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Administration by Treasury

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Article

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INTRODUCTION

The Treasury Department pulled out all the stops during the beginning and middle of the financial crisis, and toward the end, when Congress got involved, its efforts got even more dramatic. First, Treasury engineered the sale of some financial intermediaries,[1] seized two congressionally chartered corporations designed to encourage home lending,[2] and issued death sentences against other financial institutions, including Lehman Brothers and Washington Mutual, by far the two largest

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1. *See* Eric Dash & Andrew Ross Sorkin, *In Largest Bank Failure, U.S. Seizes, Then Sells*, N.Y. TIMES, Sept. 26, 2008, at A1, *available at* 2008 WLNR 18286005 (describing the circumstances surrounding Treasury's engineering the sale of Washington Mutual to J.P. Morgan Chase for $1.9 billion); Megan Davies & Joseph Giannone, *JPMorgan to Buy Bear Stearns for $2 a Share*, REUTERS, Mar. 17, 2008, *available at* http://www.reuters.com/article/idUSN1671008920080317 (describing the takeover of Bear Stearns by J.P. Morgan as having "the backing" of the Treasury); Robin Sidel et al., *WaMu Is Seized, Sold Off to J.P. Morgan, in Largest Failure in U.S. Banking History*, WALL ST. J., Sept. 26, 2008, at A1, *available at* http://online.wsj.com/article/SB122238415586576687.html (describing the sale of Washington Mutual); Andrew Ross Sorkin, *In Sweeping Move, Fed Backs Buyout and Wall St. Loans*, N.Y. TIMES, Mar. 17, 2008, at A1, *available at* 2008 WLNR 5189440 (describing the sale of Bear Stearns to J.P. Morgan Chase as "done at the behest of the Fed and the Treasury Department").

2. *See* Charles Duhigg et al., *As Crisis Grew, a Few Options Shrank to One*, N.Y. TIMES, Sept. 8, 2009, at A1, *available at* 2008 WLNR 17004722 (describing the Treasury takeover of Fannie Mae and Freddie Mac); Rebecca Christie & Dawn Kopecki, *Paulson Engineers U.S. Takeover of Fannie, Freddie*, BLOOMBERG.COM, Sept. 7, 2008, http://www.bloomberg.com/apps/news?pid=20601087&sid=ajcw4yxxPGJ8.

bank failures in American history.[3] It did almost all of this, to the consternation of many observers, without review by the courts, the advice of Congress, or, it appears, the input of the rest of the executive branch.[4]

Such radical administrative independence is not thought to be a feature of the modern administrative state. And sure enough, when Treasury's dealmaking and nationalization efforts failed to relieve the strains on the financial markets, the Federal Reserve Board, its partner in these deals, bailouts, and forced resolutions, urged the Department to seek guidance and money from Congress.[5] Treasury agreed to do so.[6]

But the congressional authorization that Treasury received underscored its unique position. The Department first proposed that Congress give it $700 billion to bail out Wall Street in a three-page document that did not provide for any supervision by the legislature or any judicial review by the courts or even

3. The Lehman Brothers bankruptcy was the largest bankruptcy in U.S. history. Sam Mamudi, *Lehman Folds with Record $613 Billion Debt*, MARKETWATCH, Sept. 15, 2008, http://www.marketwatch.com/story/lehman-folds-with-record-613-billion-debt; Yalman Onaran & Christopher Scinta, *Lehman Files Biggest Bankruptcy Case as Suitors Balk*, BLOOMBERG.COM, Sept. 15, 2008, http://www.bloomberg.com/apps/news?sid=awh5hRyXkvs4&pid=20601087. Washington Mutual's failure was the largest bank failure in U.S. history. Sidel et al., *supra* note 1; Ari Levy & Elizabeth Hester, *WaMu Assets Sold to JPMorgan in Record Bank Failure*, BLOOMBERG.COM, Sept. 26, 2008, http://www.bloomberg.com/apps/news?pid=20601103&sid=aVA8ErWOAjmI.

4. *See* Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL'Y 55, 57 (2010) (using the Troubled Asset Relief Program (TARP) as an example of the unconstitutionality of modern administrative law); Simon Johnson, *The Quiet Coup*, THE ATLANTIC, May 2009, at 46, 52–53 *available at* http://www.theatlantic.com/magazine/archive/2009/05/the-quiet-coup/7364/ (arguing that banks captured the policymaking process during the financial crisis and that the Treasury Department and Federal Reserve engaged in "late-night, backroom dealing"); Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, at 11 (Univ. of Chi. Law Sch., John M. Olin Law & Economics Working Paper No. 440; Univ. of Chi. Law Sch., Public Law and Legal Theory Working Paper No. 244; Harvard Law Sch.: Pub. Law & Legal Theory Paper Series, Harvard Public Law Working Paper No. 08-50; Harvard Law Sch.: Program on Risk Regulation Research Paper Series, Paper No. 09-04, 2008), *available at* http://ssrn.com/abstract=1301164 (stating that some of Treasury's actions during the financial crisis were probably not legal).

5. *See* Joe Nocera & Edmund L. Andrews, *Running a Step Behind as a Crisis Raged*, N.Y. TIMES, Oct. 23, 2008, at A1, *available at* 2008 WLNR 20148298 ("'Ben said, "Will you go to Congress with me?"' said Mr. Paulson, referring to the Federal Reserve chairman, Ben S. Bernanke. 'I said: "Fine, I'm your partner. I'll go to Congress."'").

6. *Id.*

other parts of the executive branch.[7] It also asked for near complete discretion regarding how to spend the money.[8]

Congress essentially gave Treasury all the money and power that it sought.[9] The bailout legislation did not result in any substantial judicial review of the Department, while the congressional oversight provided by the statute—the sort of oversight that does play a role in some of the other matters that Treasury handles—largely consisted of congressmen and blue ribbon commissioners waxing apoplectic while Treasury changed its mind, multiple times, about how to spend its newly gotten funds.[10]

Nor was this legislative victory for Treasury's discretion the only notable aspect of its role in the financial crisis. Before getting its generous flexibility from Congress, Treasury apparently never consulted with the Department of Justice (DOJ) to ensure that the legislation met the usual constitutional and procedural standards, and was crafted in a way that considered the possible risk of litigation.[11] It also did not ask the Office of Management and Budget (OMB) to review the fiscal implications of such a massive bailout.[12] Most bills proposed by the executive branch, of course, feature such reviews.[13]

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7. *See* Steven Davidoff, *The 'Compromises' in the Bailout Bill*, DEALBOOK (Sept. 29, 2008, 10:15 AM), http://dealbook.blogs.nytimes.com/2008/09/29/the-compromises-in-the-bailout-bill/.

8. Treasury urged Congress to pass a law whereby "[d]ecisions by the Secretary pursuant to the authority of this Act" should be "non-reviewable and committed to agency discretion," and accordingly could "not be reviewed by any court of law or any administrative agency." *Text of Draft Proposal for Bailout Plan*, N.Y. TIMES, § 8, Sept. 20, 2008, http://www.nytimes.com/2008/09/21/business/21draftcnd.html (providing the text of the proposal). Nor was there any provision, at least initially, for reporting to Congress itself on how the money was spent. *Id.*

9. Davidoff, *supra* note 7.

10. *See infra* Part II (describing Treasury's handling of the financial crisis).

11. *See* Nocera & Andrews, *supra* note 5 (characterizing the original bailout plan, which was drawn up by Treasury with little outside input, as "poorly conceived and unworkable").

12. Neither, for that matter, did Congress itself or the Congressional Budget Office play much of a role in vetting the legislation. *See* David M. Herszenhorn, *Bush Signs Bill*, N.Y. TIMES, Oct. 4, 2008, at A1, *available at* 2008 WLNR 18884174 (describing Congress taking two weeks to approve the $700 billion bailout package); Lori Montgomery & Paul Kane, *Bush Enacts Historic Financial Rescue; House Passes Plan by Wide Margin, but Stocks Keep Falling*, WASH. POST, Oct. 4, 2008, at A01 (stating that Congress spent two weeks to approve the bill and emphasizing that the bill gave Treasury broad powers).

13. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1267 (2006) (describing the persis-

The financial crisis was an extraordinary time for Treasury, and perhaps extraordinary times are not the best times to assess the way an agency ordinarily does its job.[14] But the interesting thing about Treasury is that it usually operates in this fashion. In crises, it acts quickly, and—although not unconstrained by law—interprets its legal authority flexibly and aggressively.[15] In ordinary times, it acts in exactly the same way. It develops policy and makes rules without much attention to the Administrative Procedure Act (APA).[16] Treasury has created for itself an ambit of discretion beyond the reach of the judiciary, and only somewhat within the bounds of congressional oversight.[17] The financial crisis illustrated just how independent Treasury has become. But this independence is not new; it is characteristic.

In fact, Treasury has marched to the beat of its own drum since the founding of the current administrative state in the aftermath of World War II. Even then, for example, it did not call its regulations "regulations," but instead called them "decisions."[18] It also officially ignored the OMB, that exemplar of presidential oversight within the executive branch until the late 1980s (and may still be unofficially ignoring it, at least on occasion, today).[19] Treasury has always used its administrative

tence of OMB review of major regulations throughout presidential administrations since President Reagan first established OMB).

14. *See* Posner & Vermeule, *supra* note 4, at 23 (describing Congress's delegation of broad powers to the Executive and the sweeping executive proposals in times of crisis).

15. *Id.* at 14 (discussing the Treasury and the Fed's "flexible reading of the 1932 law," which they interpreted to give them the authority to bail out AIG).

16. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2006).

17. *See generally* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007).

18. As Carl McFarland observed when the APA was being promulgated:

> [I]f you were a bright young law student walking down the corridor in your law school and saw a set of books labeled "Treasury Decisions" you would probably pass them by if you[] were looking for Treasury regulations, because the word "decisions" usually means determinations in particular cases. But in the Treasury Department they call a general rule a "decision."

Carl McFarland, *Analysis of the Federal Administrative Procedure Act*, *in* THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 16, 19–20 (George Warren ed., 1947).

19. It was not subject to such review before the implementation of the administrative process encapsulated in the 1987 Paperwork Reduction Act, also unconventional for an agency. William F. Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 HARV. J. ON LEGIS. 1,

law judges differently—and less frequently—than do other agencies.[20] And, in an odd complement to its regulation of federally chartered banks, it even operated its own bank, out of its ornate Cash Room, where government checks could be cashed, and Treasury securities bought and sold.[21] Other agencies do not act so creatively; they act through rulemaking and adjudication, subject to review by the courts, notice-and-comment from the public,[22] and supervision within the executive branch by OMB.[23] And that is all they do. But Treasury is different.

Its idiosyncrasies have a long history, too. As Jerry Mashaw has shown, Treasury's independence from judicial review (if not always from congressional oversight) stretches back to the earliest days of the republic, and its status as an agency established long before the advent of post-war administrative procedure is critical for understanding why Treasury is so different.[24] Thomas Jefferson's Secretary of Treasury, Albert Gal-

37 (1987); *see also* Executive Office Appropriations Act of 1987, Pub. L. No. 99-500, § 101(m), 1986 U.S.C.C.A.N. (100 Stat. 1783) 309, 317 (excluding OMB review of regulations of the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department); John V.N. Philip, Note, *The Paperwork Reduction Act in* United Steelworkers of America v. Pendergrass*: Undue Restriction and Unrealized Potential*, 89 COLUM. L. REV. 920, 923 (1989) (discussing how new procedures under the Act require previously exempt agencies to consult with the OMB). Even then, Treasury and the IRS disputed OMB's oversight to the point of a within-the-executive-branch deployment of a legal process to force it to be more conciliatory. Memorandum Op. for the Counsel to the Vice President & Counsel to the Dir., Office of Mgmt. & Budget, 6 Op. O.L.C. 388, 388–89 (1982); *see also* Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 552–62 (1989) (suggesting that old-line cabinet departments such as State and Treasury had the clout to beat OMB when it came to a dispute). Moreover, OMB has since been told to tread carefully when working with Treasury to sort through tax expenditures. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD/AIMD-94-122, TAX POLICY: TAX EXPENDITURES DESERVE MORE SCRUTINY 97 (1994).

20. *See generally* Ronald Cass, *Allocation of Authority Within Administrative Agencies: Theory and Empirical Analysis*, 66 B.U. L. REV. 1 (1986) (describing the use of administrative law judges).

21. Indeed, it did so between the Civil War and the 1970s. *See* Guy Munsch, *Restoring and Modernizing the U.S. Treasury Building: An Overview and Three Case Studies*, 33 APT BULL.: J. PRESERVATION TECH. 23, 23–29 (2002).

22. *See Hickman*, *supra* note 17, at 1732–35 (describing the general rulemaking requirements for agencies imposed by the APA).

23. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-929, OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 7–8 (2003).

24. *See* Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1666 (2008) (explaining that during the Jacksonian era "much, if not most, oversight and control of . . . administrative action originated within bureaus and

latin, for example, complained that Congress tried to give him too much power independent of the President—a complaint that resonates today in view of the power given Treasury to bail the banks out of the recent financial crisis.[25] Then, as now, Treasury did not let its central mission prevent it from taking on other administrative tasks. It spearheaded, for example, some of the earliest efforts of the federal government to provide health insurance to its citizens by administering insurance programs for sick or injured merchant mariners.[26] In short, Treasury developed its own way of performing its duties long before the modern administrative state took shape.[27]

departments," and that "Treasury regulated its relationships with state banks and with the sub-Treasuries by contract and circular, largely unaided (and occasionally derailed) by congressional legislation").

25. *See* MARY L. HINSDALE, A HISTORY OF THE PRESIDENT'S CABINET 44–45 (1911). For further discussion, see Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483, 486–88 (1988). *See also* Elizabeth Lee Thompson, *Reconstructing the Practice: The Effects of Expanded Federal Judicial Power on Postbellum Lawyers*, 43 AM. J. LEGAL HIST. 306, 308–09 (1999) (describing Treasury's control of all Southern commodities following the Civil War).

26. Gautham Roa, *Sailors' Health and National Wealth*, COMMON-PLACE (Oct. 2008), http://www.historycooperative.org/journals/cp/vol-09/no-01/rao/.

27. Stephen Skowronek has observed, albeit in a very different context, that "[m]odern American state building successfully negotiated a break with an outmoded organization of state power. The modern American state represents an internal governmental reconstruction worked out through incremental political reform." STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE 285 (1982). Treasury has been performing its own Skowronekian mission a century after the administrative state he described was built. In that sense, Treasury's incremental evolution into discretionary areas has, in the end, created an agency a sea change apart from ordinary administrative law. Of course, Skowronek found the development to push at the outer bounds of constitutionality: "The major constructive contribution of the New Deal to the operations of the new American state lay in the sheer expansion of bureaucratic services and supports. . . . [T]he New Deal turned bureaucracy itself into the extraconstitutional machine so necessary for the continuous operation of the constitutional system." *Id.* at 289. For more on this, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."). Others characterize the impetus behind the legislative announcement as nothing more than the usual sorts of battles between conservatives and liberals over policy choices. *See, e.g.*, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1561 (1996) (arguing that the enactment was spurred by conservatives' fear of overreaching by F.D.R.'s New Deal agencies and that only when the Supreme Court began refusing to strike down New Deal proposals in 1937 "did the reform proposals receive broad public interest").

This Article analyzes the administrative law of Treasury and shows how it evades the ordinary constraints of the APA. The Department has found for itself an evolving mission that removes it from the traditional province of judicially supervised administrative procedure. At the same time, it enjoys a patina of expertise that has largely, though not always, insulated it from the hurly-burly of political supervision from Congress or the President. Sometimes it escapes its usual obligations by acting through contract, rather than regulation; it does deals akin to Secretary Henry Paulson's deal during the last financial crisis.[28] Sometimes Treasury avoids administrative procedure because it is engaged in criminal-style law enforcement with only civil-style limitations on its investigative capabilities—increasingly the case with the Department's law enforcement efforts, which include the pursuit of terrorists, narcotraffickers, and tax cheats.[29] Foreign relations with other important players and regulators in the global marketplace are also increasingly a part of Treasury's remit, and those actions similarly take it out of the usual context of domestic checks on its powers.[30] Each of these increasingly important parts of Treasury's mission is subject to judicial deference for traditional national security- and foreign relations-related reasons.[31]

Those portions of Treasury's oversight that do implicate regulated industry and judicial review often proceed on a principles-and-examination basis that differs from traditional rules-based administrative law. Moreover, financial regulation—which standalone parts of Treasury do for both banks and thrifts—is simply less litigious than is the sort of regulated industry oversight that other important agencies, such as the Environmental Protection Agency (EPA), perform.[32] Unlike the EPA, Treasury's mission is aligned with the goals of the companies it regulates, in that both the industry and the regulator aspire to ensure that financial institutions are "safe and

28. *See* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 473–512 (2009) (describing Treasury's actions during the 2008 financial crisis as facilitating and making deals).

29. *See infra* Part I.C.3.b (describing Treasury's expanded role in monitoring criminals and tax evaders).

30. *See infra* Part I.C.2 (explaining how Treasury's international operations evade many of the typical administrative constraints).

31. *See supra* notes 29–30.

32. *See infra* notes 60–67 and accompanying text (showing that Treasury is party to far fewer suits than other agencies).

sound," or capitalized sufficiently to survive a reversal of fortunes.[33] Underlying all this is the work that Treasury has always done—which is itself in the realm of nontraditional administrative procedure—which is to raise money and dole it out to the rest of the federal government pursuant to Congress's complex appropriations directions.

If history, an evolving and discretion-oriented mission, and a principles-based and relatively collaborative approach to regulated industry are the facts that explain why Treasury's administration is different, then the normative implications and substantive relevance of the difference remain to be explored.

The descriptive case for understanding how Treasury operates rests not just on its importance, but also on the fact that it is a particularly important example of an overlooked kind of government regulation. Moreover, although Treasury is less constrained by courts than are classic APA-regulated agencies, it is not alone in this capacity. Mashaw has shown in a series of articles that much of the action of the administrative state—action that lawyers try to shape—has happened far away from the courts since the Republic's earliest days.[34]

In general, older agencies like the Departments of State and Defense do things differently, because, like Treasury, they had their own administrative procedures and customs in place before the post-war implementation of the APA regime.[35] So do agencies that derive most of their authority from the funds they disburse, like block grant operators such as the Department of Housing and Urban Development, and, to a lesser degree, the Department of Health and Human Services, which devotes most of its budget to funding Medicaid and Medicare, both directly and through the states.[36]

33. *See infra* Part I.C.1.a (describing bank regulation as a collaborative process).

34. *See* Mashaw, *supra* note 24, at 1669–84 (showing that American administrative procedure was quite elaborate at the beginning of the Republic even though there was not yet a modern conception of judicial review); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1319–37 (2006) (describing the historical role of the courts and judicial review in administrative law).

35. The Department of the Treasury, Department of War, and Department of State were established by Congress during George Washington's tenure as the first President of the United States. BRYON GIDDENS-WHITE, OUR GOVERNMENT: THE PRESIDENT AND THE EXECUTIVE BRANCH 13 (2006).

36. Jacob Goldstein, *Reminder: Medicare, Medicaid Are Gobbling Up the Budget*, WALL ST. J. HEALTH BLOG (Feb. 2, 2010, 8:47 AM), http://blogs.wsj.com/

Is this quasi-independence a bad thing? Some have argued that the Treasury Department is a department run amok.[37] But it may be worth viewing Treasury's administrative law as useful experimentation, with its own set of constraints, albeit limited ones, in the hope that a variety of forms of governance make for a better administrative state. To be sure, the way that Treasury regulates now is a particularly striking example of the lengths to which agencies will go to move beyond old constraints. Public choice theorists presume that agencies will always seek to broaden the scope of their authority.[38] And although, as Daryl Levinson has suggested, the jury is very much out on this question,[39] it is certainly the case that Treasury has shifted away from supervised administration and toward discretion by shifting the locus of its activities toward emergencies, law enforcement, and international affairs—areas on which it spent little time as recently as twenty years ago.[40] It has turned its authority over banking, in crisis, into a remit to pursue or eschew all but unreviewable bailout-or-failure decisions, and the like.[41]

This record is not altogether praiseworthy, but it is, as a descriptive matter, tremendously understudied. Each of Treasury's various activities has developed into a legal ecosystem, with its own rules and regulations, with substantial effects on the economy, and especially on the industries and individuals subject to its oversight. Large private bars have evolved in the District of Columbia and elsewhere to manage the relationships

health/2010/02/02/reminder-medicare-medicaid-are-gobbling-up-the-budget/; *see infra* notes 258–61 and accompanying text.

37. *See, e.g.*, Lawson, *supra* note 4, at 57–58.

38. *See, e.g.*, David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 99 (2000) (explaining that public choice analyses have often assumed that administrative agencies act with self-interested motives).

39. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 920 (2005) (arguing that government officials may not seek to aggrandize their agencies, as scholars have previously contended).

40. *See, e.g.*, David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 92–95 (2009) (describing the evolution of a committee chaired by the Secretary of the Treasury from one with a cautious track record to one with broader involvement in foreign affairs).

41. And here, too, Treasury exemplifies a process known to other agencies, which on occasion have preferred to implement their mandates through informal advice and the development of best practices rather than through the sort of rulemaking likely to end up in the courts of appeals. For a description of this process, see generally David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294 (2006).

between Treasury's regulators and its regulated.[42] And yet, almost nothing about what these lawyers do is studied in law schools, or analyzed by legal scholars.

To fill that void, this Article proceeds in four parts. Part I posits that Treasury has removed itself from typical administrative law and moved into a place that depends more on congressional than on judicial oversight (although, on occasions, there is little of either). Using Treasury's organizational chart to assess its operations, this Part shows how it has found a niche in the interstices of supervision where it plays a role in domestic rulemaking that is devised informally, in collaboration with regulated industry, and often in coordination with its international counterparts. Before turning to the nuances of Treasury's operation, however, Part I justifies that methodological approach. A case study on one aspect of the financial crisis—Treasury's bailout of the multi-billion dollar money market fund (MMF) industry—illustrates the difference between Treasury's administrative law and ordinary administrative law. Part II offers that case study, and considers the marginal role that judicial review has played in the financial crisis, as an example of how the administrative structure essayed in Part I meshes with the typical administrative state. Part III assesses how Treasury's administrative law might fit into a broader vision of agency action, one less constricted by the APA, and one that more comprehensively describes what the government—and the lawyers who represent clients before it—do. Finally, this Article concludes by cautiously making the case in defense of Treasury's dramatic administrative exceptionalism—a case that calls for better congressional oversight, perhaps, but not necessarily an expansion or revisitation of the basics of administrative governance.

I. HOW TREASURY WORKS

This Part contends that Treasury practices a different form of administrative regulation than that usually studied by legal scholars. It points to two reasons for Treasury's exceptionalism: a historical bent away from traditional administrative law, one that preceded the APA and was not much affected by it; and an evolution of its current activities into the interstices of regulation by courts and even by other parts of the executive branch. This Part explores what Treasury does in some detail, for two

42. *See infra* note 50 and accompanying text.

reasons. First, it does so because legal scholars have neglected these activities even as vigorous legal bars have grown to address them. Second, an account of the work that Treasury does in ordinary times makes it possible to understand its actions during extraordinary times, such as the recent financial crisis, which is addressed in Part II. Initially, however, this Part justifies the usefulness of this sort of inquiry, with a view to placing this Article in the legal literature and offering a point of departure for the description that follows.

A. METHODOLOGY

This Article will put forth a complicated and detailed story about how Treasury actually works. It is a picture of path dependence, historical accident, and bureaucratic turf building, all contributing to relative independence that led, during the financial crisis, to Treasury's ability to act without much constraint from Congress, the President, or the courts.

But any article that resorts to a departmental organizational chart to guide its own articulation of subject matter, as this one is about to, must answer the question of whether the exercise is in fact worth the candle. Eric Posner and Adrian Vermeule, for example, have essayed a much less complicated story of administrative exercise of authority in crisis, and it is one that could be applied to Treasury (though not Treasury alone).[43] To Posner and Vermeule, Treasury need not be separated from the rest of the executive branch, which—channeling executive power enthusiasts like Thomas Hobbes and Carl Schmitt—they presume to be the only serious vehicle through which crises may be addressed.[44] Posner and Vermeule's examples of executive crisis management without participation by the coordinate branches include the aftermath of 9/11 and the aftermath of the financial crisis, but one can think of others.[45] Indeed, John Yoo has posited that, during times of crisis, presidents push the limit of their constitutional authority and tend to succeed in doing so.[46]

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43. Posner & Vermeule, *supra* note 4.

44. *Id.* at 16.

45. *Id.* at 17.

46. JOHN H. YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH, at xix (2009) (explaining that "[p]residential power has expanded with each crisis and emergency"). "Our Constitution designed the executive branch to wield power effectively and flexibly, and our history has favored forceful, not constrained, Presidencies." *Id.* at xx.

These accounts posit the executive branch as a unitary black box, inseparable from the will of the President, the "man on horseback" of the modern administrative state.[47] By contrast, this Article goes into substantial regulatory detail because such accounts, in my view, prove too much while answering too little. Why, for example, during the financial crisis did Treasury coordinate its response with the Federal Reserve and bother with the aggressive interpretation of its statutory authority if, in the end, it knew it would not be constrained by that authority in crisis? There is every reason to believe that those institutions did what they did because they enjoyed the legal flexibility as well as the pecuniary resources to act, while the White House itself deferred for a variety of reasons, political and otherwise.[48] Conversely, Treasury need not have acted at all if it is inseparable from the rest of the executive branch. It could have waited for the President to act by fiat. Or it could simply have ordered nationalizations, rather than structuring deals, and bailed out, for example, the MMF industry instead of exercising its statutory powers over the Exchange Stabilization Fund to do so.[49] There is no way to predict, privilege, or evaluate one or the other of these approaches by taking a Schmittian approach to administrative law, if such an approach means ignoring institutional detail. Only a thicker story about what exactly does constrain Treasury can offer a more complete account of what happened during the financial crisis.

A detailed account of Treasury's administration is also necessary because it is an administrative regime rarely studied by scholars or reviewed by courts, but one that is very lawyered up. Lawyers representing clients before the Committee on For-

47. The "man on horseback" trope traditionally involves the takeover of the government by a military leader. Since the President is the Commander-in-Chief of the armed forces, perhaps the analogy may be stretched to fit. *See* Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1409 (2008) ("[D]emocratic organizational theory has long held that civilian institutions and personnel must exercise ultimate authority over the military, lest a 'man on horseback' wrest control of the State from the citizenry.").

48. *See* Davidoff & Zaring, *supra* note 28, at 465–68 (describing the agencies' legal flexibility); Posner & Vermeule, *supra* note 4, at 36 ("[A] damaged president could not fufill the necessary leadership role, but that role quickly devolved to the Treasury Secretary and Fed Chair . . . .").

49. *See* Davidoff & Zaring, *supra* note 28, at 470 ("Governments, though, again, not the government of the United States, have nationalized firms and industries before. But this regulation by deal is new, and it is new in size, scale, and scope."); *id.* at 504–08 (describing the mechanism by which the Treasury guaranteed the money market system).

eign Investments in the United States (CFIUS), which Treasury chairs and manages, comprise one of the fastest growing bars in Washington D.C. and New York City, with at least five lawyers from antitakeover specialists Wachtell Lipton recently authoring papers on how to navigate the process.[50] The financial regulation industry is also well advised; indeed, many of the largest and most elite law firms in the country have financial institutions practice groups.[51] The current chairman of Sullivan and Cromwell, the whitest of white shoe New York law firms, is a banking lawyer.[52] These individuals appear in court rarely and in the pages of law reviews as infrequently. But they comprise a large percentage of what sophisticated lawyering is all about, and their lawyering depends upon relationships with the Treasury Department. Ignoring the way Treasury does its business would only continue to write this important part of the legal profession out of the annals of legal scholarship.

B. THE CASE FOR DIFFERENCE

Treasury, at least in comparison with other agencies, is infrequently subject to judicial review, rarely passes rules, and does little work with OMB. In this section, I review the case for treating Treasury differently. In the sections that follow, I discuss how Treasury came to occupy its unique place in the federal administrative scheme.

The paradigm of administration through the APA is a "major rule" made through notice-and-comment.[53] But Treasury

50. As I have discussed elsewhere, antitakeover specialist Wachtell, Lipton, Rosen & Katz had no fewer than five attorneys, including a name partner and a chair of its executive committee, pen pieces on the Committee during a six-month period between November 2007 and May 2008. Zaring, *supra* note 40, at 87; *see also* Profile of Edward D. Herlihy, WACHTELL, LIPTON, ROSEN & KATZ, http://www.wlrk.com/EDHerlihy (last visited Oct. 22, 2010) (listing Herlihy as co-chair of Wachtell Lipton's executive committee).

51. Chambers and Partners ranks the four best as Cravath, Swaine & Moore; Davis Polk & Wardwell; Simpson Thacher & Bartlett; and Latham & Watkins—firms undoubtedly among the most prestigious and lucrative in the country. The Chambers and Partners rankings of Banking and Financial Institutions practice groups in the United States may be found at http://www.chambersandpartners.com/USA/Editorial/33222 (last visited Oct. 22, 2010).

52. *See* Alan Feuer, *Trauma Surgeon of Wall Street*, N.Y. TIMES, Nov. 15, 2009, at MB1, *available at* 2009 WLNR 22970411.

53. *See* John F. Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39, 69–72 (2003) (describing how Treasury does not typically follow APA notice-and-comment procedures when promulgating temporary regulations and revenue rulings).

rarely acts through that sort of rulemaking, and when it does pass a rule, it is quite likely to do so without going through the notice-and-comment process.[54] In the decade between October 1999 and October 2009, Treasury only issued five so-called major rules, almost all of which were done in conjunction with other agencies that do find themselves more constrained by the APA.[55] During the same period, the Department of Transportation issued forty-one major rules,[56] the Securities and Exchange Commission (SEC) issued forty-three major rules, and the EPA issued forty-five.[57] Moreover, Treasury frequently issues rules without a notice of proposed rulemaking, which is ordinarily required by the APA.[58] Indeed, it was one of the "departments [to] have been severely criticized for [its] failure to separately state and currently publish [its] substantive rules, statements

54. *Id.*

55. *GAO Federal Rules Database Search*, U.S. GOV'T ACCOUNTABILITY OFF., http://www.gao.gov/fedrules/index.php (search "Department of the Treasury" agency, "All" priority, "Major" rule types, date published in the Federal Register between "October 1999" and "October 2009"). A major rule is defined as a rule resulting in, or likely to result in, an annual effect on the economy of $100 million or more (or meeting certain other criteria). 5 U.S.C. § 804(2) (2006). Of the 928 substantive rules promulgated by Treasury during this period, 570 originated with the IRS. *Compare GAO Federal Rules Database Search*, *supra* (search "Department of Treasury" agency, "Significant/Substantive" priority, "All" rule types, date published in the Federal Register between "October 1999" and "October 2009"), *with id.* (search "Department of Treasury" agency, "Internal Revenue Service" subagency, "Significant/Substantive" priority, "All" rule types, date published in the Federal Register between "October 1999" and "October 2009") (showing the significant proportion of IRS rules). The Department of Transportation, by contrast, issued 984 rules during this period. *Id.* (search "Department of Transportation" agency, "Significant/Substantive" priority, "All" rule types, date published in the Federal Register between "October 1999" and "October 2009").

56. *GAO Federal Rules Database Search*, *supra* note 55 (search "Department of Transportation" agency, "All" priority, "Major" rule types, date published in the Federal Register between "October 1999" and "October 2009").

57. *Id.* (search "Independent Agencies and Govt Corporations" agency, "United States Securities and Exchange Commission" subagency, "All" priority, "Major" rule types, date published in the Federal Register between "October 1999" and "October 2009"); *id.* (search "Independent Agencies and Govt Corporations" agency, "Environmental Protection Agency" subagency, "All" priority, "Major" rule types, date published in the Federal Register between "October 1999" and "October 2009").

58. Treasury is one of seven agencies mostly likely to issue a rule without a notice of proposed rulemaking, ordinarily required by the APA. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-126, FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISHED FINAL ACTIONS WITHOUT PROPOSED RULES 12 (1998).

of policy and general interpretations" as long ago as 1951, as Victor Netterville then observed.[59]

Nor is the Department subject to the levels of litigation that bedevil other agencies. It is infrequently subject to suit in the D.C. Circuit, the premier court for administrative law, as a simple count attests.[60] Between 1998 and 2008 the SEC was a party to fifty-five cases in the D.C. Circuit;[61] the EPA was a party to 199 cases in the D.C. Circuit;[62] and the Department of Transportation was a party to thirty-five such cases.[63] In contrast, Treasury was a party to only fourteen cases during that decade, twenty-five percent the level of the SEC, and seven percent the EPA number.[64]

Trials are no different. Treasury regulates banking in conjunction with the Federal Reserve.[65] Exclusive of tax disputes, the government was a defendant in trial court in thirty-six banking cases during the one-year period from 2007 to 2008.[66] Over the same period, the EPA was a defendant in 257 cases, and the government brought 307 securities cases (the SEC is usually only a defendant when one of its rules is challenged before enforcement, a rare but not unheard of occurrence).[67] Again, the implication is that Treasury neither brings nor defends cases in the federal courts to the extent that other important agencies do.

Moreover, OMB review of Treasury, often thought to be the paradigm of alternative supervision to that of the judiciary, is

59. Victor S. Netterville, *The Administrative Procedure Act: A Study in Interpretation*, 20 GEO. WASH. L. REV. 1, 8 (1951).

60. A Westlaw search for ca("Department of the Treasury") & da(aft 1956) in the CTADC database (reported opinions by the D.C. Circuit) on September 12, 2010, identified only seventy-five cases since 1956. This includes all cases where "Department of the Treasury" is in the caption of the case.

61. Westlaw search for ca("Securities and Exchange Commission") & da(aft 1999 & bef 2008) on September 12, 2010.

62. Westlaw search for ca("Environmental Protection Agency") & da(aft 1999 & bef 2008) on September 12, 2010.

63. Westlaw search for ca("Department of Transportation") & da(aft 1999 & bef 2008) on September 12, 2010.

64. Westlaw search for ca("Department of the Treasury") & da(aft 1999 & bef 2008) on Sept. 12, 2010.

65. *See, e.g.*, Davidoff & Zaring, *supra* note 28, at 465–66 (providing an example of coordination between the two offices in a banking matter).

66. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 144 (2008).

67. *Id.* at 144–45.

limited.[68] Indeed, Treasury spent much of the time after the creation of OMB disregarding it.[69] And when Treasury was, finally, subjected to the supervision of the office, that supervision proved to be much less strict than it is for the rest of the executive branch. Between 2004 and 2008, the Office of Information and Regulatory Affairs, part of OMB, completed only nine economically significant reviews for Treasury.[70] By comparison, the EPA was subjected to fifty-four economically significant reviews during the same period,[71] and the Department of Transportation was subject to forty-five.[72]

In one context, the observation that Treasury does not participate in ordinary administrative process is not new. In tax, the Department has failed to observe the niceties of the APA without obvious justification for decades.[73] As Kristin Hickman

68. *See* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 291 (1991) (concluding OMB's "effect on day-to-day decisionmaking should not be overstated"); Bagley & Revesz, *supra* note 13; Bruff, *supra* note 19; Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1088 (1986) (noting that OMB had left eighty percent of the regulations it reviewed unchanged); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1061 (1986) (explaining that before the OMB's increased role, judicial review and congressional oversight cured most agency mistakes); Alan B. Morrison et al., *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 191 (1986) (arguing that authority still resides with agencies and that the OMB's role is supervisory); Steven T. Kargman, Note, *OMB Intervention in Agency Rulemaking: The Case for Broadened Record Review*, 95 YALE L.J. 1789, 1790 (1986) (illustrating how OMB-influenced agency decisions are largely untouchable by judicial review).

69. *See supra* notes 12, 19 and accompanying text.

70. *See Historical Reports*, OFF. INFO. & REG. AFF., http://www.reginfo.gov/public/do/eoHistReviewSearch (select "Department of the Treasury" under "Economically Significant Reviews Completed" for each of years 2004–2008) (revealing zero, zero, four, two, and three reviews for each year, respectively).

71. *See id.* (select "Environmental Protection Agency" under "Economically Significant Reviews Completed" for each of years 2004–2008) (revealing eleven, eleven, eight, ten, and fourteen reviews for each year, respectively).

72. *See id.* (select "Department of Transportation" under "Economically Significant Reviews Completed" for each of years 2004–2008) (revealing eight, eight, six, seven, and sixteen reviews for each year, respectively). It is also worth noting that a General Accounting Office (GAO) 2003 report on OMB, designed to study OMB's role in agency rulemaking, examined nine agencies, not including Treasury, which is perhaps some evidence that the GAO did not consider OMB an important check on Treasury's authority. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-03-929, OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 8 (2003).

73. Treasury's fiscal work, to be sure, is often ministerial. It receives tax revenues, and issues them pursuant to congressional appropriations to the rel-

has explained, "the status quo evolved slowly, with APA non-compliance the unanticipated and unintended consequence of the well-intentioned pursuit of alternative priorities."[74] Hickman found that about forty percent of Treasury's revenue rules do not comply with APA notice-and-comment procedures.[75]

Tax, as they say, is different. But it is also exemplary of the rather different experience the entirety of the Treasury Department has with traditional administrative procedure, especially when compared to other agencies that find their missions and agendas defined by it.

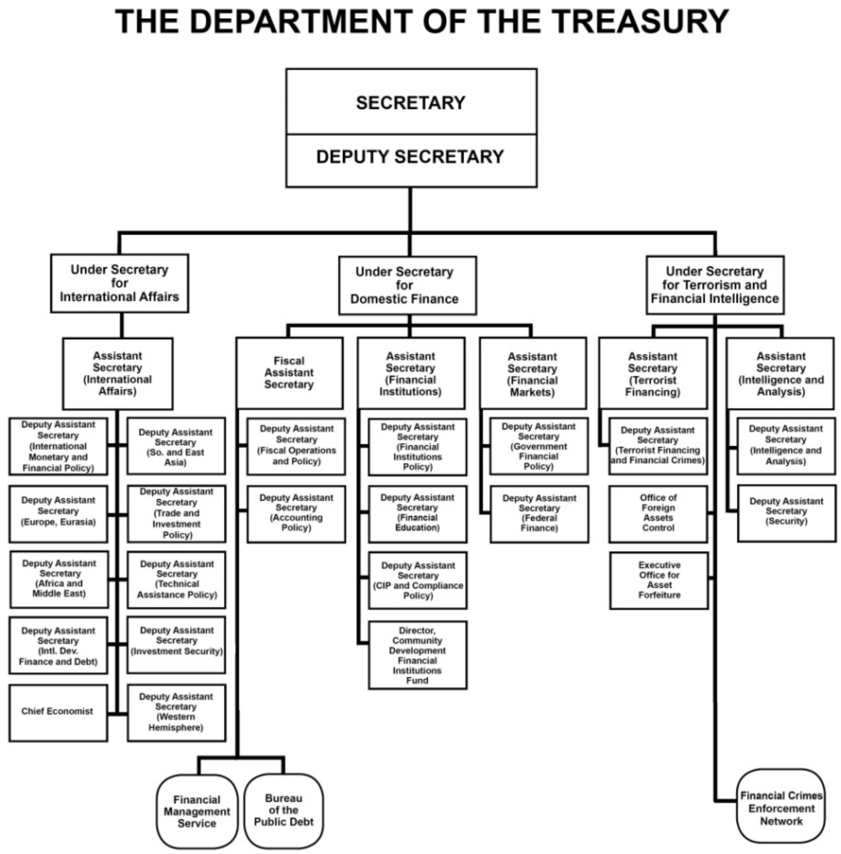
C. WHAT TREASURY DOES

A useful way to make sense of the policymaking role that Treasury plays is to examine the Department as it defines itself. This approach requires a tour through a slightly simplified variant of Treasury's organizational chart, a perhaps not instantly compelling, but ultimately illustrative, guide to the Department. This section describes what Treasury does by focusing on its three undersecretariats as a way to illustrate the Department's broad remit. It describes the undersecretariats and suggests a unifying principle for each. At the same time, the descriptions serve the broader goal of illustrating Treasury's uniqueness among agencies, and evaluating the costs and benefits of its alternative administrative law.

evant agencies. *Duties & Functions of the U.S. Department of the Treasury*, U.S. DEPARTMENT TREASURY, http://www.treas.gov/education/duties/ (last updated May 25, 2010). The point is only that this fundamental operation of the Department is old and one that has never been subject to the usual constraints of administrative procedure. *See* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1157 (2008) ("[S]tatutory provisions and the courts' own jurisprudence combined discourage procedural challenges against Treasury regulations to the point of denying taxpayers an adequate judicial remedy to vindicate procedural rights granted in the APA.").

74. Hickman, *supra* note 17, at 1799; *see also* Coverdale, *supra* note 53; Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398–99 (2007) (explaining that administrative agencies often create "guidance documents" rather than notice-and-comment rules to avoid the requirements of the APA, and using the Treasury Department's Examination Handbook on the operation of thrift institutions as an example of such a document).

75. Hickman, *supra* note 17, at 1748 (finding that 40.9 percent of the 232 rulemaking projects studied did not follow notice-and-comment procedures under the APA). Hickman also notes critics of Treasury's lack of compliance with notice-and-comment procedures. *Id.* at 1730 n.12.



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Treasury, like almost all departments, has a single secretary in charge, and a deputy secretary with broad, department-wide responsibilities.[77] The undersecretaries are the first set of specialists, and only one of them handles revenues.[78] Treasury began as a getter and spender of government money[79]—but its

76. This chart has been adapted from the complete version which can be found at *US Department of Treasury Organization Chart—Top Level*, NETAGE.COM, http://www.netage.com/economics/gov/USTreasury-chart-top.html (last visited Oct. 22, 2010). A more recent version of this chart has been posted on the Department of the Treasury's website. Treasury Organization Chart, U.S. DEPARTMENT TREASURY, http://www.ustreas.gov/open/docs/DAS%20with%20bureaus%20org%20chart%208.12.2010.pdf (last visited Oct. 22, 2010).

77. *See* OFFICE OF THE CURATOR, DEP'T OF THE TREASURY, DEPARTMENT OF THE TREASURY 16 (2006), *available at* http://www.treasury.gov/education/history/brochure/brochure.pdf (outlining the structure of Treasury).

78. *See id.* at 15.

79. *See id.* at 1 (detailing Treasury's historical roots).

domestic finance office pairs government finance with financial sector regulation, evidencing a move away from this traditional function.[80] The other two undersecretaries deal with international affairs and national security, missions that enjoy special protections from the APA's reach.[81]

The undersecretaries exemplify the uniqueness of the Department's administrative profile and offer a revealing picture of much of Treasury's operation. The remaining units of Treasury, most which report to one of the three undersecretaries, are organized into bureaus and offices. Bureaus do the yeoman's work of the Department and employ the vast majority of its workers.[82] The offices, in contrast, set policy.[83] While Treasury has activities not supervised by the undersecretaries, with the notable exception of tax policy, these activities are small and Washington-focused parts of the Department—mostly involving its public relations people, economists, and lawyers.[84]

Treasury's success in avoiding APA review lies in the fact that while its bureaus perform ministerial work that does not involve a litigious regulated industry quick to sue,[85] its offices increasingly make significant policy in areas where the APA does not reach.

In fact, much of what Treasury does in its bureaus is what it has done since its founding in 1789. Treasury collects taxes, issues debt, and disperses the proceeds to government agencies as Congress directs.[86] The acquisition of money accounts for the vast majority of employment within the Department, which as of January 2009, employed 105,668 full-time employees, 90,466 of which worked for the Internal Revenue Service.[87] Another 526 of the remaining employees collect alcohol and tobacco taxes.[88]

80. *See Office of Domestic Finance*, U.S. DEPARTMENT TREASURY, http://www.treasury.gov/offices/domestic-finance/ (last updated Apr. 15, 2010).

81. 5 U.S.C. § 553(a)(1) (2006) (exempting functions involving the military or foreign affairs from administrative procedure requirements).

82. *See* OFFICE OF THE CURATOR, *supra* note 77, at 15.

83. *See id.* at 14.

84. *See* Treasury Organization Chart, *supra* note 76.

85. Tax is a notable exception, and its own phenomenon—one that this Article will largely leave to the ministrations of tax scholars.

86. *See* OFFICE OF THE CURATOR, *supra* note 77, at 14–15.

87. *Federal Employment Statistics*, U.S. OFF. PERSONNEL MGMT. (Jan. 2009), http://www.opm.gov/feddata/html/2009/January/table15.asp.

88. *Id*. It is worth noting that nothing in the argument of this Article turns on the idiosyncratic, elaborate, and massive tax regime that has its own independent bureau only nominally within Treasury, its own rules, its own

But it has become apparent, particularly during the financial crisis, that Treasury is much more than a tax collection and fundraising organization. Accordingly, this section focuses on Treasury's nontax efforts, including those used to respond to the financial crisis and to regulate various critical areas of both the domestic and administrative economy.[89]

Treasury has achieved APA autonomy by increasingly specializing in areas that happen to lie outside of the APA's purview. While banking supervision, to be sure, is subject to the APA, it tends to be a rather collaborative exercise in practice.[90] Treasury's other specialties, including government finance,[91] financial law enforcement, international affairs, and national security, are traditionally and/or effectively outside the province of the APA.[92]

These issues have grown in importance over the past three decades to the point where President George W. Bush said that what Treasury does as a law enforcer is "a major thrust of our war on terrorism."[93] The increasingly international nature of what Treasury does is also a new development, one that parallels the growth of the G-level government ministerial process, as well as the increasing international interconnection of the U.S. economy and the inclination of most government agencies (not just financial regulators) to join global networks to deal with the problems of regulating domestic economies in an interconnected world.[94] The remainder of this section explores the undersecretariats' functions in greater detail and describes just how far outside the ordinary realm of administrative procedure Treasury operates.

courts, and its own bar. Still, tax's idiosyncrasy is both instructive and replicated elsewhere in the Department.

89. For the Federal Management Service, which is comprised of many of the remaining employees of the Department, the APA is much less relevant than the Red Book, which governs the federal government's fiscal outlays.

90. *See infra* Part I.C.1.a (discussing banking regulation).

91. *See* 5 U.S.C. § 553(a)(2) (2006) (excepting from APA "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits or contracts"). Indeed, some early versions of the APA specifically exempted the fiscal operations of the Treasury from review entirely. Foster H. Sherwood, *The Federal Administrative Procedure Act*, 41 AM. POL. SCI. REV. 271, 276 (1947).

92. *See* 5 U.S.C. § 553(a)(1) (2006).

93. *Bush: 'We Will Starve the Terrorists,'* CNN.COM (Sept. 24, 2001), http://archives.cnn.com/2001/US/09/24/ret.bush.transcript/.

94. *See, e.g.*, Treasury Organization Chart, *supra* note 76 (displaying international Treasury officers serving under the Under Secretary for International Affairs).

1. Domestic Finance

The Undersecretary for Domestic Finance handles a panoply of activities, marrying the development of policy for banking regulators—and accordingly, the regulatory environment of banks—with the monitoring of the financial markets.[95]

It is banking regulation that gets attention these days; but the financial operations conducted under the Undersecretary's aegis are some of the Department's oldest.[96] Nonetheless, because Treasury does the most regulating in the banking arena, it is worth exploring its principles-based, less-adversarial-than-some nature.[97] It is also worth remembering that this sort of regulation is hardly the only thing the Department does. As a regulator, Treasury embodies a cooperative approach, where its leaders speak on the phone with the institutions they oversee more than do senior officials at other agencies, perhaps more than any other agency in the government.[98] As a financier, Treasury is subject not to the APA, but to the alternative administrative procedure of money.

a. Banking Regulation

Treasury, or, specifically, two of its bureaus—the Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS) (which are in the process of being consolidated pursuant to the Dodd-Frank Act)[99]—supervise federally

95. *See Office of Domestic Finance*, *supra* note 80 (outlining duties of the office).

96. *See* OFFICE OF THE CURATOR, *supra* note 77, at 2–6 (outlining the early financial duties of Treasury).

97. This review is admittedly broad-brush; multivolume treatises have been written about the details of banking regulation. *See, e.g.*, HENRY J. BAILEY & RICHARD B. HAGEDORN, BRADY ON BANK CHECKS (2010) (multivolume treatise on regulation and case law related to bank checks and commercial paper); INTERNATIONAL BANKING LAW AND REGULATION (Dennis Campbell ed., 2000) (two-volume treatise on international banking regulation); MICHAEL P. MALLOY, BANKING LAW AND REGULATION (1994) (three-volume treatise on banking regulation); MICHIE ON BANKS AND BANKING (P.A. Ernest ed., 2004) (thirteen-volume comprehensive treatise on banking law and regulation); WILLIAM H. SCHLICHTING ET AL., BANKING LAW (2010) (regularly updated nine-volume treatise on banking law).

98. *See, e.g.*, Binyamin Appelbaum & Ellen Nakashima, *Regulator Let IndyMac Bank Falsify Report*, WASH. POST, Dec. 23, 2008, at A1 (noting regulators' conference calls with bank officials).

99. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 311–319, 124 Stat. 1376, 1520–28 (2010).

chartered banks and federally chartered thrifts, respectively.[100] The goal for both of these agencies is to keep the institutions "safe and sound," as they are all covered by federal deposit insurance.[101] This arrangement means that the government must pay for institutions that fail, and so has an abiding interest in preventing them from doing so.[102] To that end, OCC and OTS deploy examiners to each of the banks they regulate, where they comb through the books, inspect the sites, and stay close to management.[103] Undoubtedly, there are plenty of rules subject to which these entities must operate; banking regulation looks, at least superficially, a lot like the rest of administrative law. And certainly, though rarely, courts play important roles in giving texture to the sort of oversight that Treasury exercises over the financial industry.[104]

But the regulation of financial institutions is a famously nonadversarial process. Financial regulators that have adopted principles-based regulation—such as most banking regulators across the globe, and also some in the United States—offer little that is reviewable to courts like the D.C. Circuit.[105] Principles-based regulation is often enforced through phone calls

100. *About the OCC*, OFF. COMPTROLLER CURRENCY, http://www.occ.treas.gov/aboutocc.htm (last visited Oct. 22, 2010); *About the OTS*, OFF. THRIFT SUPERVISION, http://www.ots.treas.gov/?p=AboutOTS (last visited Oct. 22, 2010). Bank holding companies, however, are regulated by the Federal Reserve. *See Federal Reserve Board Frequently Asked Questions: Banking Information*, FED. RES. BOARD, http://www.federalreserve.gov/generalinfo/faq/faqbkinfo.htm (last updated July 16, 2010). Because the largest and most important banks include bank holding companies, it is fair to say that these institutions have two regulators, which may not always, at least when it comes to the details, get along.

101. *Who is the FDIC?*, FED. DEPOSIT INS. CORP., http://www.fdic.gov/about/learn/symbol/WhoistheFDIC.pdf (last visited Oct. 22, 2010).

102. *See, e.g.*, *About the OCC*, *supra* note 100 (outlining OCC's preventative measures, including removing failing banks' officers and changing banking practices).

103. *See id.* (noting OCC's supervisory activities); *see also About the OTS*, *supra* note 100 (explaining OTS's role in supervision).

104. *See* Howell E. Jackson, *The Expanding Obligations of Financial Holding Companies*, 107 HARV. L. REV. 507, 523–28 (1994) (describing judicial oversight over the enforceability of capital maintenance commitments); Kieran J. Fallon, Note, *Source of Strength or Source of Weakness?: A Critique of the "Source-of-Strength" Doctrine in Banking Reform*, 66 N.Y.U. L. REV. 1344, 1372–80 (1991) (describing judicial oversight of the Federal Reserve Board's source-of-strength policy).

105. For analyses of rules-based versus principles-based regulations, see generally Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411 (2007); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

and jawboning, rather than through enforcement orders and prohibitions that can lead to litigation.[106] Moreover, for banking regulators, many of the regulatory standards are not passed by rule, but by international arrangement through the Basel Committee on Banking Supervision, which promulgates the baseline rules on how much capital banks must hold in their coffers.[107] Also, much of the regulation on the ground occurs via on-site examiners who enforce quite informally and often on a face-to-face and confidential, instead of a written and public, basis.[108] This sort of close, informal supervision has contributed to the independence of the Department.

Moreover, Treasury and its regulated industry are largely pursuing similar objectives. Because of its mission for safety and soundness, Treasury wants banks to make enough money to remain solvent—a goal that dovetails, of course, with the ends of bank owners.[109] Moreover, the banking charter is itself valuable, meaning that regulated banks benefit from the restrictions on their activity provided by the government—especially because those restrictions are paired with deposit insurance, which guarantees that banks will be able to borrow from their depositors at quite low rates.[110] Banks, in short, quite rationally want to be regulated by Treasury.

The result is that a culture of regulation has developed in which the bank regulators and the banks themselves work together closely.[111] This culture of cooperation toward safety and

106. *See, e.g.*, Appelbaum & Nakashima, *supra* note 98 (discussing principles-based regulators' tendency to regulate through conference calls). There are few principles-based regulators in the federal government. Those that do exist—such as the Commodities Futures Trading Commission (CFTC)—enjoy a more limited relationship with the judiciary and possibly with their executive and congressional supervisors than the more rules-based and enforcement-oriented agencies. *See, e.g.*, Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 95 VA. L. REV. 785, 795 (2009) (comparing the CFTC's principles-based regulation to the rules-based SEC); DEP'T OF TREASURY, THE DEPARTMENT OF THE TREASURY BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE 11 (2008), *available at* http://www.ustreas.gov/press/releases/reports/Blueprint.pdf (characterizing the CFTC as adopting a "principles-based regulatory philosophy").

107. David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 573 (2005).

108. *See About the OCC*, *supra* note 100 (describing on-site reviews).

109. *See, e.g.*, Appelbaum & Nakashima, *supra* note 98 (describing OTS as behaving more like "consultants, not cops").

110. *See id.* (noting that banks classified by Treasury as "well capitalized" are able to receive deposits from brokers).

111. *See id.* (questioning the Agency's cozy "relationship with the compa-

soundness stands in marked contrast to the ordinarily adversarial nature of regulation by other agencies. Indeed, some argue that the confluence of interests has made Treasury particularly beholden to its regulated industry.[112] Even if that is the case, and this Article takes no position on that issue, the result is that banks sue Treasury or its institutions to undo rules less often than, say, the securities industry sues the SEC.[113]

b. Government Finance

Treasury also routes much of its government finance work—its original *raison d'être*—through the Undersecretary for Domestic Finance.[114] This sort of finance is not the source of Treasury's rather impressive power over the economy, but it is an important area of governance, one often ignored by legal scholars. And Treasury, subject once again to its own unique administrative practice, plays a crucial role.

Its Office of the Fiscal Service, which reports to the Undersecretary, "develop[s] policy for and operate[s] the financial infrastructure of the [f]ederal government."[115] The infrastructure itself is not riveting, but it does matter: it includes "payments, collections, cash management, financing, central accounting, and delinquent debt collection," as the Department itself defines it.[116] This infrastructure includes the Financial Management Service, which doles money out to federal agencies pursuant to their congressional appropriations after receiving it from the IRS, and the Bureau of the Public Debt, which does the ministerial work of debt finance: selling Treasury bills, and so on.[117]

nies it regulates").

112. *See id.* (stating that "OTS fail[s] to enforce its own rules" with respect to regulated banks).

113. *See* Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 671 (2007) ("The Treasury Department . . . [has] numerous structural and practical constraints preventing . . . capture."). *But see* Johnson, *supra* note 4, at 52 (discussing the American financial sector and noting "[f]rom this confluence of campaign finance, personal connections, and ideology there flowed, in just the past decade, a river of deregulatory policies").

114. *See Office of Domestic Finance*, *supra* note 80 (listing the office's duties).

115. *Office of Fiscal Service: About the Office of Fiscal Service*, U.S. DEPARTMENT TREASURY, http://www.ustreas.gov/offices/domestic-finance/fiscal-service/ (last modified Dec. 5, 2008).

116. *Id.*

117. *See id.* In performing this role, for what it is worth, Domestic Finance has stayed true to its light, principles-based approach. It has regulated the markets for the sale of its debt with a much lighter touch than that exercised

Accordingly, there is a fundamental, albeit ministerial, part of Treasury's responsibility that is entirely separate from administrative procedure. This budgetary role has long been outside the purview of judicial review—much of it is exempted from rulemaking entirely under 5 U.S.C. § 553(a)(2)—and this traditional role probably informs the way the rest of the Department operates.[118]

To be sure, this role is not bereft of oversight. Federal appropriations law, guided by congressional appropriations statutes and annual budgets, largely determines how the money Treasury has raised is spent.[119] There is a great deal of interstitial and "rules of the road" guidance in these principles that fills the gaps that the ordinarily very lengthy appropriations legislation leaves behind. There is even a treatise expounding those rules of the road—the so-called Red Book.[120] But the Red Book is written by the Government Accountability Office, rather than Treasury.[121] So it is not that the Department *makes* the rules in this area; still, Treasury is intimately bound up in fiscal questions, and matters of fiscal oversight are rarely presented as matters of administrative procedure. This fiscal role, longstanding as it has been, however, arguably contributed to Treasury's unique form of administrative procedure. Its more recent responsibilities, as represented by its two other undersecretaries, develop this theme. There, as well as here, the oversight comes loosely from Congress instead of tightly through the courts.

by other American capital markets regulators. *See* Edward W. Little, Jr., Comment, *Legislating in Secret: The Treasury Department's Thirty-Five Percent Rule and the "Public Contracts" Exemption to the Administrative Procedure Act*, 6 ADMIN. L.J. AM. U. 545, 545 (1992) (describing Treasury's authorization to oversee government debt).

118. *See* Lincoln v. Vigil, 508 U.S. 182, 193–94 (1993) (holding that the Indian Health Service's decision to discontinue a program providing services to handicapped Indian children was not subject to judicial review because Congress gave the Agency a lump sum appropriation which it had discretion to allocate). Section 553(a)(2) exempts from rulemaking "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2) (2006).

119. *See* United States v. MacCollom, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." (citing Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850))).

120. U.S. GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (3d ed. 2004).

121. *Id.*

2. International Affairs

Treasury also develops policy in international monetary affairs, trade and investment policy, and international debt strategy, and has devoted a second of its three undersecretaries to overseeing its international work.[122] International affairs, like government finance, are exempt from the APA.[123] As the world has globalized, Treasury's increasingly important role in setting—and critically, coordinating—U.S. policy abroad has inexorably led to an expansion of discretion in setting policy at home.[124] In this role, Treasury regulates not by fiat, but through informal cooperation.

As an international policymaker, Treasury guides U.S. participation in international financial institutions, including, most notably, the World Bank and the International Monetary Fund (IMF).[125] It coordinates American policy for the G-level ministerial process and prepares the President for economic summits.[126] It also participates actively in the financial regulatory networks that have sought to develop common rules for the regulation of global finance.[127]

Treasury thus acts as an international participant in the shaping of domestic regulation, not just for the United States, but also for regulators across the globe. In the IMF, for example, it has pushed its own policies in the restructuring of sovereign debt.[128] In the Basel Committee on Banking Supervision,

122. *See* Treasury Organization Chart, *supra* note 76.

123. 5 U.S.C. § 553(a)(1) (2006). For further discussion of this exemption, see Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 241–42 (2009).

124. *See* Zaring, *supra* note 107, at 597–600 (discussing democratic oversight of international regulatory cooperation); *see also* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 454–56 (1988) (discussing reverberation between international and domestic negotiations).

125. *See Office of International Affairs: Offices*, U.S. DEPARTMENT TREASURY, http://www.ustreas.gov/offices/international-affairs/offices.shtml (last updated Aug. 4, 2010) (discussing the role of the Office of Development Policy and Debt in advising the U.S. government on its international economic development efforts).

126. *See* REBECCA M. NELSON, CONG. RESEARCH SERV., THE G-20 AND INTERNATIONAL ECONOMIC COOPERATION: BACKGROUND AND IMPLICATIONS FOR CONGRESS 8 (2009), *available at* http://www.fas.org/sgp/crs/row/R40977.pdf (noting Treasury's role in coordinating with various federal agencies to prepare for the G20 summit).

127. *See infra* notes 128–30 and accompanying text.

128. *See* Jonathan Sedlak, Comment, *Sovereign Debt Restructuring: Statutory Reform or Contractual Solution?*, 152 U. PA. L. REV. 1483, 1484 (2004)

it has tried to ensure that the regulation of banking capital adequacy is consistent with U.S. interests.[129] And in the G20, it has pursued the same interests regarding the relationship between metropolitan and offshore financial havens, among many other things.[130]

Much of what Treasury does through its International Affairs Undersecretariat might best be described as regulation through international networks. Such networks exhibit "pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the 'domestic' from the 'international' sphere."[131] The goals of these networks include cooperating on law enforcement and harmonizing regulatory standards.[132] Informal institutions in their own right, these networks afford Treasury domestic regulatory flexibility. By operating internationally, Treasury has evaded many of the constraints it would otherwise face in pure domestic regulation, as Robert Putnam has shown.[133] In addition, as international networks have become foci of the response to the financial crisis,[134] Treasury will likely only do more of its regulatory work in coordination with these international institutions, which are themselves an alternative to domestic notice-and-comment law.[135]

Treasury also takes the lead in coordinating U.S. participation in the increasingly important G20 process.[136] That process

(noting Treasury's advocacy for inclusion of collective action clauses in lenders' debt instruments).

129. *See generally* Zaring, *supra* note 107, at 573–80 (noting the involvement of American regulators, including the Treasury's OCC, in the capital accord negotiation process).

130. *Cf.* NELSON, *supra* note 126, at 8, 12 (noting Treasury's role in representing the United States in the G20 and enumerating targeted regulatory reforms).

131. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 14 (2004).

132. *Id.* at 51–52 (categorizing regulatory government networks as information, enforcement, and harmonization networks).

133. *See* Putnam, *supra* note 124, at 454–56.

134. The new Financial Stability Board is an example of this response. *See History*, FIN. STABILITY BOARD, http://www.financialstabilityboard.org/about/history.htm (last visited Oct. 22, 2010) (discussing creation of the Financial Stability Board by G20 nations to improve international financial regulation and promote financial stability).

135. *See, e.g.*, Zaring, *supra* note 107, at 565 (noting, for example, that the International Organization of Securities Commissions' administrative procedures are not subject to the notice-and-comment requirements of the APA).

136. NELSON, *supra* note 126.

features heads of state meetings that are always preceded by meetings of Treasury officials and foreign finance ministries.[137] The purpose of the G20 is to deal with the global economy.[138] The G7, a predecessor to the G20, was founded in the mid-1970s by heads of state of the developed Western economies and has since grown to include some representatives of the developing world.[139] In the aftermath of the financial crisis, the G20 has taken on the responsibility of designing a global regulatory architecture to identify and respond to bubbles and incipient panics across borders.[140]

Never formalized by treaty, the G20 has no legal status. It has neither promulgated bylaws or rules for decisionmaking nor created a secretariat or administrative bureaucracy. In short, the G20 is a politicized organization of heads of states pressing their countries' interests in an at-will, discretionary environment.[141] The G20 views itself as a "consultation procedure," instead of an international institution.[142] And critically, in setting global economic policy, Treasury and finance ministers are almost as central as the heads of state that prompted the formation of the organization.

In short, Treasury's role in the G20, like much of what Treasury does, is replete with discretion and informality. To be sure, the international entities in which it formulates domestic policy are different—an international lawyer might evaluate an international organization like the IMF, a network like the Basel Committee, and a purely political outfit like the G20 differently, especially with regard to the legal force of the international rules they promulgate.[143] Nonetheless, with each of these

137. For a discussion of the G20, see generally David Zaring, *International Institutional Performance in Crisis*, 10 CHI. J. INT'L L. 475, 493–99 (2010).

138. *See id.*

139. *See* Peter I. Hajnal & John J. Kirton, *The Evolving Role and Agenda of the G7/G8: A North American Perspective*, 7 NIRA REV. 5, 6 (2000), *available at* http://www.g7.utoronto.ca/scholar/hajnal_nira.pdf.

140. *See* Zaring, *supra* note 137, at 493 ("[The G20] has come to be the basis of the initial policymaking response to the crisis that we have seen at a global level.").

141. *Id.* at 496.

142. *The G8: Questions About the G8*, G8—SOMMET EVIAN SUMMIT 2003, http://www.g8.fr/evian/english/navigation/the_g8/questions_about_the_g8.html#question5 (last visited Oct. 22, 2010) (noting that the G8 has no official language because it is not an international organization).

143. After all, while the G20 may be what political scientists call a regime, in that it creates "sets of governing arrangements" that include "networks of rules, norms, and procedures that regularize behavior and control its effects,"

international entities, Treasury has elected to make policy in a way that is outside the regime of traditional, APA-style law. As is the case with Treasury's other, non-APA style activities, it is Congress that most closely supervises its international affairs.[144] Even Congress, however, has limited oversight capabilities over the technical, yet important, standards that Treasury executes in conjunction with its foreign counterparts.

3. National Security

Finally, Treasury is increasingly playing a national security role, which three of its policymaking offices exemplify: the Office of Foreign Asset Control (OFAC), the Financial Crimes Enforcement Network (FinCEN), and the Committee on Foreign Investments in the United States (CFIUS). The purpose of these offices is to starve terrorists and other potential adversaries and undesirables of funding and to ensure that adverse foreign governments do not obtain critical U.S. assets.[145] Here again, the supervision is light, probably too light. And once again, it comes through Congress, not the APA and the courts. Through these offices, Treasury uses civil administrative tools to pursue a security (be it anticriminal or national) enterprise, an odd combination of methods and goals.

With its new powers, such as those granted in the USA PATRIOT Act,[146] Treasury has imposed broad new regulations

ROBERT D. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 19 (1977), it was never a "regime invested with any of the trappings of legal formality, or even quasi-legal network-like status," Zaring, *supra* note 137, at 496. *See also* Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables* (1982), *reprinted in* INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983) (defining "regimes").

144. *See* Zaring, *supra* note 107, at 597.

145. OFAC "administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals." *Office of Foreign Assets Control: Mission*, U.S. DEPARTMENT TREASURY, http://www.ustreas.gov/offices/enforcement/ofac/index.shtml (last visited Oct. 22, 2010). "FinCEN's mission is to enhance U.S. national security, deter and detect criminal activity, and safeguard financial systems from abuse by promoting transparency in the U.S. and international financial systems." FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/ (last visited Oct. 22, 2010). CFIUS determines the effect on national security of "transactions that could result in control of a U.S. business by a foreign person." *Office of Investment Security: Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEPARTMENT TREASURY, http://www.treas.gov/offices/international-affairs/cfius/ (last updated Feb. 20, 2009).

146. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §§ 301–377, 115 Stat. 272, 296–342 (codified as amended in scattered titles of the U.S.C.). This section of the USA PATRIOT Act is also

on banks, made decisions about which foreign purchases of American assets will be permitted (the grounds for denial are that they put national security at risk or critical infrastructure in the hands of non-Americans) and, perhaps most troublingly, is empowered to visit severe sanctions on individuals, groups, and institutions without complying with Fourth Amendment limits on the ability to seize property without obtaining a warrant.[147] These efforts are coordinated through the Department's third undersecretariat, the Undersecretariat for Terrorism and Financial Intelligence.[148]

This national security role is not entirely new. But it has expanded vastly in the past two decades in response to, first, the war on drugs, and second, the war on terror. These wars have prompted Congress to give Treasury new powers to address national security threats.[149] And Treasury has interpreted those powers aggressively. These new powers are another facet of the modern Treasury Department's exemption from ordinary administrative procedure (or criminal procedure, for that matter) in matters that increasingly occupy much of the Department's attention.

The Undersecretary oversees OFAC and FinCEN, two of the offices that exemplify Treasury's national security role.[150] Treasury's role in CFIUS, as the head of an interagency committee, is related to the national security work of the other two offices. However, while those offices seek to freeze the assets of wrongdoers, CFIUS oversees a process that turns away the assets of disfavored foreign investors before they may be deployed.[151]

known as the "International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001." *Id.* § 301.

147. For a discussion of these new powers, see Zaring, *supra* note 40, at 95–97. As the 9/11 Commission has observed, "the use of administrative orders with few due process protections, particularly against our own citizens, raises significant civil liberty concerns and risks a substantial backlash." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING 50 (2004), *available at* http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf [hereinafter 9/11 COMMISSION MONOGRAPH].

148. *See Terrorism and Financial Intelligence: Mission*, U.S. DEPARTMENT TREASURY, http://www.ustreas.gov/offices/enforcement/ (last updated Aug. 4, 2010).

149. *See, e.g.*, David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1361 (2007) (highlighting the use of new powers pursuant to the USA PATRIOT Act).

150. *See* Organization Chart, U.S. DEPARTMENT TREASURY, http://www.ustreas.gov/offices/enforcement/pdf/org-chart.pdf (last visited Oct. 22, 2010).

151. *See* Zaring, *supra* note 40, at 84–85 (detailing the transaction review

Although this section will describe and analyze this administrative regime as it exists, it is not a regime that normatively does the Department much justice. Treasury's national security powers sweep extraordinarily broadly, but inexpertly balance rights and national interests. Its power over foreign investment, for example, is frighteningly uncabined in theory, but in fact is a rather toothless congressional notification service. Its power over other perceived national security threats constitute a combination of undesirable turf-building and an exploitation of civil means to do criminal work that poses its own set of problems. If this Article ultimately suggests that much of what Treasury does is positive, if unorthodox, its national security functions present a cautionary side of the coin—perhaps the strongest counterargument to the cautious embrace of Treasury's approach to administrative procedure is taken here.

a. The Office of Foreign Assets Control

Although the story of Treasury's national security role is mostly a story about the last two decades, Treasury first exercised these powers to wage economic war in World War I. Through the Trading with the Enemy Act, initially passed in 1917, Congress gave the Department the power to "freeze" the assets located in the United States of the foreign sovereigns at war with the country.[152] Since then, those powers have grown to cover less obvious enemies of the United States. Asset freezes have been used against nonwarring foreign powers such as Cuba and North Korea, and more recently have also been applied to individuals instead of foreign powers.[153] Current OFAC interventions range from drug interdiction efforts, to counterterrorism, to the imposition of sanctions on Cuba.[154]

Although the Department's OFAC efforts target criminal activity such as narco-trafficking and terrorism, it pursues these activities with civil law enforcement tools, including assets freezes, which are not subject to Fourth Amendment constraints.[155] This ability to use the lower civil burdens of proof to pursue what are essentially criminal law enforcement goals is what makes Treasury such an effective actor in national securi-

procedure followed by CFIUS).

152. Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified as amended at 12 U.S.C. § 95a (2006)).

153. *See* Zaring & Baylis, *supra* note 149, at 1405.

154. *See id.* at 1400.

155. *Id.* at 1394.

ty—albeit one that should give civil libertarians, and proponents of technical bureaucratic expertise, pause.

Treasury's response to the war on terror illustrates how its powers have evolved.[156] Twelve days after 9/11, because of "the pervasiveness and expansiveness of the financial foundation of foreign terrorists,"[157] the President issued an executive order declaring a national emergency and authorizing the Secretary of the Treasury to freeze the assets of individuals or groups that "assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism."[158] OFAC is the office charged with drawing up lists of the individuals and groups that meet these criteria—the executive branch then institutes freezes against them.[159]

The power to freeze assets—to which the USA PATRIOT Act added the ability to "block" assets during the pendency of civil investigations into whether given individuals, entities, or organizations were engaged in forbidden activities[160]—came

156. Some of OFAC's terrorism regulation predates 9/11, however. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), for example, authorizes the Secretary of State to designate an organization as a Foreign Terrorist Organization (FTO). *See* 8 U.S.C. § 1189(a) (2006). Such a designation is significant because it allows OFAC to freeze all assets of the designated organization that are in the United States or controlled by a U.S. financial institution. *See id.* § 1189(a)(2)(C); Zaring & Baylis, *supra* note 149, at 1394 n.142 (discussing other consequences of FTO designation).

157. Exec. Order No. 13,224, 66 Fed. Reg. 49,079, 49,079 (Sept. 25, 2001). OFAC acted "under presidential wartime and national emergency powers and authority granted by specific legislation to impose controls on transactions and freeze foreign assets under U.S. jurisdiction." *The Oil-for-Food Program: Tracking the Funds: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 53 (2004) (statement of Herbert A. Biern, Senior Associate Director, Division of Banking Supervision and Regulation, Federal Reserve Board), *available at* http://www.federalreserve.gov/boarddocs/testimony/2004/20041117/default.htm.

158. Exec. Order No. 13,224, § 1(d)(i), 66 Fed. Reg. at 49,080. The authority for these freezes came from the International Emergency Economic Powers Act (IEEPA). 50 U.S.C. §§ 1701–1706 (2006). For more, see Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy,* 45 WM. & MARY L. REV. 1341, 1370–73 (2004) (explaining specially designated global terrorist classifications).

159. *See* Zaring & Baylis, *supra* note 149, at 1397 (discussing how the director of OFAC initiates asset freezes). These lists are subject to review under the APA, but also subject to the usual deference courts afford the Executive in national security matters. *See id.* at 1398 (stating that challenges to OFAC blocking orders rarely succeed).

160. The USA PATRIOT Act permits OFAC to

> investigate, *block during the pendency of an investigation*, regulate,

from the successor statutes to the Trading with the Enemies Act.[161] After 9/11, the President expanded the reach of this tool to individuals by establishing a list of proscribed individuals and organizations whose assets are subject to "freezure."[162]

These freezures, so-called because the government does not consider them a search or seizure, are powerful tools that reach every piece of property that the target has, including hard drives, office contents, and funds.[163] This "stop now" order, done without a search warrant, is a remarkable law enforcement tool. Indeed, "when executive branch officials discuss asset freezes, they describe the basis for an asset freeze as merely a 'belief' (which is consistent with the broad discretion provided by the statute)."[164] A freeze is born on the signing of "[o]nly a single piece of paper" by the not particularly exalted director of OFAC—a fact that bothered the 9/11 Commission.[165] And judi-

> direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. § 1702(a)(1)(B) (2006) (emphasis added).

161. Pursuant to the pre-9/11 IEEPA, the President was granted the authority "to deal with any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." *Id.* § 1701(a). IEEPA gave the president the ability to freeze the assets of nations with whom the United States is either at war, or that he had designated to be a national enemy. *Id.* § 1702(a)(1). The statute also provides for the sanctioning of supporters and nationals of the enemy. *Id.* § 1702(a)(1)(C). For a discussion of how the USA PATRIOT Act altered the IEEPA, see Crimm, *supra* note 158, at 1357–59.

162. OFAC maintains this list on its website. *Office of Foreign Assets Control: Specially Designated Nationals List*, U.S. DEPARTMENT TREASURY, http://www.ustreas.gov/offices/enforcement/ofac/sdn/ (last updated Oct. 19, 2010); *see also* Exec. Order No. 13,224, § 1, 66 Fed. Reg. 49,079, 49,079–80 (Sept. 25, 2001).

163. *See, e.g.*, Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 64 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003) (describing the freezing of the group's assets as well as the seizure of documents, computers, and furniture from the group's offices); Zaring & Baylis, *supra* note 149, at 1398 n.159 (noting the government's argument that an asset freeze does not fall within the purview of the Fourth Amendment because it does not search the frozen property).

164. Mariano-Florentino Cuéllar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, 22 BERKELEY J. INT'L L. 15, 39 n.90 (2004).

165. 9/11 COMMISSION MONOGRAPH, *supra* note 147, at 99, 112. "This provision lets the government shut down an organization without any formal de-

cial review, the remedy for those whose assets have been blocked during the pendency of an investigation, is lenient in the context of national security, as noted earlier.[166] By 2008, OFAC had blocked $323 million from sanctioned states and $148 million in assets of individuals deemed to be associated with foreign enemies.[167]

In sum, OFAC exemplifies how Treasury now focuses on law enforcement and investigation in a manner that is inconsistent with the usual rules of administrative law. It generates these lists through a relatively secret process, without notice-and-comment. The lists result in action by an agency that, in its freezes, neither follows the disciplines of the Fourth Amendment nor basic legal standards of predeprivation notice.

b. Financial Crimes Enforcement Network

The second major part of Treasury's law enforcement and national security regime is FinCEN. If OFAC is an example of Treasury's ability to get around the problems of criminal procedure, FinCEN, although it performs a related function with regard to tracking wrongdoers, is an example of the impositions the non-APA part of Treasury can make on regulated industry. Complying with FinCEN's anti-money laundering reporting requirements is very expensive.[168] This center (a combination of "bureau" and "office" in Treasury parlance) is also a beneficiary of Treasury's increasing focus on security threats.[169] The implication, once again, is that Treasury is here doing something

termination of wrongdoing. It requires a single piece of paper, signed by a mid-level government official." *Id.* at 112.

166. As one court quoted when discussing OFAC, when an "agency's reasons and policy choices . . . 'conform to certain minimal standards of rationality' . . . the rule is reasonable and must be upheld." *Holy Land*, 219 F. Supp. 2d at 67 (quoting Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 521 (D.C. Cir. 1983)). In that case, the charities alleged that OFAC's actions violated the Due Process Clause, the Takings Clause, the Fourth Amendment ban on unreasonable search and seizure, the First Amendment rights to freedom of speech and association, the Religious Freedom Restoration Act, and the APA. *Id.* at 75.

167. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, TERRORIST ASSETS REPORT 2 (2008), *available at* http://www.ustreas.gov/offices/enforcement/ofac/reports/tar2008.pdf.

168. *See* Zaring & Baylis, *supra* note 149, at 1413 (noting that U.S. banks spent approximately $125 million in both 2003 and 2004 to comply with FinCEN regulations and that "[h]igh-end estimates have placed the total costs of the money-laundering laws as $7 *billion* in 2003").

169. *See id.* at 1414–15 (describing FinCEN's expansion of discretion and power).

important, burdensome, and expensive, and yet has managed to avoid much judicial oversight—although financial intermediaries have lobbied the Department and the legislature to limit the sweeping scope of their terrorism tracking obligations.

As I have detailed elsewhere,[170] FinCEN has its roots in the Bank Secrecy Act of 1970 (BSA),[171] which Congress passed to prevent tax evaders from hiding their taxable assets in federally regulated banks.[172] The BSA requires banks and other federally regulated financial institutions to report large or otherwise suspicious transactions to the Treasury Department.[173] The statute's reporting requirements were also meant to make it difficult for criminal enterprises to launder their money. The USA PATRIOT Act expanded the reach of the BSA's criminal sanctions,[174] empowered the Treasury Department to pursue civil penalties against these launderers,[175] and increased the reporting requirements on, and broadened the definition of, financial institutions subject to the BSA.[176] The goal of these amendments was to interdict the flow of money to terrorists, by forcing them out of financial institutions with large disclosure obligations to the government.[177] But these reporting require-

170. *See id.* at 1409–18 (discussing FinCEN in more detail).

171. Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended at 12 U.S.C. §§ 1951–1959 (2006), 31 U.S.C. §§ 321, 5311–5314, 5316–5322 (2006)).

172. *See* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 26–30 (1974) (discussing the prevention of money laundering and other purposes of the BSA).

173. *See* 31 U.S.C. §§ 5311–5314, 5316–5322 (allowing Treasury to require reporting under a number of different circumstances).

174. *See, e.g.*, 18 U.S.C. § 1956 (2006) (expanding the number of predicate penalties for a money laundering charge); *id.* § 1956(c)(7)(D) (2006) (adding the provision of monetary support to the list of crimes under the Antiterrorism Act); *id.* § 1960 (2006) (deeming the operation of an unlicensed money transfer business a crime of general, rather than specific, intent); 31 U.S.C. § 5332 (2006) (criminalizing the transportation of bulk cash).

175. *See* 18 U.S.C. § 1956(b). For a description of this provision, see Zaring & Baylis, *supra* note 149, at 1410 n.228.

176. *See* Robert W. Helm & Kevin K. Babikian, *Creating, Managing and Distributing Offshore Investment Products: A Legal Perspective*, *in* NUTS & BOLTS OF FINANCIAL PRODUCTS 2005: UNDERSTANDING THE EVOLVING WORLD OF CAPITAL MARKET & INVESTMENT MANAGEMENT PRODUCTS 715, 964 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1471, 2005).

177. *See The Financial War on Terrorism and the Administration's Implementation of Title III of the USA PATRIOT Act: Hearings Before the S. Comm. on Banking, Hous., and Urban Affairs*, 107th Cong. 60 (2002) (statement of Michael Chertoff, Assistant Att'y Gen., Criminal Division, Department of Justice) ("Title III of the USA PATRIOT Act has provided law enforcement with important new authority to investigate and prosecute the financing of crime, including terrorism.").

ments have had profound practical consequences. While FinCEN nominally aims to support law enforcement by trolling assets for signs of terrorists, organized criminals, and tax evaders,[178] much of the Agency's actual activity involves policing the report filing programs of the financial institutions covered by the BSA and the USA PATRIOT Act.[179]

Moreover, defining exactly which financial institutions must comply with its requirements is largely up to FinCEN. A vast array of institutions and individuals are now subject to reporting requirements, including credit unions, commodity trading advisors, and informal or unlicensed transmitters of money.[180] That last category may be broad enough to render BSA reporting requirements applicable to pawnbrokers, hawallas, and even the most casual moneylending schemes.[181] And the Treasury Department is empowered to further expand the list of covered institutions.[182] Though its expansion has so far happened in a comment-responsive way, FinCEN has since resorted to few typical administrative law tools to justify its impositions on the financial sector.[183]

Entities and individuals subject to the BSA—and its expansion via the USA PATRIOT Act—must jump through a number of regulatory hurdles, including filing Suspicious Activity Reports,[184] establishing anti-money laundering programs,[185]

178. *Mission*, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/about_fincen/wwd/mission.html (last visited Oct. 22, 2009) (declaring FinCEN's mission as "[s]upporting law enforcement, intelligence, and regulatory agencies through sharing and analysis of financial intelligence").

179. *See* FIN. CRIMES ENFORCEMENT NETWORK, ANNUAL REPORT FISCAL YEAR 2009, at 4 (2009), *available at* http://www.fincen.gov/news_room/rp/files/annual_report_fy2009.pdf (indicating that approximately 16.7 million BSA-required reports were filed in fiscal year 2009).

180. 31 U.S.C. § 5312(a)(2), (c) (2006).

181. There have been some efforts to develop a safe harbor, or "white list," of safe transactions and transactors. *Cf.* Robert E. O'Leary, *Improving the Terrorist Finance Sanctions Process*, 42 N.Y.U. J. INT'L L. & POL. 549, 583–84 (2010) (discussing Treasury white lists and charities).

182. 31 U.S.C. § 5312(a)(2)(Z) (2006) (allowing for regulation of "any other business designated by the [Treasury] Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters").

183. *See* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 443–45 (2005) (describing a notice-and-comment process for feedback and development as opposed to public hearings or legislative involvement).

184. *See* 31 U.S.C. § 5318(g) (2006) (outlining the requirements for reporting suspicious transactions).

185. 31 U.S.C. § 5318(h) (outlining the requirements for an institution's anti-money laundering program); *see also* Lester Joseph, *Anti-Money Launder-*

and, in the case of banks, complying with "know your customer" regulations.[186] Compliance with all of these regulations is expensive.[187] Covered entities often hire consultants, who use software systems to track transactions, offer outside training sessions, and advise financial institutions as to what they must do to meet the Department's standards.[188] Treasury has imposed large fines on financial institutions that fail to meet their FinCEN reporting requirements, and the large number of institutions subject to penalties suggests that compliance is by no means easy.[189]

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ing Update, *in* ADVANCED CORPORATE COMPLIANCE WORKSHOP 2003, at 627, 633 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1378, 2003) (providing further description of the anti-money laundering requirements).

186. *See* 31 U.S.C. § 5318(*l*) (requiring financial institutions to make efforts to verify new customers, maintain records of the information used for verification, and consult terrorist lists); Jeffrey P. Taft & Christina A. LaVera, *The Changing Landscape of Federal Money Laundering Laws: An Overview of the USA PATRIOT ACT and Related Developments*, 57 CONSUMER FIN. L. Q. REP. 109, 111–12 (2003) (providing more information on Customer Identification Verification). In addition to the previously described regulations, financial institutions are required to file Currency Transaction Reports, which include reports on "coins and currency received in a *nonfinancial* trade or business." William J. Sweet, Jr. et al., *Summary of the USA PATRIOT ACT of 2001 Anti-Money Laundering Provisions, in* NEW RESPONSIBILITIES & OBLIGATIONS UNDER THE MONEY LAUNDERING ABATEMENT & FINANCIAL ANTI-TERRORISM ACT OF 2001, at 55, 68 (PLI Corp. Law & Practice, Course Handbook Ser. Number B-1289, 2002). Further, FinCEN increased regulation on insurance companies by requiring them to implement anti-money laundering programs and file Suspicious Activity Reports. Press Release, Fin. Crimes Enforcement Network, Insurance Companies Required to Establish Anti-Money Laundering Programs and File Suspicious Activity Reports (Oct. 31, 2005), *available at* http://www.fincen.gov/newsrelease10312005.pdf.

187. *See* Karen E. Hoffman, *AML Security Emphasis Detection and Prevention*, BANKING STRATEGIES, Jan./Feb. 2005, at 54, 56 (indicating that in both 2003 and 2004 banks spent $125 million a year on FinCEN regulatory compliance); Zaring & Baylis, *supra* note 149, at 1413 (noting that the money-laundering laws may have total costs around $7 billion).

188. *See* Zaring & Baylis, *supra* note 149, at 1406–07 (discussing the role of consultants).

189. *See, e.g.*, *In re* Wachovia Bank, No. 2010-1, FinCEN Assessment of Civil Money Penalty (Mar. 12, 2010), *available at* http://www.fincen.gov/news_room/ea/files/100316095447.pdf (assessing a $110 million fine); *In re* Doha Bank, No. 2009-1, FinCEN Assessment of Civil Money Penalty (Apr. 20, 2009), *available at* http://www.fincen.gov/news_room/ea/files/Doha.pdf (assessing a $5 million fine); *In re* United Bank of Africa, No. 2008-3, FinCEN Assessment of Civil Money Penalty (Apr. 22, 2008), *available at* http://www.fincen.gov/news_room/ea/files/UBAAssessment.pdf (assessing a $15 million fine); *In re* El Noa Noa Corp., No. 2008-2, FinCEN Assessment of Civil Money Penalty (Apr. 14, 2008), *available at* http://www.fincen.gov/news_room/ea/files/ElNoaNoa.pdf (assessing a $12,000 fine); *In re* Sigue Corp. & Sigue, LLC, No. 2008-1, FinCEN Assessment of Civil Money Penalty (Jan. 24, 2008), *available at* http://

c. Committee on Foreign Investment in the United States

Treasury's new focus on national security is not restricted to FinCEN and OFAC. As the head of CFIUS, Treasury works with a number of national security- and international commerce-related departments to supervise foreign acquisitions of American assets.[190] Treasury occasionally regulates as a member of interagency committees in the executive branch in other ways as well,[191] but CFIUS may be its most notable (and therefore exemplary) institution. These committees enjoy plenty of discretion, are not subject to judicial review, and, because they do not themselves promulgate rules, are not subject to OMB oversight.[192] But, as we will see, the legislature can provide a great deal of oversight in this area and does in the case of CFIUS. Indeed, generally speaking, it is the prospect of better legislative oversight that might provide the most relief to good governance worriers when confronted with the discretion the Department now enjoys.

CFIUS is perhaps the Treasury outfit most on the minds of Wall Street investment bankers and Washington deal lawyers, for it can impose the death penalty on deals that involve foreign acquirers.[193] The justification for CFIUS's role is that the government should be able to nix assets acquisitions that would threaten U.S. security. It monitors, for example, the purchasing of property near sensitive military bases and recently rejected a

www.fincen.gov/news_room/ea/files/sigue_assement_final.pdf (assessing a $12 million fine). A list of other enforcement actions are available on FinCEN's website. *Enforcement Actions*, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/news_room/ea/ (last visited Oct. 22, 2010).

190. *See* Zaring, *supra* note 40, at 83 (describing the role of CFIUS); *Office of Investment Security: Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEPARTMENT TREASURY, http://www.treas.gov/offices/international-affairs/cfius/members.shtml (last updated Feb. 19, 2009) (identifying the members of CFIUS and offices that participate in CFIUS's activities).

191. In addition to CFIUS, Treasury is a member of other interagency committees. *E.g.*, *Federal Interagency Committee on Indoor Air Quality*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/iaq/ciaq/index.html#CIAQ_Members (last visited Oct. 22, 2010); *About the Interagency Coordinating Council on Emergency Preparedness and Individuals with Disabilities*, U.S. DEPARTMENT HOMELAND SECURITY, http://www.dhs.gov/files/committees/editorial_0592.shtm (last modified Oct. 6, 2008).

192. *See* Jennifer Cooke, *Finding the Right Balance of Sovereign Wealth Fund Regulation: Open Investment vs. National Security*, 2009 COLUM. BUS. L. REV. 728, 772 (asserting a complete absence of judicial review of CFIUS); Zaring, *supra* note 40, at 98 ("CFIUS's evolving legal authority is a story about substantive flexibility . . . .").

193. *See* Zaring, *supra* note 40, at 107 n.111 (describing the oft threatened use of a blocked transaction).

proposed acquisition of a gold mine by a Chinese firm that ventured too close to a U.S. air force base in Nevada.[194]

Like Treasury's other security-focused pursuits, however, CFIUS does not follow traditional administrative procedure. Although OFAC and FinCEN are subject to some judicial review, CFIUS operates secretly and is not subject to judicial review of any sort.[195] If OFAC illustrates a rights problem of civil tools being repurposed for law enforcement, and FinCEN is an example of how this uneasy repurposing can burden regulated industry, CFIUS represents a different kind of law enforcement; it is law enforcement as a congressional notification service. That is, rather than rejecting many foreign transactions in its own right, it keeps Congress apprised of potential acquisitions, which in turn prompts the legislature to raise a fuss when it deems any particular acquisition to be problematic.[196] This role is more evident from the Committee's practice than its mandate.

Like that of many of Treasury's enterprises, CFIUS's legal authority is replete with discretion.[197] For example, the Committee is charged with reviewing proposed foreign acquisitions to determine whether they will impair "national security," a term "interpreted broadly and without regard for particular industries," its scope lying entirely "within the President's discretion."[198] Thus, even if CFIUS were subject to judicial review, there would likely be no law to apply that would render reviewable CFIUS's interpretations of its broad jurisdictional mandate.[199] How would a court review an agency's interpreta-

194. Eric Lipton, *Chinese Withdraw Offer for Nevada Gold Concern*, N.Y. TIMES, Dec. 22, 2009, at B3, *available at* 2009 WLNR 25712705.

195. *See supra* note 192 and accompanying text.

196. *See generally* Zaring, *supra* note 40.

197. *See supra* note 192 and accompanying text (describing the lack of judicial review over CFIUS).

198. David Zaring, *What Exactly Can Foreign Sovereigns Purchase in America?*, THE CONGLOMERATE (Apr. 11, 2008), http://www.theconglomerate.org/2008/04/what-exactly-ca.html; *see also* Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 72 Fed. Reg. 70,702, 70,705 (Nov. 21, 2008) (stating that the Committee will address national security concerns raised by "particular transaction[s]," "rather than identifying certain sectors in which foreign investment is prohibited, restricted, or discouraged"); Zaring, *supra* note 40, at 84.

199. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 601 (1988) (concluding that, as a statutory matter, employment decisions by the director of the CIA are not subject to judicial review, and suggesting that employment in a national security agency is essentially unreviewable). Still, the question of how *Webster*'s statutory national security exemption applies in other contexts is contested.

tion of what constitutes "critical infrastructure" or what threatens U.S. national security? This observation might lead some to conclude that if the United States had a vibrant nondelegation doctrine, CFIUS would probably violate it.[200]

In a sense, the Committee's broad remit seems to be constrained only by its deadlines in reviewing foreign acquisitions. Potential foreign acquirers submit their deals for evaluation over a thirty-day period, and, if CFIUS decides to investigate further, a subsequent forty-five day window.[201] The Committee then sends a recommendation to the President, who either blocks the transaction or permits it.[202] CFIUS may also recommend that the President impose—in the form of "mitigation agreements"[203]—a variety of conditions on the acquiring company, such as preventing foreigners' access to the operations of the target asset and guaranteeing U.S. law enforcement access to the firm's resources.[204] CFIUS concludes any such agreements, and it seems that the great majority of them are modest forms of boilerplate.[205]

If CFIUS is not subject to robust constraints by the courts or the Executive, the real locus of its restraint is the increasing supervision exercised by Congress. Congress has regularly objected to foreign acquisitions ever since the Committee was founded, to the point where some foreign acquirers consult with Congress before embarking on mergers.[206] CFIUS itself rarely

See Zaring, *supra* note 40, at 84 n.8 (questioning the scope of *Webster*). The terms that trigger CFIUS investigations, such as "covered transaction," "foreign person," "U.S. person," "critical infrastructure," and "national security," are either defined broadly or left undefined. *See* Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 21,861, 21,861–68 (Apr. 23, 2008) (codified at 31 C.F.R. pt. 800) (providing a lengthy discussion of covered transactions and definitions). CFIUS's proposed definitions of these terms generally offer examples of terms but maintain flexibility to reach other, dissimilar matters. *Id.*

200. *See* Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 489–507 (1985) (describing the U.S. delegation doctrine as "moribund" and critiquing efforts to revive it).

201. 50 App. U.S.C. § 2170(b) (2006). This grant of substantive power is increasingly common following *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 864–66 (1984).

202. 50 App. U.S.C. § 2170(b)(3)(B), (d).

203. The agreements are so labeled because the acquirer agrees to take steps to "mitigate" the threat to national security. *Id.* § 2170(*l*)(1).

204. *Id.*

205. *See* Zaring, *supra* note 40, at 117–21 (discussing "boilerplate" agreements).

206. *See* Council on Foreign Relations, Global FDI Policy: Correcting a Protectionist Drift (June 26, 2008) (transcript available at http://www.cfr.org/

gets in the way of foreign acquisitions, and indeed, has nixed less than a handful of them since its founding in the mid-1970s.[207] Instead, its main role is to bring mergers to the attention of Congress, where given the right level of outrage, the transactions are more likely to be challenged, through a variety of committee-oriented legal and political means.[208] With CFIUS, we see that some of Treasury's operation is supervised in a different way than are other agencies, rather than not supervised at all. Indeed, congressional oversight of CFIUS is representative of how Congress, rather than the courts, can exercise restraint over Treasury.

d. Conclusion

Everything Treasury does in relation to national security is interesting, and little of it is obviously within the traditional expertise of an agency whose *raison d'être* used to be getting and spending money.[209] Nonetheless, as the de facto regulator of the financial system, Treasury's authority over banks and thrifts has positioned it to play a role in antiterrorism and mergers and acquisitions, two of the subjects of many a newspaper headline over the last decade.[210] The Department did not used to do these things, but now it does, and in each of them it enjoys less judicial review than would criminal law enforcers, or, for example, domestic antitrust regulators evaluating a proposed merger. In this way, the Department expanded its turf and moved away from the tough judicial oversight presented by criminal procedure, though such toughness is occasionally debated,[211] and from the APA.

publication/16695/global_fdi_policy.html) (discussing how companies get approval from members of Congress before engaging in transactions). For more on Congress's role, see Jonathan C. Stagg, Note, *Scrutinizing Foreign Investment: How Much Congressional Involvement Is Too Much*? 93 IOWA L. REV. 325, 342 (2007) ("Congress has chosen to take action in several instances where it considered a transaction a threat to national security, even after CFIUS conducted an investigation and approved the deal.").

207. *See* Yvonne C.L. Lee, *The Governance of Contemporary Sovereign Wealth Funds*, 6 HASTINGS BUS. L.J. 197, 209 (2010) (citing examples of foreign investments facing opposition from Congress despite executive approval); Stagg, *supra* note 206, at 340 n.116 (noting, for example, that in 2004 CFIUS only recommended blocking one out of forty-five such transactions).

208. *See* Lee, *supra* note 207.

209. OFFICE OF THE CURATOR, *supra* note 77, at 1.

210. *See, e.g.*, Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1, *available at* 2006 WLNR 10871009.

211. *See* Jack Balkin & Sanford Levinson, *Understanding the Constitution-*

Treasury's increasingly important national security role, in other words, affects a great deal of daily economic operations. Nevertheless, Treasury enjoys a vast amount of discretion in overseeing those operations *because of its national security claims*. In this sense, its new remit poses not only a case study in how bureaucratic authority can fill the interstices of oversight, but also a question about the appropriate limits of unreviewable national security claims.[212] As Treasury continues to grow its operations in this area, the importance of this question will likely grow as well.

II. THE FINANCIAL CRISIS AND TREASURY'S ADMINISTRATION

If a review of Treasury's normal operations inspired by its own organizational chart suggests that much of its activities exist outside the realm of ordinary administrative procedure, then we might expect Treasury to operate outside those confines when it faces dramatic problems like the financial crisis. And Treasury's bold steps during that crisis were, in fact, unique by the standards of conventional administrative law. But the argument here is not that Treasury's actions during the crisis were unique, but rather that they were analogous to the way the Department ordinarily acts: namely, outside the realm of ordinary administrative procedure.[213]

al Revolution, 87 VA. L. REV. 1045, 1056 (2001) ("Criminal procedure has been in retrenchment from the days of the Warren Court almost continuously since the 1970s.").

212. Of course, the extent of unreviewability on the basis of national security and executive branch prerogative has, in other contexts, spawned a large legal literature and series of Supreme Court cases—as exemplified by the extensive litigation over executive detentions, extraordinary renditions, and conditions of confinement for potential terrorists since 9/11. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006) ("[The President] may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."). *See generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) (examining whether the President possesses inherent war powers that may be used against the will of Congress); Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 SUP. CT. REV. 1 (discussing the tendency of the judiciary to require clear direction from Congress before allowing serious executive intrusion into fundamental liberties); Posner & Vermuele, *supra* note 4 (comparing emergency governance during the 9/11 attacks and the 2008 financial crisis).

213. *See supra* notes 53–58 and accompanying text (explaining how Treasury rarely follows standard administrative procedures).

To some, Treasury's actions looked like a department on a rampage.[214] Other regulators of distressed financial institutions, such as the SEC and FDIC, which both had a claim to supervising the safety and soundness of investment and other banks, played decidedly secondary roles during the crisis, as Treasury flexed its muscles and led the way, often quite dramatically.[215]

To be sure, the crisis encapsulated what is notable about Treasury's unique form of administration. It first maximized its authority by doing deals, rather than by regulating. Dealmaking permeated even the staffing of the government's response—its financial crisis team was comprised largely of investment bankers, and led by Secretary Paulson, a veteran dealmaker who served as the Chief Executive Officer of Goldman Sachs.[216] None of this was reviewed by a court—as Treasury no doubt expected—and all of it was made without any regard for the niceties of corporate law by the states.[217]

If Treasury's initial dealmaking approach afforded it maximum discretion, the new programs it created to bail out, destroy, or recapitalize struggling financial intermediaries were also subject to the aggressive interpretations that have become a hallmark of Treasury's administrative procedure. Treasury's bailout of the MMF industry is an instructive example of where the history and evolution of Treasury's authority—again, away from ordinary procedure and into something unique—has taken the Department. Section A considers this example. It is also worth assessing the successes (or lack thereof) during the financial crisis of the ordinary protection private parties enjoy

214. *See* Lawson, *supra* note 4, at 57–58 (arguing that Congress and the President were out of control when they handed Treasury unprecedented emergency authority).

215. *See* U.S. SEC. & EXCH. COMM'N, SEC'S OVERSIGHT OF BEAR STEARNS AND RELATED ENTITIES: THE CONSOLIDATED SUPERVISED ENTITY PROGRAM (2008), *available at* http://www.sec.gov/about/oig/audit/2008/446-a.pdf (noting SEC's role in supervising investment banks); *FDIC Mission, Vision, and Values*, FED. DEPOSIT INS. CORP., http://www.fdic.gov/about/mission/index.html (last updated May 4, 2009) (discussing the FDIC's mission of "examining and supervising financial institutions for safety and soundness and consumer protection").

216. *See* Neil Irwin, *On the Money at Treasury; Working Behind the Scenes, Paulson Had His Department Ready to Confront the Credit Crisis*, WASH. POST, Nov. 20, 2007, at D01 (discussing Paulson's Goldman Sachs background and Treasury's use of dealmaking).

217. *See* Davidoff & Zaring, *supra* note 28, at 467 (explaining that Treasury acted as a dealmaker whose primary focus was not on strict compliance with contract, securities, and corporate law).

against overweening government regulation: lawsuits. Section B evaluates the record of judicial review during this period.

A. THE MONEY MARKET FUND BAILOUT AS A CASE STUDY

Treasury turned itself into an on-the-fly FDIC for the MMF industry during the financial crisis. A description of how it did so illustrates Treasury's use of discretion—in this case to both save and remodel an entire asset class, at a cost of billions, and with the stroke of a pen and a little executive branch consultation.

The first MMF was the Reserve (later the Reserve Funds), developed by Bruce Bent and Henry B.R. Brown in 1970. The idea was to take cash and invest it in short-term securities that were like cash, because they were liquid (i.e., could be sold), constantly maturing (i.e., they returned the principal to investors shortly after they were bought), and were reasonably safe.[218] In this way, MMFs were designed to be relatively riskless liquid assets, albeit with a return only slightly higher than holding cash.[219] Catastrophe was thought to be unlikely given the asset classes in which MMFs would typically invest—government securities, certificates of deposit, and asset-backed commercial paper.[220] MMFs built a strong business on the basis of offering this liquid, slightly-better-than-cash product to a variety of investors.[221] The funds were often used by institutional investors for their short-term cash pool, but individual investors also invested heavily in them.[222]

The funds were not exempt from regulation; they were deemed to be covered by the SEC's Investment Company Act of 1940, as implemented, specifically, by Rule 2a-7.[223] That rule included requirements that MMFs not acquire instruments

218. Robert N. Sobol, *Enhanced Cash "Yield Plus" Funds: The Treasurer's New Cash Management Complement to Money Market Funds*, 7 J. INVESTMENT COMPLIANCE 60, 60 (2006) (stating that Bruce Bent invented money market funds in 1970 and offered them to the public in 1971); Bruce Weber, *Henry B.R. Brown, Who Opened Money Markets to Masses, Dies at 82*, N.Y. TIMES, Aug. 15, 2008, at B5, *available at* 2008 WLNR 15305678 (stating that Henry B.R. Brown and Bruce Bent collaborated in starting the first money market fund, the Reserve).

219. *See* Sobol, *supra* note 218, at 61 (describing how MMFs are known for their relative stability).

220. *Id.* at 61 (noting these asset classes, their traditional safety, and the general willingness of funds to protect their investors' principal).

221. Weber, *supra* note 218.

222. *See id.* (noting total MMF assets at nearly $3.6 trillion in 2008).

223. 17 C.F.R. § 270.2a-7 (2010).

with a remaining maturity greater than 397 days; that they maintain a stable net asset value per share; that they not maintain a dollar-weighted average portfolio that exceeded ninety days; that they limited investments to securities that present minimal risks; and that they met diversification requirements.[224]

The problem with MMFs began in September 2008 with the news that the Reserve Primary fund, the progeny of the first fund started by Bent and Brown, had "broken the buck"; that is, its net asset value fell below one dollar.[225] The fund immediately announced its winding up, and reported that customers would only receive ninety-seven cents on each dollar they invested on September 16, 2008.[226] The fund had moved out of super safe Treasury bonds and, increasingly, into commercial paper and other unsecured short-term lending done by businesses, including Lehman Brothers, where it had, at the time of the bank's failure, $785 million of short-term financing outstanding.[227] Reserve Primary's assets in commercial paper increased from one percent in July 2007 to approximately sixty percent in July 2008.[228] Another MMF failed two days later, on September 18, 2008, when Putnam Investments was forced to liquidate its Putnam Prime Money Market fund, a $12.3 billion fund serving professional investors.[229]

The results were close to catastrophic for the industry, as investors left MMFs in droves for safer asset classes. In less than a week, almost $170 billion of investor funds flowed out of

224. *See id.*; Sobol, *supra* note 218, at 61 (referring to these requirements).

225. Diana B. Henriques, *Money Market Fund Warns Its Customers Face Losses*, N.Y. TIMES, Sept. 17, 2008, at C1, *available at* 2008 WLNR 17634393 (noting the rareness of MMFs breaking the buck). The one other instance of an MMF breaking the buck occurred in 1994, when Community Bankers Mutual Fund in Denver liquidated. *See* Christopher Condon, *Reserve Primary Money Fund Falls Below $1 a Share*, BLOOMBERG.COM, Sept. 16, 2008, http://www.bloomberg.com/apps/news?pid=20601087&sid=a5O2y1go1GRU (stating that Community Bankers Mutual Fund liquidated because of investments in interest-rate derivatives).

226. Tara Siegel Bernard, *Money Market Funds Enter a World of Surprising Risk*, N.Y. TIMES, Sept. 18, 2008, at C13, *available at* 2008 WLNR 17703966.

227. John Waggoner, *Money Market Fund Breaks a Buck*, USA TODAY, Sept. 17, 2008, at 4B, *available at* 2008 WLNR 17632868.

228. INV. CO. INST., REPORT OF THE MONEY MARKET WORKING GROUP 54–55 (2009), *available at* http://www.ici.org/pdf/ppr_09_mmwg.pdf (describing how the growth in its commercial paper assets increased the Primary Fund's yield, doubling its assets from $30 billion to $67 billion).

229. Diana B. Henriques, *Professional Money Fund Is Closed by Putnam*, N.Y. TIMES, Sept. 19, 2008, at C1, *available at* 2008 WLNR 17804319.

money market institutions.[230] And because MMFs were the leading purchasers of commercial paper at a time when credit from any other source was largely unavailable, Treasury worried that the problems would spill over into the broader economy, in which the larger businesses rely, in substantial part, on commercial paper to finance their working capital.[231]

Treasury flexed its regulatory muscle to preserve the viability of the country's short-term debt purchasers, announcing on September 19 that it would insure the funds up to $50 billion.[232] Its goal was to "provide[] support to investors in funds that participate in the program and [assure that] those funds will not 'break the buck,'" in order to "alleviate investors' concerns about the ability for money market mutual funds to absorb a loss."[233] Nearly all MMFs became part of the program.[234]

Treasury created and financed the program through a novel use of an obscure fund on hand for international currency crises. It justified the program by recourse to the aging statute that gave Treasury the ability, in its view, to disburse those assets to a domestic financial industry in trouble. Treasury rooted its power to insure the money market in the Gold Reserve Act of 1934, which created the Exchange Stabilization Fund and allowed the Department to hold gold and various currencies to deal with shocks to the economy.[235] Congress appropriated $2 billion to the Exchange Stabilization Fund (ESF) in 1934

230. Diana B. Henriques, *Treasury to Guarantee Money Market Funds*, N.Y. TIMES, Sept. 20, 2008, *available at* 2008 WLNR 17890780 ("Money funds held more than $3.4 trillion in investor funds, as of the most recent industry tally released Thursday, down almost $170 billion from the previous week.").

231. *See* Press Release, U.S. Dep't of the Treasury, Treasury Announces Guaranty Program for Money Market Funds (Sept. 19, 2008), *available at* http://www.treasury.gov/press/releases/hp1147.htm (describing MMFs as "a fundamental source of financing for our capital markets and financial institutions").

232. Henriques, *supra* note 230 ("The Treasury Department announced that, at least temporarily, it would guarantee money market funds against losses up to $50 billion."); Press Release, U.S. Dep't of the Treasury, *supra* note 231 (announcing the guaranty program and stating that the assets for the program will come from the Exchange Stabilization Fund that was established by the Gold Reserve Act of 1934).

233. Press Release, U.S. Dep't of the Treasury, *supra* note 231; *see also* Davidoff & Zaring, *supra* note 28, at 506–07 (discussing Treasury's attempt to stabilize the market).

234. Mark Jewell, *Money-Market Funds Flock to Guarantee Program*, USA TODAY, Oct. 10, 2008, http://www.usatoday.com/money/economy/2008-10-10-3754594472_x.htm.

235. Press Release, U.S. Dep't of the Treasury, *supra* note 231; *Exchange Stabilization Fund: Introduction*, U.S. DEPARTMENT TREASURY, http://www.treas.gov/offices/international-affairs/esf/ (last updated Aug. 6, 2007).

and by September 30, 2009 the Fund had assets worth approximately \$105 billion, which Treasury used to back the money market industry.[236] It justified the repurposing of the ESF with reference to Congress's somewhat inscrutable guidance about the fund.[237] As amended in the 1970s, the Gold Reserve Act provided that:

> The Department of the Treasury has a stabilization fund. . . . Consistent with the obligations of the Government in the International Monetary Fund on orderly exchange arrangements and a stable system of exchange rates, the Secretary, with the approval of the President, may deal in gold, foreign exchange, *and other instruments of credit and securities*.[238]

Although funds like Reserve Primary dealt largely in dollars, and the Gold Reserve Act was aimed at non-dollar denominated wealth, Treasury interpreted "other instruments" to allow it to provide guarantees for MMFs.[239] As required by the statute, Treasury then obtained the President's approval for its interpretation.[240]

In this way, Treasury made itself into a deposit insurer for the entire money market industry. In addition, two months after Treasury set up this insurance program, it made an agreement with Reserve to purchase any government securities the fund was unable to sell at full value—that is, Treasury set up after-the-fact insurance for the creditors of the first failed fund.[241]

236. OFFICE OF INSPECTOR GEN., DEP'T OF THE TREASURY, OIG-10-027, AUDIT OF THE EXCHANGE STABILIZATION FUND'S FISCAL YEARS 2009 AND 2008 FINANCIAL STATEMENTS 2, 13 (2009), *available at* http://www.treas.gov/offices/international-affairs/esf/congress_reports/ (follow "ESF Annual Report for Fiscal Year 2009" hyperlink). The appropriated capital was later reduced to \$200 million. *Id.* at 2.

237. Press Release, U.S. Dep't of the Treasury, *supra* note 231.

238. 31 U.S.C. § 5302(a)(1), (b) (2000) (emphasis added).

239. *See id.* § 5302(b) (listing a series of assets that conspicuously omits U.S. dollars).

240. *Id.*; *see also* Davidoff & Zaring, *supra* note 28, at 507.

241. Diana B. Henriques, *Treasury to Support a Frozen Money Fund*, N.Y. TIMES, Nov. 21, 2008, at B6, *available at* 2008 WLNR 22234562. The agreement was a condition of the insurance program. *See id.* ("The purchase agreement was a condition that the Treasury Department imposed on the fund before accepting it into the temporary money fund insurance program. . . . If the fund had been insured with no strings attached, it could have simply dumped its remaining \$6.1 billion in government securities without worrying that such a fire sale would cause its per-share value to fall below a dollar because the Treasury would have been required to cover any shortfall.").

Treasury's role in the money market industry has not been infinite; its guarantee expired on September 19, 2009.[242] But it was quite a regulatory development in MMF oversight, and one that had little to do with the SEC, which putatively regulated the funds.[243] Treasury's actions were not reviewed by the courts, had only a weak legislative hook, and occasioned no review by OMB. The MMF bailout is indicative of the way Treasury dealt with the crisis and representative of the way it usually acts, crisis or no: without judicial review, with almost no legislative oversight, and with little evaluation of the budgetary consequences elsewhere in the executive branch.

B. JUDICIAL REVIEW OF THE FINANCIAL CRISIS

During the crisis, the role of courts in the MMF bailout was exemplary, rather than unique. In much of the government's response to the financial crisis there has been little judicial review—for standing reasons, because the financial industry has not tried to take Treasury to court, and because courts tend to avoid passing judgment on Treasury policies, to the point where the reticence almost looks cultural, rather than grounded in any particular doctrine. To be sure, it is early—courts often intervene in structuring financial regulation very late in the process.[244] But the passive virtues deployed by the courts during the crisis are not so different, as we have seen, from the ordinary judicial scrutiny to which the Department is exposed.

Indeed, the final version of the bailout statute, the Emergency Economic Stabilization Act (EESA), included a provision for such review,[245] which must have been somewhat surprising

242. Press Release, U.S. Dep't of Treasury, Treasury Announces Expiration of Guarantee Program for Money Market Funds (Sept. 18, 2009), *available at* http://www.ustreas.gov/press/releases/tg293.htm.

243. *See* 17 C.F.R. § 270.2a-7 (2010) (regulating MMFs under the auspices of the SEC).

244. For example, the Sarbanes-Oxley Act, which created the Public Company Accounting Oversight Board (PCAOB), was enacted in 2002, but the Supreme Court did not rule on the PCAOB's constitutionality until 2010. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 101–109, 116 Stat. 745 (codified at 15 U.S.C. § 7201 (2006)); David Zaring, *Previewing the Business Case Decisions Tomorrow*, THE CONGLOMERATE (June 27, 2010), http://www.theconglomerate.org/2010/06/previewing-the-business-case-decisions-tomorrow.html (discussing a Supreme Court case assessing the constitutionality of the PCAOB).

245. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 119, 122 Stat. 3782, 3787 (codified at 12 U.S.C. § 5229 (2006)).

to a department unaccustomed to it.[246] But Congress's insistence on some judicial review did not, in the end, result in much actual supervision.[247] Seemingly blockbuster litigation soon fizzled: Citigroup pursued some relatively halfhearted litigation against Wells Fargo for slipping in a high bid, with Treasury's blessing, before it could consummate its proposed merger with Wachovia.[248] But that litigation went nowhere.[249]

There was also a colorable, if politically tinged, claim against the auto bailout: some dissident debtholders of Chrysler unsuccessfully argued that the Troubled Asset Relief Program (TARP) should not be used for auto manufacturers.[250] But this sort of challenge was rare, and it never reached a federal appellate court for consideration on the merits. The rest of the litigation arising under the TARP was mounted by cranks and long shots. Pro se homeowners, for example, eyeing mortgage relief tried to argue that the TARP obligated the banks to refinance their loans.[251] Pro se taxpayers brought their own crea-

246. *See supra* note 24 and accompanying text.

247. Congress provided in section 119 of the EESA that "[a]ctions by the Secretary pursuant to the authority of this Act shall be subject to chapter 7 of title 5, United States Code, including that such final actions shall be held unlawful and set aside if found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law." Emergency Economic Stabilization Act § 119(a)(1). It confusingly added that "[n]o injunction *or other form of equitable relief* shall be issued against the Secretary for actions pursuant to section 101 [the power granting section] . . . other than to remedy a violation of the Constitution." § 119(a)(2)(A) (emphasis added). But because arbitrary and capricious review is generally thought of as equitable relief, it was never entirely clear what exactly Congress wanted the courts to do when reviewing an admittedly broad swath of Treasury's bailout implementation actions. For more on this, see Davidoff & Zaring, *supra* note 28, at 520.

248. Wachovia Corp. v. Citigroup, Inc., 634 F. Supp. 2d 445 (S.D.N.Y. 2009) (denying Citigroup's motion for judgment on the merger and holding that EESA could retroactively disrupt exclusivity agreement between the parties); Citigroup, Inc. v. Wachovia Corp., 613 F. Supp. 2d 485 (S.D.N.Y. 2009) (holding that the bank's state law claims against two competitors were not completely preempted by EESA).

249. *See Wachovia Corp.*, 634 F. Supp. 2d 445; *Citigroup, Inc.*, 613 F. Supp. 2d 485.

250. This claim was dismissed, somewhat bizarrely, for lack of standing. *In re* Chrysler LLC, 405 B.R. 79, 83 (S.D.N.Y. 2009) (dismissing a claim that TARP could not be used to bail out an auto manufacturer).

251. Mangosing v. Wells Fargo Bank, N.A., No. CV-09-0601-PHX-FJM, 2009 WL 1456783, at *1 (D. Ariz. May 22, 2009) (dismissing a pro se claim that EESA obligated a bank to renegotiate a mortgage); *see also* Ramirez v. Litton Loan Servicing LP, No. CV-09-0319-PHX-GMS, 2009 WL 1750617, at *1 (D. Ariz. June 22, 2009); Santos v. Countrywide Home Loans, No. Civ. 2:09-02642 WBS DAD, 2009 WL 3756337, at *2–3 (E.D. Cal. Nov. 6, 2009); Farrell v. United States, No. 09-209C, 2009 WL 3719211, at *1 (Fed. Cl. Oct. 30, 2009).

tive claims against the legality of the TARP.[252] None of these claims went anywhere.

So it was for Treasury even before the passage of the legislation. Before the TARP, some Bear Stearns shareholders pursued state court litigation against Bear Stearns itself for the way that it accepted its Treasury-urged, but very low-priced, sale.[253] State courts in New York and Delaware resisted efforts to get them to deploy basic principles of corporate governance to police the mergers encouraged by the Department.[254]

On the one hand, it was never obvious that Treasury would be subjected to serious litigation over its response to the financial crisis. The standing problems were always difficult, and the industry was reticent to stand on every jot and tittle of its rights as the government bailed it out. On the other hand, however, the statutes did provide for judicial review. Treasury does not deal with judicial review often, and if anything, the judicial participation in the government's response to the crisis exemplifies just how far the agency has gotten away from judicially enforced administrative law.

III. THREE VERSIONS OF ADMINISTRATIVE LAW

This Article has analyzed Treasury's existence outside the usual ambit of administrative procedure and the process whereby it came to occupy this unique position. The implication is not necessarily that Treasury is a rogue agency, but rather that it is a different one. A central point is that administrative law conventionally understood misses a great swath of actual administration, in addition to what lawyers do to affect it.[255] Treasury has a great deal of flexibility, and this Article so far

252. *See* Murray v. Geithner, 624 F. Supp. 2d 667 (E.D. Mich. 2009) (permitting a taxpayer claim that the bailout of AIG, which has Sharia compliant products, violated the Establishment Clause).

253. *See, e.g.*, *In re* Bear Stearns Cos. S'holder Litig., C.A. No.3643-VCP, 2008 WL 959992 (Del. Ch. Apr. 9, 2008); *In re* Bear Stearns Litig., 870 N.Y.S.2d 709 (N.Y. Sup. Ct. 2008).

254. *See* Davidoff & Zaring, *supra* note 28, at 483, 535 ("[T]hose state officials with the capacity to act . . . either got[] out of the way of or cooperated with federal officials.").

255. This has been a longstanding project of Jerry Mashaw. *See, e.g.*, Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267 (1990). Frederick Schauer has made analogous claims about constitutional law—that the subject concerns only a subset (and in his view a relatively minor subset) of government. *See* Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 8 (2006).

has documented its flexibility in some detail. The implication drawn here, however, is not that the Department is lawless. Rather, it is better understood as regulated in a different, less onerous, way than other agencies.

Still, Treasury has managed its political oversight, both within the executive branch, and in Congress, quite spectacularly. Treasury has managed to develop a unique claim to expertise, especially when it is acting ministerially to implement the budget, and, to a degree, to administer tax policy. But Treasury has managed to avoid a great deal of active congressional oversight because of its colorable claim of expertise in the areas of national security and international affairs. In what follows, I show how what Treasury has done, though in many ways unique, offers insight into a more complete picture of administrative law. The conclusion then offers a modest prescription for increased supervision of Treasury without undermining its unique approach to administration.

Although most administrative law syllabi and scholars focus on one administrative law regime, it might be better to conceive of three types of regimes that prevail in the United States, with Treasury exemplifying one of them. The best-known is that supervised by the courts and subject to the rules of the APA. The EPA and SEC, with their consumer-protection-oriented missions, are examples of such agencies. These agencies have an adversarial relationship with regulated industry, and they often face challenges from active and energetic consumer advocates or other nongovernmental organizations.[256] Litigation is common, so the context of these agencies' rules will ultimately depend on judicial decisionmaking.

The second type of administrative law regime is a more coordinated model—that is, coordinated with the stakeholders involved in the agencies' remit. This might be called a constituency, or interest group representation approach.[257] The Department of Housing and Urban Development (HUD) and the federal government's welfare administration may be examples of this model, where states and cities, as well as interest groups, participate in the policymaking and funding decisions

256. *See, e.g*, NetCoalition v. SEC, Nos. 09-1042, 09-1045, 2010 WL 3063632 (D.C. Cir. 2010) (petitioning for review of an SEC order); Our Children's Earth Found. v. EPA, 527 F.3d 842 (9th Cir. 2008) (alleging that the EPA has failed to comply with the Clean Water Act).

257. Zaring & Baylis, *supra* note 149, at 1372 n.48 (describing the "interest representation" model).

of the agencies quite informally, or through a procurement process that rarely sees the light of judicial day.[258] Sometimes agencies that pursue their bureaucratic missions this way do so through contracts between the government and private parties that are designed to pursue public ends through private means.[259] Sometimes, these agencies make policy through conditions imposed on the block grants provided states, localities, or other clients.[260] And sometimes the government will avoid APA requirements through guidance, best practices, and public-private partnerships, where administrative oversight is entirely lacking, and agency policy is effectuated through contract and advice.[261]

Finally, the Treasury model avoids the constraints of administrative law by either taking advantage of its exemptions, or by ignoring the traditional administrative structure altogether. The Treasury model of administrative law is interesting in its own right, but the Department's idiosyncrasies should not hide the fact that it is, in fact, a different approach to administration that is not completely unique. There are other agencies like Treasury, agencies that play important roles in the government without playing important roles in the judicial (or OMB) administration of the executive branch and administrative state. These departments include the pre-APA agencies, and those whose regulatory mission does not comfortably fit in a model of consumer protection or interest group representation. The most notable of these agencies are the Department of State and the Department of Defense.

The Department of State operates largely outside of judicial supervision, mostly because of the well-known deference to

258. *See* Barbara L. Bezdeck, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559, 1559 (2001) (discussing the movement of welfare policy to the state and local levels); Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 OR. L. REV. 433, 484 (2003) (discussing the role of local housing movements in influencing HUD policy).

259. Wendy Bach, *Welfare Reform, Privatization and Power: Reconfiguring Administrative Law Structures from the Ground Up*, 74 BROOK. L. REV. 275, 277 (2009) (noting that contracting out is a growing trend in welfare administration).

260. *See, e.g.*, Bezdeck, *supra* note 258, at 1559 (discussing the use of block grants in welfare administration).

261. *See generally* Dominique Custos & John Reitz, *Public-Private Partnerships*, 58 AM. J. COMP. L. 555 (Supp. 2010) (discussing public-private partnerships, the contracting out of government functions, and the lack of oversight).

the executive in foreign affairs.[262] The State Department is an agency that makes policy without following notice-and-comment procedures, and that, at least for its most important policies, need not worry about judicial review.[263]

The Department of Defense, like Treasury, also antedates some of the technical aspects of the APA.[264] It too has a foreign affairs and national security function that insulates much of what it does from judicial review.[265] And Defense's enormous procurement role has necessitated the development of a unique

262. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (explaining that the "President is the sole organ of the nation in its external relations" (citation omitted)); *see also* Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, 83 YALE L.J. 1, 3–6 (1973) (discussing *Curtiss-Wright* and its role with respect to foreign affairs).

263. *See* 5 U.S.C. § 553(a)(1) (2006) (exempting foreign affairs activities from notice-and-comment procedures). The DOJ—the other classic old-line agency in addition to Defense—is a somewhat different case, though as much as it shapes policy for other agencies, it too does not make policy through the APA. Its important criminal law function is regulated by the courts through criminal, rather than administrative, procedure. *See The Federal Courts and the Other Branches of Government: How Does the Executive Branch Interact with the Federal Courts?*, FED. JUD. CENTER, http://www.fjc.gov/federal/courts.nsf (follow "The Federal Courts and the Other Branches of Government" hyperlink; then follow "How does the Executive Branch interact with the Federal Courts?" hyperlink) (last visited Oct. 22, 2010) (noting that the DOJ "is the most frequent litigator in the federal courts"). The four original departments in the executive branch were Treasury, Foreign Affairs (which later became the State Department), War (which later became the Department of Defense), and Justice. GIDDENS-WHITE, *supra* note 35, at 13. Justice is heavily lawyered, of course, and in many cases does follow many of the dictates of administrative procedure; its extraordinary role in administrative procedure lies in its performance supervision over those agencies subject to judicial review because of the role it plays in representing those agencies in that review. *See Appellate Staff*, U.S. DEPARTMENT JUST., http://www.justice.gov/civil/appellate.htm (last visited Oct. 22, 2010). It does not do so for every agency; some have their own appellate review staffs, such as the Federal Energy Regulatory Committee and EPA. *See* Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 253–59, 287 (1996). Department of Justice lawyers cannot be fired and therefore can exercise a great deal of discretion over the positions and policies of their clients, the agencies that they represent. *See, e.g.*, John T. Noonan, *Immigration Law 2006*, 55 CATH. U. L. REV. 905, 913 (2006) (explaining that, in the immigration context, since DOJ lawyers are "[f]reed to exercise discretion," they could "transform the litigation and mediation of immigration cases").

264. The Department of War, which later became the Department of Defense, has existed since the creation of the country. GIDDENS-WHITE, *supra* note 35, at 13.

265. Am. Fed'n of Gov't Emps. v. Hoffmann, 427 F. Supp. 1048, 1079 (N.D. Ala. 1976) (explaining that judicial review of "military matters and national defense" is "properly circumscribed").

form of judicial process in which such cases rarely find their way to the D.C. Circuit, although other courts, notably the Federal Circuit and Court of Federal Claims, play a role in what it purchases and the policy it makes through that process.[266]

Treasury is, in short, not the only exceptional agency in the government when it comes to policymaking. Pre-APA agencies and principles-based regulators may look rather similar to the Agency, and be subject to similar sorts of constraints. Other agencies with exceptionalist operations will be in the same boat. To be sure, Treasury also operates outside of the ordinary province of administrative law because of its own unique pedigree, seniority, and mission. But while unique, it is not alone.

As a descriptive matter, we may also observe that agencies' approaches to administration are not stable. Other agencies will on occasion try to move away from the traditional model and toward the Treasury model.[267] These agencies may turn away from rules and toward guidance of the sort Treasury employs in its banking regulatory bureaus. Agencies moving toward the Treasury model will also have to determine if they can meet their regulatory missions using international agreements or domestic funding. Notably, Treasury's ability to find domestic resources is matched only by the Federal Reserve.[268] Furthermore, such agencies may look to build on the national security nature of their missions, which might be accomplished

266. *See, e.g.*, Rothe Dev. Corp. v. U.S. Dep't of Defense, 262 F.3d 1306 (Fed. Cir. 2001) (holding that strict scrutiny applies to an unsuccessful bidder's equal protection claim regarding a Department of Defense contract). But if the oldest of government agencies look like Treasury, the financial regulation work that Treasury does need not be insulated from court oversight or notice-and-comment. The CFTC and SEC are financial regulators that are often subject to litigation as enforcers over a recalcitrant capital market establishment. *See, e.g.*, NetCoalition v. SEC, Nos. 09-1042, 09-1045, 2010 WL 3063632 (D.C. Cir. 2010); Compania de Salvadorena de Cafe v. Commodities Futures Trading Comm'n, 446 F. Supp. 687 (S.D.N.Y. 1978). The CFTC explicitly pursues a more principles-based approach to regulation, perhaps comparably to Treasury. Fisch, *supra* note 106, at 795.

267. Note the proliferation of international offices and counterterrorism programs across agencies, including OSHA and HUD. *See* Zaring & Baylis, *supra* note 149, at 1425.

268. *See* Joel Seligman, *Let the S.E.C. Help Itself*, N.Y. TIMES, Feb. 27, 2010, at A21, *available at* 2010 WLNR 4145159 (arguing that the SEC should be able to fund itself like the Federal Reserve does); *see also* Erik Gerding, *Funding the SEC: Dependent on the Kindness of the Regulated?*, THE CONGLOMERATE (Feb. 27, 2010), http://www.theconglomerate.org/2010/02/funding-the-sec-tie-to-market-levels-but-dont-rely-on-fees.html (agreeing that the SEC should not be funded through congressional appropriations, but rather should be tied to market levels).

by expansive use of the counterterrorism policies that all agencies have been granted in the wake of 9/11.

CONCLUSION

I conclude with a modest prescription: more vigorous legislative, rather than judicial, supervision of Treasury. The normative takeaway of this Article is that it is not clear that Treasury's administrative law should be feared, though it must be understood. Its flexibility avoids some of the basic problems that exist with administrative law, including, for example, the ossification threatened by an increasingly elaborate rulemaking process.[269] It is not subject to the onerous aspects of judicial review that, for example, deterred the National Highway Traffic Safety Administration from efficiently meeting its mandate to ensure auto safety in the 1970s.[270] Indeed, APA-style procedures are not models of scientific efficiency, as George Shepherd has observed, and Treasury's avoidance of them may not always be a bad thing.[271]

Most fundamentally, if a regime is designed to give bureaucrats flexibility and hold them accountable for their results—a management technique taught in many business schools, and a practice allegedly used often during the last administration—then Treasury's administrative model might seem to be an exemplar rather than a problem. After all, Treasury has the flexibility to deploy a variety of different approach-

269. Ossification is often thought to be a function of the *Vermont Yankee* decision, which meant that rulemaking procedures alone would be the basis for judicial review; the possibly predictable effect was that such procedures ballooned in size and scope. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978) (limiting judicial review of rulemakings to the rulemaking record); Gillian E. Metzger, *The Story of* Vermont Yankee*: A Cautionary Tale of Judicial Review and Nuclear Waste*, *in* ADMINISTRATIVE LAW STORIES 124, 126 (Peter L. Strauss ed., 2006) (describing the growth of rulemaking records).

270. JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 103–04 (1990) (describing the malign influence of the courts in slowing an agency from enacting appropriate auto safety regulations).

271. As Shepherd explained regarding the enactment of the APA:

> The APA was an important and clear example of an attempt to influence outcomes by means of procedural requirements. The debates over the APA were not primarily a search for scientific efficiency, as others have argued. Instead, opposing political and economic forces fought fiercely over the APA for seventeen years because all knew and intended that the APA would influence policy outcomes profoundly.

George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1681 (1996).

es towards meeting its goals, and it is held accountable for its performance. This sort of independence is problematic when civil liberties are at stake. But with other regulatory missions, it is an organizational approach with a lengthy private-sector pedigree.

Moreover, it may be desirable to have a number of different approaches to administration available. It may be theoretically advantageous, for example, to compare regulatory regimes (although holding constant the differences between agencies in making governance comparisons is exceedingly difficult). As Mashaw has said, "[t]his idea of a quasi-independent, but internally responsible, administrative bureaucracy continues to have attraction for those who are skeptical of the efficacy of governmental accountability through either judicial review or the polarized politics of electoral institutions."[272] Furthermore, it would be possible to overemphasize the lack of constraint on the institution. Treasury is subject to the organizational constraints facing any bureaucracy, and is confronted by a well-organized bar that can agitate, press for consistency, and try to blow the whistle on bureaucratic excess, even when the prospect of litigation or congressional outrage is uncertain.[273] And Treasury has always been subject to closer oversight by the President, at least in theory.[274]

Finally, Congress itself can play an important role in supervising those areas of the government where courts and litigators fear to tread. As we know, and as this Article has noted, it already does so to some degree through the appropriations process. We have seen that the supervision is extremely close for Treasury outfits like CFIUS. Moreover, Congress has had a

272. Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1739 (2007).

273. *See, e.g.*, David Broder, *Permanent Government, Intractable Problems*, WASH. POST, Jan. 23, 1992, at C7 (discussing the difficulties faced by the Department of Health and Human Services in making positive changes within congressional limitations on appropriations).

274. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (describing the growth of presidential oversight and influence over agency decisionmaking). This Article should serve as a counterpoint to Kagan's, because the President, despite purportedly occupying a central role in agency oversight, actually does not play such a strict supervisory role over Treasury—and certainly did not during the financial crisis.

committee designed to oversee Treasury since 1816,[275] and has long required specific accounting by the Department.[276] Indeed, Treasury itself developed an internal administrative process to ensure compliance with congressional instruction.[277] Throughout its history, moreover, blue-ribbon committees have been convened at Congress's request for various supervisory duties on an as-needed basis.[278]

And it is the limitations of congressional supervision, rather than the depredations of it, that, if anything, are the aspects of administration by Treasury most in need of change. Treasury is not a perfect agency, and Congress has hardly supervised it perfectly for its own part. But on occasion, it can make its policy preferences known—as it has, for example, through the Agency's CFIUS process. Treasury is, above all, an alternative form of government regulation. As such, alternative oversight by Congress, which could preserve the uniqueness of the Department's approach to regulation, might be the best way to treat this most powerful and most often misunderstood engine of government supervision of the economy.

275. *See* Mashaw, *supra* note 272, at 1724 ("By 1816 the House had established six standing committees on expenditures—one each for the Departments of State, Treasury, War, Navy, and the Post Office, and one on public buildings.").

276. *Id*. at 1720.

277. *Id*.

278. Moreover, this is a form of supervision with historical pedigree. Treasury would sometimes be reviewed by boards of eminent officers. For example, the Chief Justice, the Treasury Secretary, the Secretary of State, and the Attorney General all inspected coinage of the mint. Mashaw, *supra* note 34, at 1301. And the Treasury Secretary, along with the Secretaries of War and State, oversaw the allocation of public land in the territories. *Id*. at 1302.