rigorous judicial review.

Though courts are charged with "say[ing] what the law is,"[250] under the political question doctrine, courts will dismiss a case or controversy as nonjusticiable. As the Court famously put it in *Baker v. Carr*, the doctrine is triggered if a court finds:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[251]

Of course, "not every matter touching on politics is a political question," because the court is tasked with interpreting the law and "cannot shirk this responsibility merely because [its] decision may have significant political overtones."[252] The doctrine has long been controversial[253] and in recent years, some have pronounced its demise in domestic affairs.[254]

The *Baker* factors are generally understood to fall under two headings:

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249. *Id.* at 815.

250. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

251. 369 U.S. 186, 217 (1962).

252. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 229–30 (1986).

253. *See* Louis Henkin, *Is There a "Political Question" Doctrine*, 85 YALE L.J. 597, 600 (1976) ("[T]here may be no doctrine requiring abstention from judicial review of "political questions."); *see also id.* at 622 ("The "political question" doctrine, I conclude, is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts.").

254. *See, e.g.*, Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 273–317 (2002).

constitutional and prudential. [255] The "textually demonstrable" requirement roots the doctrine in the constitutional text and structure, establishing certain judgments as formally outside the province of the courts.[256] The other five factors are rooted in prudential considerations; they are not mandated by the Constitution but merely desirable for a court seeking to preserve its legitimacy.[257] Which of these two justifications is dominant is deeply contested, [258] and other justifications abound. Commentators note that political question doctrine is justified by the judiciary's incompetence and lack of training on political questions[259] and by the self-regulating character of inter-branch disputes.[260]

The doctrine has found frequent use when courts are confronted by questions touching on foreign affairs.[261] The perception, as Professor Thomas Franck once noted, is that "it's a jungle out there" and that "the conduct of foreign relations therefore requires Americans to tolerate a degree of concentrated power that would be wholly unacceptable

255. Glennon, *supra* note 248, at 814–15.

256. This was Herbert Wechsler's vision of the doctrine, *see* HERBERT WECHSLER, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959); *see also* Nzelibe, *supra* note 93, at 948–49; Ann-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 1984 (1993); FRANCK, *supra* note 8, at 31.

257. This was Alexander Bickel's vision of the doctrine, as a passive virtue. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1962); *see also* Nzelibe, *supra* note 93, at 949; Burley, *supra* note 256, at 1985; FRANCK, *supra* note 8, at 48, 50, 58, 60.

258. *Compare* Barkow, *supra* note 254, at 263 ("The problem with the prudential theory . . . is that once the political question doctrine is unleashed entirely from the Constitution itself, what keeps a judge's use of the doctrine in check?"), *and* Gerald Gunther, *The Subtle Vices of the "Passive Virtues" —A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 1 (1964) (criticizing Bickel's model as "vulnerable and dangerous"), *with* Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1049 (1985) ("The concern for principled decisionmaking as a rationale for the political question doctrine represents an unduly narrow, short-sighted and even solipsistic view of the judiciary's function in a constitutional system."), *and* Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 461 (2004) ("In the struggle between principle and expedience, the doctrine is the mechanism by which courts give expedience its due. The doctrine reflects a profoundly subversive judicial judgment that constitutional adjudication has its limits. Bickel's crucial insight, never fully articulated, is that constitutional law cannot be self-validating.").

259. *See, e.g.*, Burley, *supra* note 256, at 1985; Glennon, *supra* note 248, at 815; FRANCK, *supra* note 8, at 6–7.

260. Glennon, *supra* note 248, at 815; *cf.* Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J., concurring).

261. PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 444 (4th ed. 1998) ("Though successful resort to the political question doctrine in purely domestic disputes is rare, the doctrine appears to have greater vitality in foreign affairs.").

domestically," [262] particularly when it comes to separation of powers questions implicating foreign affairs, courts find frequent use of the doctrine.[263] As the Court once noted,

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[264]

In other words, the inherited case law embraces the belief that "[f]oreign affairs is different."[265] Recently, however, the Court has indicated that it will not jump so quickly to decide that foreign relations issues are political questions when there are run-of-the-mill statutory issues at stake.[266]

Many scholars have attacked the use of the political question doctrine in foreign relations, seeking either to get rid of it completely or modify it significantly. They argue that the doctrine is based on specious foundations, problematic, and ultimately undermines the rule of law.[267] Particularly notable members of this camp are Professors Thomas Franck, Anne-Marie Slaughter, and Peter Spiro. Professor Franck attacks the assumption that foreign affairs are different from domestic affairs and argues that the doctrine has resulted in judicial abdication of a crucial set of legal questions, ultimately diminishing the rule of law.[268] Professor Franck proposes to replace the political question doctrine with an evidentiary rule

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262. FRANCK, *supra* note 8, at 14.

263. *See Goldwater*, 444 U.S. at 998 (1979); Made in the USA Found. v. United States, 242 F.3d 1300, 1312 (11th Cir. 2001); Mahorner v. Bush, 224 F. Supp. 2d 48, 52 (D.D.C. 2002); *see also* Nzelibe, *supra* note 93, at 953.

264. Chicago & S. Air Lines, Inc. v. Waterman S.S. Co., 333 U.S. 103, 111 (1948).

265. Nzelibe, *supra* note 93, at 944.

266. *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012).

267. *See, e.g.*, Glennon, *supra* note 248, at 815–16; Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 239–40 (1985); Charney, *supra* note 8, at 813 ("[T]here is no basis for a broad rule permitting deference or abstention in cases touching on international law and policy. For the most part, the courts are well equipped to decide them independently."). Some seek to get rid of the doctrine in both domestic and foreign affairs. *See* Louis Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524, 529 (1987) ("I see the political question doctrine as being at odds with our commitment to constitutionalism and limited government, to the rule of law monitored and enforced by judicial review."); Redish, *supra* note 258, at 1033.

268. FRANCK, *supra* note 8, at 10–44, 48–49; *see also* Henkin, *supra* note 267, at 529–30.

derived from German constitutional law,[269] an approach that would leave the Executive's power over foreign relations "largely undisturbed."[270] Professor Slaughter rejects the political question doctrine in foreign affairs on similar grounds, but seeks only to reduce its scope, rather than abandon it wholesale. Relying on political science studies showing that liberal democratic states share common values, do not wage war against each other, and are economically interconnected, she argues that the doctrine should not apply to actions regarding other liberal democracies.[271] Relations between liberal democratic states are unlike the conventional model of foreign relations, in which secrecy, war, and power politics dominate; between liberal states, she argues, foreign and domestic affairs converge. Correlatively, when cases or controversies arise between the U.S. and a "nonliberal" state, courts should apply the doctrine, as the conventional justifications for deference to the Executive in foreign relations are more likely to apply.[272] Professor Spiro argues that the justifications for the political question doctrine are unfounded, particularly given globalization. The judicially manageable standards prong relies on circular reasoning because the absence of such standards is the result of repeated application of the political question doctrine.[273] More importantly, courts often deal with complex issues, and the fact of international institutions mediating global affairs renders it unlikely that judicial error will spark an international incident.[274]

In response to these critics, others have vigorously defended the doctrine's use in foreign relations.[275] Professor Jide Nzelibe has recently provided a thorough defense of the doctrine. Professor Nzelibe argues that "courts suffer from peculiar institutional disadvantages that often warrant

269. *See* FRANCK, *supra* note 8, at 4–5, 7. Franck's proposal has been criticized as reintroducing the foreign-domestic distinction by providing a different evidentiary standard for foreign affairs questions, *see* Burley, *supra* note 256, at 1982. For pushing judges to decide substantive questions "in the guise of assigning burdens of proof," see *id.* at 1981; *see also* Nzelibe, *supra* note 93, at 967–68.

270. Burley, *supra* note 256, at 1983.

271. *Id.* at 1982, 2002–03.

272. *Id.* at 2002–03. Nzelibe responds that the liberal project flounders because it is unclear who decides "whether or not a country qualifies as a liberal state." *See* Nzelibe, *supra* note 93, at 974.

273. Spiro, *supra* note 8, at 677.

274. *Id.* at 679, 682–83.

275. *See generally* Nzelibe, *supra* note 93. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457 (2005); *see also* John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 300 (1996); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 129 (1993) (asserting that in foreign affairs, courts should defer to the Executive because courts "lack[] the capacity to make the necessary judgments").

absolute deference to the decision of the political branches in most foreign affairs controversies."[276] In particular, courts "lack the institutional resources or capacity to track the evolution of international norms"[277] and have reduced legitimacy in foreign affairs because judicial legitimacy is lowest when issues implicate "the very existence of the state" rather than protection of individual rights.[278] Additionally, courts may be unable to develop standards for political issues,[279] judges may fear the high stakes involved,[280] access to evidence may be difficult,[281] and the separation of powers enables the political branches to achieve a self-regulating equilibrium without judicial entanglement.[282] Professor Nzelibe emphasizes that the costs of judicial review outweigh the benefits. The cost of judicial error might be high, particularly because remedies are limited. The benefits are illusory because they assume that courts can provide a more effective check on the Executive than Congress and that the absence of judicial review amounts to abandoning the rule of law.[283] Finally, Professor Nzelibe concludes that courts should consider their institutional (in)competence when considering whether to abandon the political question doctrine in foreign affairs cases.[284]

Neither side is likely to convince the other that the political question doctrine should be supported or eliminated in foreign relations cases, but in situations where there is statutory delegation to the Executive Branch regarding foreign policy, akin to statutory delegation in domestic regulatory law, foreign hard look review can provide a helpful alternative to the two entrenched positions. Because foreign hard look review requires judicial review but recognizes limited judicial competence over substantive questions of policy, it navigates between the risks of both judicial abdication

276. Nzelibe, *supra* note 93, at 944.

277. *Id.* at 944, 976–80 (describing courts' inability to track international norms).

278. *Id.* at 987–91.

279. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ((noting that "'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature'") (quoting United States *ex rel.* Joseph v. Cannon, 692 F.2d 1373, 1379 (D.C. Cir. 1981)).

280. Nzelibe, *supra* note 93, at 951–52; *see also* FRANCK, *supra* note 8, at 50–58; BICKEL, *supra* note 257, at 184; Spiro, *supra* note 8, at 678.

281. Nzelibe, *supra* note 93, at 951; *see also* FRANCK, *supra* note 8, at 46–48.

282. Nzelibe, *supra* note 93, at 956–57; *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 379 (1980); Yoo, *supra* note 275, at 300; *see also* Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990) ("Congress possesses ample powers under the Constitution to prevent Presidential over-reaching, should Congress choose to exercise them."); Glennon, *supra* note 248, at 819–20.

283. Nzelibe, *supra* note 93, 992–96.

284. *Id.* at 975.

and judicial entanglement. Foreign hard look review enables courts to review a number of foreign relations cases that courts have and would otherwise find nonjusticiable. It thus promotes reasoned decisionmaking and provides meaningful review to affected parties while still respecting the Executive's ability and expertise in foreign affairs. To be clear, foreign hard look review would not extend to political questions that are rooted in *constitutional* challenges under the separation of powers. Rather, it is limited to political questions that emerge in situations where there is a statutory foreign affairs authority delegated to the Executive.

Consider first *Wood v. Verity*,[285] in which an American fisherman challenged an enforcement policy of the National Marine Fishery Service (NMFS). Under the Lacey Act, it is unlawful for persons to transport fish or wildlife in foreign commerce in violation of a foreign law.[286] Wood was caught fishing without a permit, in violation of Bahaman law, in waters that are claimed by the Bahaman government and that the United States recognizes as within the Bahaman exclusive economic zone (EEZ).[287] The fisherman challenged NMFS's enforcement of the Bahaman law, given that the United States only recognizes the Bahaman EEZ as a matter of policy, rather than through a definitive treaty.[288] Finding the challenge nonjusticiable under the political question doctrine, the court found that *Baker*'s textual commitment prong was satisfied by the Constitution's commitment of treaty negotiations and foreign recognition to the Executive Branch, and that *Baker*'s judicially manageable standards prong was satisfied because the judiciary is "ill-equipt [sic] to determine the sensitive aspects of foreign policy bearing upon international negotiations on fisheries matters."[289] As a result, Wood failed to convince the court that the Bahaman law is not a recognizable foreign law under the Lacey Act.

But was it appropriate to apply the political question doctrine in this case? NMFS's enforcement action was based on a statute, the Lacey Act. And the State Department's determination of the EEZ boundaries was established as an agency rule, made pursuant to authority granted by the

285. 729 F. Supp. 1324 (S.D. Fla. 1989).

286. 16 U.S.C. § 3372 (2012); *Wood*, 729 F. Supp. at 1325–26.

287. *Wood*, 729 F. Supp. at 1326. U.S. regulations provide that when maritime boundaries are not definitely determined, the boundaries will be determined by the United States and the foreign state based on considerations of equity. *See id.* (citing Proclamation No. 5030, 3 C.F.R. § 22, 23. (1983)). The Bahamas and the United States differ on policy when EEZ's conflict: the Bahamas recognizes their full EEZ, up until twelve nautical miles from the foreign state. *See* United States v. Rioseco, 845 F.2d 299, 300 n.1 (11th Cir. 1988).

288. *Wood*, 729 F. Supp. at 1326; 42 Fed. Reg. 12,937 (Mar. 7, 1977). The United States and Bahamas were in longstanding and stalled negotiations as to portions of their maritime boundaries. *See Wood*, 729 F. Supp. at 1327.

289. *Wood*, 729 F. Supp. at 1327–28.

Magnuson Fishery Conservation and Management Act of 1976.[290] The State Department issued public notice of the boundaries in the Federal Register and even cited the APA's provisions in § 553(a)(1) and (b)(B) to support its determination that the policy could take effect immediately without comment.[291] In other words, the central issue raised—whether the boundaries for the EEZ were enforceable—was a function of a rule published by the State Department pursuant to the APA. If the State Department recognized the applicability of the APA, surely the court need not have reverted to the political question doctrine instead of applying the far more mundane doctrines of administrative law.

Under foreign hard look review, the fisherman could have challenged the State Department's decision to establish the EEZ boundaries as arbitrary and capricious, and the court would have reviewed the case as it would review any other agency rule for being arbitrary and capricious. The court could have required the State Department to justify establishing an equidistant boundary rule in the disputed U.S.-Bahaman areas, particularly given the differences in the U.S. and Bahaman policies on boundaries in the absence of a treaty,[292] to account for the factors it considered, and to explain its ultimate judgment. If the State Department had reasoned justifications for its decision, the court would still have dismissed Wood's complaint—as not being arbitrary, rather than declaring it a political question. If the State Department had not provided reasoned justifications for its decision, the court would have found the action arbitrary and capricious.

Consider a more prominent example of the use of the political question doctrine—the Supreme Court's decision in *Gilligan v. Morgan*.[293] After the protests at Kent State, Ohio, university students argued that the Ohio National Guard's training process made it inevitable that the Guard would use deadly force in addressing civil disorders, when non-lethal force would suffice.[294] As a remedy, they asked that the district court evaluate the Guard's "training, weaponry, and orders," and establish and monitor standards for the Guard's practices.[295] Citing *Baker v. Carr*, Chief Justice Burger argued that the "nature of the questions to be resolved . . . are subjects committed expressly to the political branches of government," and

290. 16 U.S.C. § 1822(d) (2012).

291. *See* 42 Fed. Reg. 12,937 (Mar. 7, 1977).

292. *See supra* note 287; *see also Wood*, 729 F. Supp. at 1325–26.

293. 413 U.S. 1 (1973).

294. *Id.* at 4. It is worth noting that the central issue was likely moot. The Guard had already changed the policies that had resulted in the violence at Kent State.

295. *Id.* at 5–6.

were therefore nonjusticiable.[296] Noting the incompetence of the judiciary, the Court explained that "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." [297] Electoral accountability, not judicial review, provides oversight for such issues.[298]

Though the Court's decision may seem reasonable at first glance, on second look, *Gilligan* seems much more like a conventional administrative law case than a nonjusticiable political question. Through various statutory provisions, Congress has delegated to the President the authority to promulgate regulations governing the organization and practices of the National Guard.[299] As a result, the Guard's processes at issue in *Gilligan* fit the definition of a rule under APA § 551(4), which defines a rule as "an agency statement of general or particular applicability and future effect . . . describing the organization, procedure, or practice requirements of an agency."[300] Although such actions are explicitly exempted from notice-and-comment rulemaking when touching on foreign or national security affairs,[301] courts can still review them for being arbitrary and capricious.[302]

Under foreign hard look review, the Court would have found the *Gilligan* claims justiciable. The Court would have required the Executive to show that it had engaged in a reasoned decisionmaking process when designing the Guard's training, weaponry, and command procedures. Had the Guard considered the relevant factors, including the fact that the Guard operates in situations of civil disturbances? Had the Guard considered alternative training regiments? Was the Guard's training regime designed in such a way that it would clearly lead to the inappropriate use of lethal force?

Applying a foreign hard look review test to *Gilligan* would have allowed the Court to guarantee that the Guard's processes were not arbitrary or

296. *Id.* at 8, 10.

297. *Id.* at 10 (emphasis omitted).

298. *Id.*

299. 32 U.S.C. §§ 104, 108, 110–111, 316, 501–507, 515, 701–714 (1970 & Supp. I); *see Gilligan*, 413 U.S. at 6–7.

300. APA, § 551(4) (2012) (defining rule).

301. *See* APA, § 553(a)(1), (b)(3)(A).

302. *See* APA, § 702 (providing authority for reviewing agency actions); § 551(1) (defining agency); § 551(13) (defining agency action). The statute at issue in *Gilligan* could potentially be interpreted as "committed to agency discretion by law" under § 701(a)(2) because it provides the Secretary of Army with the power to evaluate training programs. *See* 32 U.S.C. § 110 (2012) (noting that the Secretary of the Army shall prescribe regulations for inspectors general or regular army officers to determine whether the Army National Guard are properly equipped and trained).

clearly erroneous. Consider, for example, a somewhat extreme hypothetical. What if the Guard's guidelines required members to shoot civilians on sight during civil disturbances, independent of any threat to safety for the Guard member or the community? Such a policy would be difficult, if not impossible, to justify. Applying foreign hard look review would enable the judiciary to police these outer bounds. But at the same time, foreign hard look provides substantial deference to the Executive's decisionmaking process. As long as the Guard had thought about its training regimen and justified it, even in the midst of uncertainty and a range of possible policy choices, the Court would find no difficulty.

Note also that under the foreign hard look test, the Court would not need to require outside participation of groups or to require the Guard to respond to comments from outside groups, but it could give greater deference if the Guard consulted with other agencies within the government that have relevant experience: the military, drug enforcement agency, secret service, and local and state police.

What *Wood v. Verity* and *Gilligan v. Morgan* show is that courts need not apply the political question doctrine to a substantial set of cases that involve foreign affairs or national security. In fact, the legal structure of these cases looks similar to the structure of cases touching squarely on domestic affairs and for which courts routinely apply hard look review. Moreover, given that the cases all implicate policy judgments and uncertainty, rather than scientific or technical questions, the courts' assessment of the Executive's reasonableness will be extremely deferential. As a result, courts need not fear applying foreign hard look review in such cases. They can instead embrace *Baker v. Carr*'s sentiment that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,"[303] and they can take a hard look at these foreign relations decisions.

B. The President's Completion Power

In a recent article, Professors Jack Goldsmith and John Manning identify and provide support for the existence of a presidential "completion power."[304] The completion power is "the President's authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme."[305] The completion power is "defeasible," which means that

303. Baker v. Carr, 369 U.S. 186, 211 (1962).

304. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2280 (2006).

305. *Id.* at 2282.

Congress can limit the power by statutory provisions detailing how the statute is to be implemented or by denying the Executive particular avenues through which to implement the statutory scheme.[306] In the absence of such limitations, however, Professors Goldsmith and Manning argue that longstanding practice indicates an Article II power that allows the President to "complete a legislative scheme."[307] In addition to showing that the completion power is referenced in Chief Justice Vinson's dissenting opinion in *Youngstown*,[308] they provide a wide ranging set of examples of the completion power—foreign affairs authorizations,[309] the use of military force abroad,[310] prosecutorial discretion,[311] Office of Management and Budget (OMB) supervision of rulemaking,[312] and *Chevron*.[313] Professors Goldsmith and Manning root the source of the completion power in Article II,[314] though they also note that it would be possible to see the power as incidental to implementing the statutory scheme established by Congress.[315]

Dean Harold Koh sees the completion power as a dangerous aggrandizement of executive authority.[316] He worries that the completion power is simply "an implied Necessary and Proper Clause for the President," and outlines three particular problems: source, overgeneralization, and *Hamdan*.[317] Dean Koh argues that the power cannot be rooted in the Commander in Chief power, Vesting Clause, or Take Care Clause, but that any power would have to be based on the delegated authority of Congress.[318] Relatedly, he argues that Professors Goldsmith and Manning overgeneralize from their examples because the common element is not an unenumerated Article II power but rather, and more simply, congressionally delegated authority.[319] Finally, he argues that *Youngstown* and *Hamdan* are counterexamples to Professors Goldsmith and Manning's proposed power. In *Youngstown*, Dean Koh notes, Justice Black held that Congress has the power to make laws and delegate power, and

306. *Id.*
307. *Id.* at 2282, 2287.
308. *Id.* at 2284–87.
309. Goldsmith & Manning, *supra* note 304, at 2287–91.
310. *Id.* at 2291–93.
311. *Id.* at 2293–95.
312. *Id.* at 2295–97.
313. *Id.* at 2298–2302.
314. *Id.* at 2302–04. They discuss the Commander in Chief Clause, Take Care Clause, and Vesting Clause as possible sources for the power.
315. *Id.* at 2302, 2304, 2308.
316. Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2368–69 (2006).
317. *Id.*
318. *Id.* at 2369.
319. *Id.* at 2371.

that President Truman had "transgressed that legislative prerogative."[320] Professors Goldsmith and Manning, he argues, would find, contrary to *Youngstown*, an "inherent lawmaking power" for the President.[321] Dean Koh acknowledges that *Dames & Moore v. Regan* dilutes the *Youngstown* approach, but then argues that *Hamdan*'s approach returns the constitutional system to equilibrium by strictly reading executive power in the face of a statutory scheme.[322]

Seeing the completion power through administrative law renders it far less controversial, in part because it opens up the possibility that foreign hard look review could apply to the Executive's completion of a statutory scheme. The completion power arises under conventional administrative law principles. Congress passes a statute that delegates authority to the Executive or that directs the Executive to take some action. However, it is unrealistic, perhaps even impossible, for a statute to be comprehensive at a sufficient level of precision for the Executive to exercise absolutely no discretion in implementing the statute or fulfilling its delegated authority.[323] The Executive thus must inevitably address ambiguities and make policy choices in interpreting statutes. This discretion—this power to "complete" the ambiguities or gaps in the statutory scheme—is the completion power. As a result, it cannot be exercised contrary to law, and it can be limited by statute.[324] Note that these limitations could extend even to issues touching on foreign and military affairs.[325]

In this light, Dean Koh's objections seem somewhat inapposite. The completion power does not replace Justice Jackson's tripartite *Youngstown* approach, as Dean Koh understands it,[326] but rather is better read as identifying a fourth category of cases that are common to administrative law: congressional authorization at a level of generality, but ambiguity with

320. *Id.* at 2370.

321. *Id.*

322. *Id.* at 2372.

323. Indeed, Goldsmith and Manning make exactly this argument. *See* Goldsmith & Manning, *supra* note 304, at 2305 ("[U]nless the legislature is capable of adopting a pellucid and all-encompassing code for a given subject (and no one today believes that it can), then implementation of the law entails some degree of discretion. Indeed, this simple but important proposition is the cornerstone of the modern, weak nondelegation doctrine."), *id.* at 2305 n.113 ("To suggest that the President may not fill in the details of the laws enacted by Congress is to contradict the conceptual basis for the modern version of the nondelegation doctrine.").

324. *Id.* at 2309. Obviously matters assigned solely to the Executive under the Constitution, such as the pardon power or veto power, are exempt from congressional constraints. *See id.* at 2302.

325. *Cf.* Barron & Lederman, *supra* note 10.

326. Koh, *supra* note 316, at 2373–74.

respect to the specific action.[327] Such statutes do not fit easily into category 1, which is framed as congressional authorization of the Executive's action; category 2, which involves congressional silence on the Executive action; or category 3, which consists of congressional prohibition of an Executive action. They do, however, describe the large category of administrative and regulatory cases in which Congress has authorized action at a general level but left ambiguities at the level of the particular executive action.[328] In the administrative law context, courts routinely recognize that the congressional scheme is ambiguous and that the Executive has discretion to interpret or implement the statute.[329] The APA supplies the relevant procedures for the Executive to interpret delegated powers and make rules.[330]

Because the completion power relies on congressional statutes for its existence—and is thus limited by those statutes—it is circumscribed by conventional administrative law structures and principles. As a result, procedural protections on expansive Executive authority, such as foreign hard look review, are applicable. Consider one of Professors Goldsmith and Manning's examples, *Zemel v. Rusk*,[331] which interpreted a statute stating that "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States."[332] In *Zemel*, the Court upheld the Secretary of

327. Goldsmith & Manning, *supra* note 304, at 2286.

328. It is possible to interpret the completion power as falling into category 2, in which Congress has not spoken to the direct question at issue. But Justice Jackson's opinion leaves unclear which of three types of actions fall into the concurrent authority of category 2: "(1) acts that either branch can perform constitutionally; (2) acts that the President can perform constitutionally, but only until Congress prohibits them; and (3) acts that the President cannot perform without statutory approval." Michael J. Glennon, *Raising* The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 327 (1985). The completion power is therefore likely not continuous with category 2's breadth.

329. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Compare this to the central issue in any *Youngstown* case: whether the Court determines that Congress had clearly authorized or prohibited an executive action. If the Court finds authorization, the decision is upheld. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981); if it finds prohibition, the action is struck, *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

330. Part of the difficulty may be that Goldsmith and Manning analogize the completion power to the Necessary and Proper Clause in Article I, and focus on the constitutional source of the completion power, *see* Goldsmith & Manning, *supra* note 304, at 2302–08. But as Goldsmith and Manning note, whether the power is rooted in congressional delegation or Article II is "immaterial," because it can be limited by Congress and must rely on a statute. *See id.* at 2282, 2305, 2308.

331. 381 U.S. 1 (1965).

332. 22 U.S.C. § 211a (2012); 3 C.F.R. § 1 (1966).

State's decision to impose area restrictions on passport use and to decline to validate passports for travel to Cuba.[333] The Court argued that international relations are "changeable and explosive" and that "Congress—in giving the [e]xecutive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."[334] Thus, the Court upheld the Secretary's policy choice, even though the statute provided no particular authorization for the area restrictions.

What is perhaps most striking is how conventional the case seems as a matter of modern administrative law. Had the case taken place today, the Secretary would have acted pursuant to statute and Executive Order[335] to exercise a power delegated by Congress.[336] Under foreign hard look review, the exercise of this power—through a "rule" established by the State Department, an "agency" under the APA—would be subject to review for being arbitrary and capricious. Instead of simply deferring to the Secretary's area restrictions, a court could have asked how the State Department determined the areas it sought to restrict, why it sought to restrict those areas, and whether it had considered alternatives to area restrictions. If the State Department had considered these issues, the Court would have accepted the area restrictions unless they were wholly "implausible" based on the State Department's justifications. If the State Department had not considered alternatives and provided a reasoned justification for the area restriction rule, the Court could have found the rule arbitrary and capricious. In this manner, foreign hard look review helps clarify the scope and limitations of the president's completion power, and as a result, makes such a power seem far less radical and expansive than some have argued.

C. National Security Deference

Courts frequently defer to the Executive Branch in cases implicating national security, including both military issues and other foreign policy issues touching on security concerns.[337] Sometimes, this deference takes the

333. *Zemel*, 381 U.S. at 7–10.

334. *Id.* at 17.

335. Under EO 11,295, the Secretary of State is delegated the authority to exercise this power "without the approval, ratification, or other action of the President." Exec. Order No. 11,295, 31 Fed. Reg. 10,603 (Aug. 9, 1966) (codified in 3 C.F.R. § 1).

336. *Cf.* Kent v. Dulles, 357 U.S. 116, 129 (1958) (noting that the passport authority is a "delegated power[]").

337. Chesney, *supra* note 13, at 1382 n.84 (distinguishing between military and national security fact deference and noting that military deference is broader than national security fact deference because it extends beyond deference to facts, and narrower than national

form of what Professor Robert Chesney has recently called "national security fact deference"—deference to the Executive's determination of factual issues in national security cases.[338] In other situations, deference is broader, rendering a case non-justiciable[339] or balancing equitable factors in favor of national security. Foreign hard look review provides courts with an alternative to expansive deference in some of these national security cases.

Consider *Winter v. Natural Resources Defense Council, Inc.*,[340] in which environmental groups sought a preliminary injunction to halt the Navy's sonar training exercises off the southern California coast until the Navy produced an Environmental Impact Statement (EIS). Under the National Environmental Policy Act, federal agencies—including the military—are required to prepare an EIS for major actions that significantly affect the environment. However, the agency can undertake a shorter environmental assessment (EA) to determine whether an EIS is necessary. If the agency finds in the EA that the action will not have a significant impact on the environment, an EIS is unnecessary.[341] In 2007, the Navy found in an EA that its planned sonar trainings would not have a significant impact on the environment, in part because the Navy would voluntarily pursue procedures to protect marine mammals.[342] The Navy thus concluded that an EIS was unnecessary.[343] Environmental groups challenged the decision, arguing that the program would harm marine mammals far more than the Navy's assessment suggested. After the district court issued a preliminary injunction, the Navy sought relief from the Council on Environmental Quality (CEQ) through a declaration of emergency circumstances that

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security fact deference because it is limited to military issues).

338. *Id.* at 1367, 1376–78, 1390–91 (describing, inter alia, *Hamdi* and the State Secrets Privilege); *see also* Masur, *supra* note 13, at 445–46 (distinguishing between legal and factual deference).

339. *See supra* Part III.A.

340. 555 U.S. 7 (2008).

341. 42 U.S.C. § 4332(2)(C) (2000); 40 C.F.R. §§ 1508.9(a), 1508.13 (2007); *see Winter*, 555 U.S. at 15–16.

342. The mitigation procedures included "(1) training lookouts and officers to watch for marine mammals; (2) requiring at least five lookouts with binoculars on each vessel to watch for anomalies on the water surface (including marine mammals); (3) requiring aircraft and sonar operators to report detected marine mammals in the vicinity of the training exercises; (4) requiring reduction of active sonar transmission levels by 6 dB if a marine mammal is detected within 1,000 yards of the bow of the vessel, or by 10 dB if detected within 500 yards; (5) requiring complete shutdown of active sonar transmission if a marine mammal is detected within 200 yards of the vessel; (6) requiring active sonar to be operated at the 'lowest practicable level'; and (7) adopting coordination and reporting procedures." *Winter*, 555 U.S. at 15.

343. *Id.* at 16.

would enable the Navy to proceed.[344]

The Supreme Court reviewed the issuance of the preliminary injunction,[345] deciding the case on the balance of equities and public interest prongs of the preliminary injunction test. The environmental groups' "most serious possible injury would be harm to an unknown number of marine mammals," whereas stopping the Navy's training "jeopardizes the safety of the fleet" and is particularly important given that "the President—the Commander in Chief—has determined that training with active sonar is essential to national security."[346] Moreover, an injunction was ill-suited as a remedy, given that the environmental groups want the Navy to produce an EIS; declaratory relief or an injunction tied to producing an EIS would be more appropriate.[347]

Though the Court considered national security and environmental harms as part of an equitable balancing test, it had open to it the other prongs of the preliminary injunction test—prongs which the parties and the Court recognized required the standard application of administrative law principles to a national security case. First, plaintiffs seeking a preliminary injunction must first show that they are likely to succeed on the merits.[348] The Natural Resources Defense Council (NRDC) argued that the CEQ was not authorized to grant exemptions to National Environmental Policy Act (NEPA), and therefore that it could receive deference only inasmuch as its reasoning was persuasive.[349] Citing the famous administrative law cases of *Mead*, *State Farm*, and *Burlington Truck Lines*, the NRDC argued that CEQ's consideration was not thorough, failed to consider any contrary evidence, ignored evidence the district court had considered, only considered the views of the Navy, and "offered no reasoning or analysis."[350] The Navy responded that courts could revise prospective relief as the legal situation changes, and the CEQs actions affected a change that authorized the Navy to act without an EIS.[351] In particular, the Navy argued that the

344. *Id.* at 18. The Council on Environmental Quality (CEQ) is authorized under 40 C.F.R. § 1506.11 (2013) to allow "alternative arrangements" to NEPA regulation compliance during "emergency circumstances." *Id.*

345. The Court noted, "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.

346. *Id.* at 26 (internal quotation marks omitted).

347. *Id.* at 32–33.

348. *Id.* at 20.

349. Brief for Respondents at 30, Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008) (No. 07-1239), 2008 WL 4154536.

350. *Id.* at 30–33.

351. Reply Brief for Petitioners at 10–11, Winter v. Natural Res. Def. Council, Inc., 555

Court should review the CEQ's decision "under the arbitrary and capricious standard in 5 U.S.C. [§] 706(2)(A)."[352] As the Navy noted, this "is a routine Article III task."[353] In other words, both sides understood that administrative law, rather than national security deference, would govern the case.

With regard to the second prong of the preliminary injunction test—showing a likelihood of suffering irreparable harm—the Court likewise dodged a direct administrative law approach, though it questioned the district court's approach. The district court, the Court noted, had not considered whether there would be irreparable harm, given that the Navy had challenged only two of the six restrictions the court established.[354] Moreover, the Court noted that irreparable harm was unlikely because an EIS seeks to force the agency to consider environmental impacts before undertaking major actions, and here the Navy had clearly taken a "hard look at environmental consequences" through its "detailed, 293-page EA."[355]

The *Winter* Court had three ways to address the issues raised, two that involved recourse to conventional principles in administrative law and one that required equitable balancing. The Court's reliance on equitable balancing placed national security in direct comparison with environmental harms, a fight that the environment was inevitably going to lose, given the gravity of national security concerns. Indeed, the reliance on equity enabled the Court to engage in comparatively little legal reasoning and instead defer broadly to the needs of the Executive Branch. Pursuing foreign hard look review, in contrast, would have enabled the Court to balance deference to the Executive's understanding of national security challenges and the need to review the agency's actions in accordance with law. Had the CEQ actually ignored the relevant evidence and the Navy not taken a hard look at the environmental impacts, the Court could have provided a remedy that would signal to the agency that it needed to take the NEPA more seriously in the future.[356]

As another example of how hard look review can address national

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U.S. 7 (2008) (No. 07-1239), 2008 WL 4448252.

352. *Id.* at 11.

353. *Id.*

354. *Winter*, 555 U.S. at 22–23.

355. *Id.* at 23 (internal quotation marks omitted).

356. Justice Breyer suggested one such remedy in his concurrence. He proposed that the restrictions remain on the Navy until it completed an Environmental Impact Statement (EIS). Given that the Navy had already been operating under these restrictions and that the EIS would be completed in only a few months, he argued that this would not be overly burdensome. *Id.* at 43 (Breyer, J., concurring).

security deference, consider *Munaf v. Geren*.[357] In *Munaf*, U.S. citizens held by the Multinational Force-Iraq and found guilty by the Iraqi criminal court sought habeas corpus to prevent their transfer to Iraqi custody. Among other things, Munaf argued that if transferred to Iraqi custody, he would likely be tortured.[358] Considering this question, the Court deferred to the State Department's determination that the Iraqi Justice Ministry had met international standards for prisoner safety, and concluded that the judiciary is "not suited to second-guess such determinations":[359]

> In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is. As Judge Brown noted, "we need not assume the political branches are oblivious to these concerns. Indeed, the other branches possess significant diplomatic tools and leverage the judiciary lacks."[360]

The Court also pointed out that it was not faced with the situation in which the Executive determined that torture is likely but decided to transfer a prisoner anyway.[361]

The Court's reticence about ratifying an Executive determination that results in torture is understandable, but it is incongruent with its deference to the Executive's determination in cases where it declares torture is unlikely to take place. Indeed, this two-track rule structures incentives poorly. If the State Department knows that when it transfers a prisoner and finds that torture is unlikely, it will be given total deference, but that when it transfers a prisoner and finds torture is likely, it will be scrutinized by the Court, the State Department would likely *always* find that torture is unlikely in order to evade judicial scrutiny. The Court's posture of providing absolutely no review of the State Department's determination may lead to ratifying decisions that have serious consequences for the transferred individual.

Foreign hard look review seems appropriate in this context. The Court is, to be sure, not in the best position to determine the actual likelihood that prisoners in other countries will be tortured,[362] but it nonetheless can ensure that the State Department has made a reasoned decision. The State Department would be required to consider a range of factors in determining which countries are likely to torture prisoners, would consider

357. 553 U.S. 674 (2008).

358. *Id.* at 700.

359. *Id.* at 702.

360. *Id.* at 702–03.

361. *Id.* at 702.

362. Even this point is not so clear, as courts often assess foreign court systems as part of comity and enforcement of judgments analyses.

alternatives to transferring a prisoner to one of those countries, and would seek out information from different agencies and departments within the government that might have helpful information on making this determination. In these situations, the State Department might even find it helpful to consult outside experts and nongovernmental institutions working on penal issues in foreign countries. Foreign hard look review provides one way for courts to provide incentives to ensure that the State Department engages in this kind of reasoned decisionmaking.

D. The Executive's Power to Violate Customary International Law

Can the President or other members of the Executive Branch violate customary international law? If, as the Supreme Court declared in *The Paquete Habana*, "[i]nternational law is part of our law,"[363] then perhaps not. After all, the President has a duty to "take care that the laws be faithfully executed."[364] But courts have often held that the President and lower executive officials *can* violate customary international law,[365] and have relied on another part of the Court's opinion in *The Paquete Habana* for support: "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[366] In other words, customary international law applies unless there is a treaty or controlling act or decision. This rule has created a substantial debate in the academic community about whether the Executive can violate customary international law, and it raises the further question of what exactly constitutes a controlling executive act. Foreign hard look review provides one possible answer to this problem—a third way between intrusive judicial enforcement and expansive executive power.

The Executive's power to violate customary international law has been hotly debated. One camp holds that the President cannot violate customary international law unless Congress has sanctioned the violation through legislation.[367] Under Article II, the President has the duty to "take care that the laws be faithfully executed," and the "laws" in that clause,

363. The Paquete Habana, 175 U.S. 677, 700 (1900).

364. U.S. CONST. art. II, § 3.

365. *See* Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986); Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995); Gisbert v. U.S. Attorney Gen., 988 F.2d 1437 (5th Cir. 1993).

366. *See* The Paquete Habana, 175 U.S. at 700.

367. *See supra* note 366; *see also* Glennon, *supra* note 328, at 324–25, 329; Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1115, 1120 (1985); Jordan J. Paust, *The President* Is *Bound by International Law*, 81 AM. J. INT'L. L. 377, 378, 381 (1987).

they argue, refer to treaties and customary international law.[368] Second, the separation of powers requires that the President follow the will of Congress. Under Justice Jackson's famous *Youngstown* framework, if Congress authorizes the action, the presidential violation is legitimate; if Congress prohibits it, a presidential violation is illegal; and if Congress is silent, the presidential action is unconstitutional because customary international law is part of federal common law, and the President has a duty to faithfully execute federal common law.[369] Third, as a matter of history, these commentators argue that the Founders,[370] Attorneys General throughout the nineteenth century,[371] and the language of *The Paquete Habana* opinion itself,[372] all support the Executive's following customary international law. Finally, they hold that the position makes practical sense because violating international law may result in foreign nations sanctioning the United States or even declaring war,[373] and that the Constitution places such important decisions in the hands of Congress.[374]

Others have argued that the President can violate customary international law,[375] and that lower executive officials can violate customary international law if directed by the President or Congress.[376] The contrary position, they argue, wrongly assumes that customary international law is part of the "Laws of the United States." As a textual matter, the Supremacy Clause only recognizes treaties as international law.[377] The Supremacy Clause states that the laws "shall be made in Pursuance" of the

368. Lobel, *supra* note 367, at 1115.

369. Glennon, *supra* note 328, at 325; *see also* Lobel, *supra* note 367, at 1119–20.

370. Lobel, *supra* note 367, at 1115–16 (citing Hamilton and Madison).

371. Paust, *supra* note 367, at 381–82.

372. *Id.* at 381 (noting that opinion is focused on usages of nations, not customary international law); Jordan J. Paust, Paquete *and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981, 985–86 (1994) (arguing that the "controlling. . . act" clause seeks to clarify what sources are to be used in determining the content of international law).

373. Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923, 927–28 (1986).

374. *See id.* at 928.

375. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1568–69 (1984) [hereinafter Henkin, *International Law as Law*]; Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 934–36 (1986) [hereinafter Henkin, *President*]; Frederic L. Kirgis, Jr., *Federal Statutes, Executive Orders and "Self-Executing Custom,"* 81 AM. J. INT'L L. 371, 374 (1987); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1207 (1988); Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL'Y 73, 74–75 (2006).

376. Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 919–20 (1986).

377. Delahunty & Yoo, *supra* note 375, at 76–78.

Constitution, which customary international law is not.[378] It also only incorporates laws made in the future and treaties made in the past or future, thus excluding customary international law, which existed prior to the Constitution.[379] Moreover, if customary international law was already part of the Laws of the United States, it would be unnecessary to specify that Congress could define and punish offenses against the law of nations.[380] As a result, customary international law cannot be part of the laws that the President must take care to faithfully execute.[381]

Supporters of presidential authority to violate customary international law also argue that the President has independent grants of foreign relations authority—the power to receive ambassadors and the Commander in Chief clause—that may provide constitutional authorization for actions that violate customary international law.[382] The President is also the "sole organ" in foreign affairs and can take actions that "make law," such as executive agreements.[383] Members of this camp provide historical evidence rebutting their opponents[384] and worry about the problems of "judicial . . . foreign policy."[385] Finally, they note that their position actually supports the development of international law: because customary international law is created and changed through state practice, United States's participation in the creation of customary international law would be limited if the Executive is unable to act.[386] Requiring Congress or the President to officially declare that the United States seeks to violate customary international law would be problematic because "customary international law requires states seeking to create a new rule to assert that their behavior is in conformity with, or is even required by, existing law. They use that assertion to coax other states to accept the new rule."[387] Supporters of executive authority are careful to note that "when statutes or constitutional provisions duplicate rules of international law, the President would act unlawfully if he violated these statutes or constitutional provisions," but "[w]hether the act was also a violation of international law would be

378. *Id.* at 76–77.

379. *Id.* The Clause says includes laws that "shall be made," but treaties "made, or which shall be made."

380. *Id.* at 80.

381. *See also* Weisburd, *supra* note 375, at 1208–33.

382. Kirgis, *supra* note 375, at 374.

383. *See* Henkin, *President*, *supra* note 375, at 934, 936; Henkin, *International Law as Law*, *supra* note 375, at 1568–69.

384. Weisburd, *supra* note 375, at 1220–34.

385. *Id.* at 1207.

386. Charney, *supra* note 376, at 917; Weisburd, *supra* note 375, at 1254.

387. Charney, *supra* note 376, at 919.

irrelevant."[388]

As serious as this academic debate is, both the *Restatement of the Foreign Relations Law* and lower courts have declared that the President can violate customary international law—and that under *The Paquete Habana*, lower executive officials can as well.[389] This position, however, may be troubling given that it places considerable discretion in the hands of not only the President but also lower executive officials. Given the debate, the risks of discretion, and the recognition that the Executive is better suited to substantive foreign policy decisions, foreign hard look review might provide one way out of this dilemma.

Consider the leading case, *Garcia-Mir v. Meese*,[390] in which Cuban refugees who were being detained as unadmitted and excludable aliens, argued that their indefinite detention violated customary international law.[391] After announcing its interpretation of *The Paquete Habana* as incorporating customary international law unless there is a controlling executive or legislative act, the court held that the detainees fit into two groups. For the first group, who were guilty of crimes or mentally incompetent, Congress had acted to limit the application of international law.[392] For the rest of the refugees, the trial court found that the Attorney General's termination of a previously established status review plan and subsequent decision to detain the refugees pending deportation was a controlling executive act.[393]

Responding to the argument that only acts from the President, not his subordinates, qualified as controlling executive acts, the Court of Appeals distinguished *The Paquete Habana*. In that case, an American gunship captured a Cuban fishing boat pursuant to the blockade imposed during the Spanish-American War, and then brought the ship to Key West, where it was condemned as a prize of war and sold.[394] The action was challenged as violating the customary international law rule that coastal fishing vessels that were not involved in war were exempt from capture as prizes of war.[395] The Supreme Court held that customary international law applied, despite an Admiral's order to capture fishing vessels off the coast of Cuba.[396]

388. Weisburd, *supra* note 370, at 1207.

389. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, note 3 (1987).

390. 788 F.2d 1446 (11th Cir. 1986).

391. *Id.* at 1453.

392. *Id.* at 1448, 1454.

393. *See id.* at 1454.

394. The Paquete Habana, 175 U.S. 677, 678–79 (1900).

395. *Id.* at 686.

396. *Id.* at 700, 713.

Interpreting the facts, the *Garcia-Mir* court noted that the Secretary of the Navy had advised the Admiral that only ships that were likely to aid the enemy could be captured, and that the Admiral had violated the Secretary's order, which had been consistent with international law. As a result, the *Garcia-Mir* court concluded that *The Paqueta Habana* did not "support the proposition that the acts of cabinet officers cannot constitute controlling Executive acts,"[397] and held that the Attorney General's actions were controlling executive actions that validly violated customary international law. Notably, the district court was more tentative in reaching the same conclusion. It found that there was no authority constructing "controlling executive act" as limited to the President, and was therefore "reluctant" to find the Attorney General's action insufficient given that "Congress has delegated to the Attorney General broad discretion over the detention of unadmitted aliens."[398] Neither the district or appeals court engaged in more thorough review or sought to create a test for what constituted a controlling executive act.

The story of *Garcia-Mir*'s refugees highlights the possibility of foreign hard look review to help clarify the scope of which "controlling executive act[s]" qualify for signaling a violation of customary international law. Allowing any action by a cabinet or sub-cabinet official to constitute a controlling executive act that can place the United States in violation of customary international law is unappealing. Subconstitutional officers have attenuated democratic legitimacy when compared to the President, and would have substantial discretion. Moreover, as long as courts recognize the action as controlling without reviewing the action itself—as the court did in *Garcia-Mir*—the executive actor faces no external checks. Expansive discretion and limited accountability risks creating a safe haven for poor decisionmaking. At the same time, however, members of the Executive Branch are best positioned to make complex normative judgments about foreign policy issues. In particular, cabinet officials may have greater expertise and more time to spend on some foreign policy issues than the President, and subcabinet officials may have even greater expertise and more time to spend on narrower issues than their superiors. Executive actors other than the President are therefore in a strong position to determine whether actions are so important to undertake that they should violate customary international law.

Foreign hard look review provides a path between the opposing poles of expansive discretion and restricted policymaking. In *Garcia-Mir*, for example, Congress had delegated broad authority to the Attorney General

397. *Garcia-Mir*, 788 F.2d at 1454.

398. *See* Fernandez-Roque v. Smith, 622 F. Supp. 887, 903 (N.D. Ga. 1985).

regarding unadmitted aliens. Pursuant to the Attorney General's authority under the statute, actions should have been reviewed for being arbitrary or capricious. The Attorney General had established a system of status tribunals to determine which refugees could be admitted to the United States, but then terminated that program when Cuba agreed to accept the return of over 2000 refugees.[399] The district and circuit courts did not review the decision to terminate the program, nor the decision not to reactivate the program when the agreement with Cuba was suspended thereafter. Under foreign hard look review, the court could have considered why the Attorney General terminated the status tribunals and whether it had considered alternatives, including terminating status review pending the Cuban Agreement. The termination of the tribunal was paradigmatic of an agency making a "departure from a past position," something that is generally reviewed for being arbitrary and capricious. The reviewing court could also have asked what factors the Attorney General had considered in deciding to detain the refugees indefinitely pending deportation, and whether the Attorney General had considered alternatives—including reinstating the status review plan. Such questions would not be so different from the Court's review of NHTSA in *State Farm*. Recall that the *State Farm* court found NHTSA's decision arbitrary and capricious in part because it had not considered whether the prior standards—airbags and passive restraints—were not still viable. Similarly, here, the court could have questioned whether the Attorney General's decision even considered reinstating the status review plan.

One of the central objections, of course, is that courts will end up requiring executive officials to explain decisions to violate customary international law, and that these explanations would undermine the Executive's ability to shape customary law.[400] However, this prospect is far less of a problem than is generally assumed. An executive official violating customary international law would have three options under a foreign hard look review system. First, consider customary international law, balance it against other factors, and determine that violation is desirable; in other words, acknowledge the violation. Second, consider customary international law and either find that it does not apply in the particular case or reframe customary international law as part of its evolution. Third, act without speaking to the customary international law question. Though there may be cases in which the Executive would prefer to remain silent rather than acknowledge or explain away an alleged customary international law violation, removing the silence option may be relatively

399. *See id.* at 891.

400. *See* Charney, *supra* note 376, at 919.

low-cost, given the benefits. In return for providing some kind of explanation, lower executive officials would be able to violate customary international law, the public would have an explanation for what decisions its officials are making, and the officials themselves will be forced to engage in reasoned decisionmaking to ensure that they are not violating customary international law by accident. Requiring an explanation, either for why the act in question does not violate customary international law or why customary international law should be interpreted differently would also aid in developing customary international law norms. As is conventional with review of public policy choices in executive lawmaking, courts would defer to the Executive's interpretation of customary international law (barring a constitutional provision, statute, or prior judicial decision to the contrary), and could allow remands without vacation or delayed mandates to enable the Executive to provide justifications after the fact.

Applying foreign hard look review to the violation of customary international law by the Executive would protect customary international law while retaining executive discretion over foreign affairs. Violations of customary international law would have to be thought through seriously and justified as violations, reinterpretations, or inapplicable by the courts. Executive Branch officials would have the power to violate customary international law when it is in line with foreign policy goals and interests. Congress would serve as a backstop, able to trump the executive action. Finally, courts could review executive actions, raising their salience in the public and guaranteeing sound decisionmaking.

E. An APA for International Lawmaking

In a wide-ranging and important recent article, Professor Oona Hathaway argues for the creation of an "APA for international law."[401] Having documented the decline in using the advise-and-consent treaty process to make agreements with foreign countries,[402] Professor Hathaway argues that treaties have been displaced by executive agreements, which are characterized by expansive executive discretion. These agreements, she suggests, are similar to regulations in the domestic context, and therefore the administrative law solution of an APA may be transferrable to the foreign affairs context. Despite her impressive research and bold suggestion, foreign hard look review may be preferable to creating an international APA and at the least would have to be an amendment to an international APA.

401. Hathaway, *supra* note 17, at 242.

402. Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

Hathaway presents evidence that treaties are relatively uncommon in contemporary foreign affairs, having been replaced by executive agreements. In the past decade, the United States ratified twenty treaties, but the government reported making 200–300 executive agreements *per year* during the same period.[403] Executive agreements come in two species: the first, Sole Executive Agreements, have authority derived from the President's explicit powers under the Article II.[404] The second, ex ante Congressional-Executive agreements, involve Congress delegating authority to the President to negotiate agreements.[405] Ex ante Congressional-Executive agreements make up 80% of the United States's international legal commitments.[406]

The rise of ex ante Congressional-Executive agreements, Professor Hathaway contends, is a troubling development because it gives too much discretion to the Executive. Although the President has the power to speak for the nation in foreign affairs, it does not follow that the President is the "sole" actor in foreign relations.[407] Indeed, the constitutional system was created on the theory that "a single branch of government should not be able to unilaterally make law over an immense array of issues."[408] Ex ante Congressional-Executive agreements also leave Congress with too limited a role, contributing further to expansive executive discretion. Delegations of negotiation power are broad, usually have no time limits, and limit ongoing congressional oversight because the Executive can negotiate and commit the nation to agreements without disclosing its activities to Congress or the public.[409] The political and constitutional value of democratic accountability is thus severely limited in these agreements,[410] a particularly important drawback because increasing democratic participation in international lawmaking, she argues, could actually lead to making international agreements more effective.[411]

403. Hathaway, *supra* note 17, at 144.

404. For a discussion of Sole Executive Agreements, see Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007).

405. Hathaway, *supra* note 17, at 149, 155–67. A third form of executive agreements is the ex post Congressional-Executive agreement, in which the President submits an agreement to Congress for passage by a simple majority.

406. *Id.* at 145.

407. *Id.* at 209.

408. *Id.* at 146.

409. *Id.* at 166–67. Agreements must be made public, but only after they have gone into effect. *See* Case Zablocki Act, 1 U.S.C. § 112b (2012) (requiring agreements to become public sixty days after going into effect).

410. Hathaway, *supra* note 17, at 166–67.

411. *Id.* at 205–06. This issue is discussed further *supra* note 17.

Professor Hathaway's answer is an APA for international lawmaking.[412] The APA exempts foreign affairs issues from notice-and-comment rulemaking, but in the domestic context, she argues, it acts as a compromise position between extensive congressional participation (akin to the treaty regime) and expansive executive authority (similar to the current executive agreement regime).[413] As a result, an APA for international lawmaking, like the domestic counterpart for regulations, might be useful in promoting transparency, accountability, efficiency, and procedural legitimacy. It would also clarify any ambiguities as to the legal status of executive agreements.[414] The international APA would apply to delegated negotiating authority from Congress and to the President's own powers,[415] and require notice and comment procedures. Given that international agreements involve slow and deliberate negotiations, rather than quick action, these notice and comment procedures would not be cumbersome if modified slightly.[416] In particular, she argues that the State Department should get comments from the public prior to or early in the negotiation process, rather that after the text is adopted,[417] and she suggests that the Case-Zablocki Act be reformed so that agreements cannot take effect until thirty or sixty days *after* they are reported to Congress and made public.[418] These two reforms would increase public participation and the Executive's information prior to negotiations, and enable Congress to act post-negotiation if an agreement is particularly noxious.[419] Judicial review of the notice and comment process would be available, as would *Chevron* deference.[420] Problems would be relatively limited: ossification could be addressed through an early and time-limited notice and comment period, and capture is unlikely because the process will actually expand popular

412. Professor Hathaway also argues for reducing "excessively broad delegations of authority from Congress to the President." *Id.* at 253. She holds that defenses of broad delegation in the domestic context assume a set of rulemaking procedures that do not exist in the international context. *Id.* at 256 n.340. Given, however, that she advocates for creating a similar set of rulemaking procedures for the international context, it is not clear why delegations should be narrowed considerably, given the extensive literature showing the benefits of broad delegation.

413. *Id.* at 243.

414. *Id.* at 248–49. They would, as regulations, have the effect of federal law, preempt state law, and bind agencies.

415. *Id.* at 257.

416. *Id.* at 238. Hathaway notes that removing the foreign affairs exemptions from the APA is insufficient precisely because some revisions will be necessary. *Id.* at 243.

417. *See id.* at 246.

418. *Id.* at 244.

419. As part of this disclosure, she wants the legal authority under which the agreement is made to be disclosed. *Id.* at 244–45.

420. *Id.* at 250 & n.327. She makes no mention of arbitrary and capricious review.

participation from the narrow set of well-informed interests that currently lobby the government.[421] Finally, narrowly tailored exceptions could be added for emergencies or secret agreements.[422]

Hathaway's proposal is a bold and impressive contribution, but there may be a simpler solution than convincing the President and Congress to pass a new framework statute to govern all of international lawmaking: foreign hard look review. As an initial matter, foreign hard look review can apply without much change to the current regime. Hathaway's argument that the APA exempts "[a]ll foreign affairs matters" is overbroad.[423] The APA exempts foreign affairs in three instances. Section 552(b)(1)(A) exempts from notice, publicity, and FOIA requests only foreign affairs issues that are determined to be secret by Executive Order—not all foreign affairs issues addressed by agencies. Section 553(a)(1) only exempts foreign affairs from the notice-and-comment rulemaking process, and § 554(a)(4) only exempts foreign affairs from adjudication procedures. Nowhere does the APA give a blanket exemption for foreign or military affairs; indeed, the APA's definition of agency clearly includes the Departments of State and Defense.[424] Thus, some APA provisions, like § 706(2)(A) providing for arbitrary and capricious review, apply to foreign relations.

Second, in the context of international agreements, foreign hard look review should be relatively simple. The State Department uses the Circular 175 procedure to engage in international lawmaking.[425] In seeking authorization to negotiate an agreement, State Department officials must write a memorandum that addresses a wide range of issues: the principal features of the agreement, including possible problems and potential solutions; the policy benefits and risks to the United States; whether congressional consultations will be undertaken; financial commitments that the agreement requires; whether the agreement has regulatory impact on domestic persons or entities; and the environmental impact.[426] The Office of Legal Advisor also provides a memo discussing the legal authority for negotiations and considering any legal issues surrounding implementation as a matter of domestic law.[427] These requirements closely track the

421. *Id.* at 252.

422. *Id.* at 253.

423. *Id.* at 241–42; *see also id.* at 221.

424. *See* 5 U.S.C. § 551(1) (2012).

425. *See* 22 C.F.R. § 181.4 (1996); U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL 720 (2006).

426. *See* Supplemental Handbook on the C-175 Process: Routine Science and Technology Agreements, *available at* http://www.state.gov/e/oes/rls/rpts/175/1264.htm; *see also* 22 C.F.R. § 181.4; U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL 720 (2006).

427. *See id.* U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL 720 (2006).

considerations that a court conducting foreign hard look review would consider. In addition, because agreements involve the participation of foreign countries, foreign hard look review recognizes that a policy judgment in the process of negotiation warrants added deference.[428] Of course, the Circular 175 memorandum is written prior to negotiations, but it seems unlikely that the State Department could not provide a follow-up memorandum on how the final agreement impacts each of the issues considered in the initial memorandum.

In addition to being a plausible process, foreign hard look review might be more desirable than an APA for international law. First, an international APA would have considerable costs, in terms of agency resources devoted to requesting and reviewing public commentary and the delays associated with that review. Because the APA for international law would apply to *every* one of the 200–300 agreements per year, these costs could be considerable. Second, although the international APA's policy of participation is admirable and may be inherently desirable as part of a broader commitment to democratic participation in policymaking, it is not clear that the benefits outweigh the costs. Instead, State Department could establish instead a voluntary consultation approach, in which only particular agreements, rather than every agreement, are subject to a commentary period prior to negotiation. This approach may be as effective as a mandatory policy for two reasons: politically, the administration is likely to desire consultation when making an agreement on any controversial issue for which it will need ultimate buy-in from regulated industries. Legally, courts reviewing the process under foreign hard look review would grant greater deference to the administration when it includes more participation. As the agreements become more salient or controversial, the State Department would increase public participation so it would get increased judicial deference for its ultimate decision.[429] Concededly, the voluntary approach would not mean participation in every agreement, but the most important, salient, and controversial would like be covered. The result would be to reduce the costs of ex ante participation to only a few agreements.

Professor Hathaway also argues that democratic participation will expand the power of the Executive at the negotiating table.[430] She notes that an unconstrained President would have a more difficult time convincing a foreign nation that the United States could not agree to

428. *See supra* notes 424–27 and accompanying text.

429. *Cf.* Stephenson, *supra* note 224 (showing that agencies will strategically choose the degree of procedures used based on the issue's degree of controversy).

430. Hathaway, *supra* note 17, at 233–37.

certain terms because the foreign nation knows that the President can pursue whatever terms she pleases. A constrained President, in contrast, could use domestic constraints as a credible way to reject or revise undesirable terms. Professor Hathaway's argument is persuasive at a theoretical level, but in practice, it ignores that constraints can be formal or informal. The formal constraints, such as Senate ratification, certainly give the President credibility in negotiations, but they come with a considerable cost in that the Senate might reject an agreement. In the absence of formal constraints, a President-negotiator could still cite to *informal* constraints: popular opinion, domestic lobbies, reelection, election of party members to Congress in mid-term elections, and election of a successor. Each of these could provide cover for a President to negotiate around undesirable terms without requiring procedures that formally constrain the negotiation. As a result, it is not clear that domestic constraints will improve negotiating power when less formal alternatives exist.

In addition, Professor Hathaway's commitment to public participation incorporates two different values: participation and accountability. Hathaway seeks participation through mandatory notice and comment policies in part to reduce expansive discretion and increase accountability. But accountability can take many forms, only one of which is the pluralist-participatory strand that notice and comment fosters. Courts provide another form of accountability, which, through hard look review, seeks to guarantee expert decisionmaking via reasoned analysis. As between the two types of accountability, it is not clear which is best in this context. Pluralist-participatory accountability allows interested groups to provide their perspectives ex ante, but it provides virtually no constraint on the decisionmaking process. Foreign hard look review does not mandate participation ex ante, but provides a greater (albeit still limited) review to ensure that the decisionmaking process was rational. To the extent that international lawmaking touches on moral or political issues, participatory accountability may have a stronger claim. To the extent that international lawmaking involves complex, uncertain, and politically unpopular but necessary foreign policy decisions, judicial accountability may be preferable. Given the likelihood of voluntary participation in the most important cases, the fact that domestic constraints may be less useful than Professor Hathaway suggests for improving presidential negotiations, and possibility of accountability through the judiciary, it is not clear that the benefits of mandatory participation outweigh the costs.

The third reason foreign hard look review may be preferable to an international APA is that Professor Hathaway undervalues the role that nonbinding agreements would play in a post-international APA world. The current flexibility and lack of procedure for concluding agreements makes

them valuable for the Executive. With greater mandatory procedures for concluding formal agreements, the executive will likely create a new category of informal nonbinding executive agreements—akin to policy guidance documents in the administrative context—to evade those cumbersome procedures. Although these agreements would not have the force of law, they would effectively control policy between the two nations, amounting in practice to an executive agreement. Professor Hathaway notes that such agreements might come into being, but her response is to identify a clear set of factors for determining the boundary between these nonbinding agreements and binding agreements.[431] Clarifying the boundaries, however, is likely to prove ineffective because courts might be reluctant not to enforce these nonbinding agreements given the risks to foreign policy.[432] As a result, under her regime, nonbinding agreements would have neither ex ante notice and comment processes nor serious ex post judicial review (beyond, presumably, the lesser form of deference the Court adopted in *Skidmore* for policy documents in the domestic context).[433] A foreign hard look review regime, instead of an international APA, would not suffer from this problem. By retaining the current executive agreement structure but adding a layer of judicial review that applies to formal and informal agreements, the Executive would have no incentive to proliferate a new category of international agreements.

Despite these drawbacks, even if one finds an APA for international lawmaking desirable, foreign hard look review might still have a role to play. Though Professor Hathaway considers judicial review of notice and comment procedures and *Chevron* deference for executive agreements, she does not consider the possibility of arbitrary and capricious review being part of the international APA. But just as agency regulations and decisions can be reviewed under hard look review, executive agreements could be reviewed under foreign hard look review to guarantee that the impetus for the agreement and the final agreement are not the products of lunacy. Moreover, the likely proliferation of nonbinding agreements suggests that adopting a foreign hard look review would be a necessary amendment to an

431. *Id.* at 246 n.319. The author suggests as factors the title of the instrument, avoidance of mandatory language, and the omission of treaty type final clauses.

432. *Cf.* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (finding that an executive agreement preempts state law); Zschernig v. Miller, 389 U.S. 429 (1968) (establishing dormant foreign relations preemption).

433. Policy documents in the administrative context are granted deference under the standard of *Skidmore* rather than *Chevron*. *See* United States v. Mead Corp., 533 U.S. 218 (2001) (citing Skidmore v. Swift, 323 U.S. 134 (1944)). Hathaway does not mention this possibility but she does discuss *Chevron* and presumably would agree with the analogy to *Skidmore*.

international APA. Foreign hard look review would provide a backstop of accountability beyond *Skidmore* for these agreements.

CONCLUSION

The role of the courts in foreign relations and national security affairs has been and will continue to be debated. My purpose here has been to move beyond the textual and historical discussions that have defined these debates, and instead to provide a pragmatic, process-based approach for the judicial role in a specific set of foreign relations cases: those in which Congress has delegated authority to the Executive. Seeing these delegations as similar to those in administrative law provides helpful opportunities to consider how the lessons of administrative law might apply to structure foreign relations decisionmaking. Foreign hard look review provides one way to navigate many of these cases. Courts and commentators should not ignore it.

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