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Flexibility and Public Participation: Refining the Administrative Procedure Act’s Good Cause Exception

Nathanael Paynter†

INTRODUCTION

In response to progressively violent and widespread sex offenses and the lenient treatment of offenders, Congress enacted the Sex Offender Registration and Notification Act (SORNA), which became effective in July 2006.¹ SORNA required states to maintain a sex offender registry and created a new federal criminal offense of “failure to register.”² SORNA included an initial registration requirement that was to be in force until states could implement SORNA by the statutory deadline in 2009.³ Importantly, SORNA also granted the Attorney General “authority to specify the applicability of the requirement of this title to sex offenders convicted before the enactment of this Act or its implementation.”⁴ Pursuant to this authority, the Attorney General promulgated an interim rule on February 28, 2007, seven months following the enactment of SORNA.⁵ The interim rule applied SORNA to all sex offenders convicted prior to SORNA’s enactment.⁶ The Attorney General did not provide a period for notice and public comment before issuing the order, as is generally required by the

¹ BA 2009, Brigham Young University; JD Candidate 2012, The University of Chicago Law School.
³ The new offense covers any person who (1) “is required to register under [SORNA],” (2) “is a sex offender . . . by reason of a conviction under Federal law” or “travels in interstate or foreign commerce,” and (3) “knowingly fails to register or update a registration.” 18 USC § 2250(a).
⁴ 42 USC § 16924(a)(1).
⁵ 42 USC § 16913(d).
⁶ 72 Fed Reg 8894, 8896–97, promulgated as a final rule at 28 CFR § 72.3.
³ 397
Administrative Procedure Act (APA), but did allow for post-promulgation comment until April 30, 2007. Instead, the Attorney General invoked the “good cause” exception to the APA, which allows an agency to bypass the notice and comment requirement “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” When invoking the “good cause” exception, the agency must incorporate into the rules issued a “brief statement of reasons” for the agency’s finding that notice and comment would be “impracticable, unnecessary, or contrary to the public interest.”

The Attorney General justified his decision to forego notice and comment on two grounds. First, the Attorney General argued that making the rule immediately effective was “necessary to eliminate any possible uncertainty about the applicability of the Act’s requirements . . . to sex offenders whose predicate convictions predate the enactment of SORNA.” Second, he maintained that delaying the implementation of the interim rule would “impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions.” According to the Attorney General, delay in effective registration would result in practical dangers including “the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders.” Given these factors, the Attorney General concluded that it would be “contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. § 553(b).”

The promulgation of the interim rule by the Attorney General applying SORNA retroactively has incurred numerous challenges by sex offenders. Many of these challenges have focused on the constitutionality of the rule under separation of powers, due process, and ex post facto doctrines. The challenges have

7 See 5 USC § 553; 72 Fed Reg 8894, 8895.
8 5 USC § 553(b)(3)(B).
9 Id.
10 72 Fed Reg at 8896 (cited in note 5).
11 Id.
12 Id at 8896–97.
13 72 Fed Reg at 8897.
14 See, for example, United States v Gould, 568 F3d 459, 461 (4th Cir 2009) (upholding SORNA against Commerce Clause and Ex Post Facto Clause challenges, among other arguments); United States v Dixon, 551 F3d 578, 583–85 (7th Cir 2008) (Posner)
overshadowed another question that has become the subject of a circuit split: does 72 Fed Reg 8894, whereby the Attorney General promulgated an interim rule that retroactively applied SORNA without a notice and comment period, violate the APA, rendering the rule invalid?

This Comment suggests that the split between the circuits should be resolved by placing additional requirements on agencies seeking to invoke the good cause exception. These additional requirements are especially important when a perceived emergency or threat of serious harm serves as the driving rationale. Ideally, Congress would amend the language of section 553(b) to provide more guidance to an agency as it considers invoking the exception; however, this is an unlikely solution, as several previous attempts have failed. Instead, the APA and courts should require that an agency invoking the exception detail how delay would result in an identifiable, measurable, and significant impact on public safety. This is in contrast to the “brief statement of reasons” currently required by the APA. Additionally, when an agency invokes the good cause exception due to emergency or because delay would cause serious harm, the APA and courts should demand that the agency show how the emergency or harm is more serious than when Congress gave the agency statutory authority to make the rule.

Part I of this Comment reviews leading cases in the circuit split regarding whether the Attorney General validly promulgated the interim rule. Part II suggests that, while the Sixth and Ninth Circuits reached the correct result, neither side of the circuit split adequately analyzed the issue. This Comment proposes that, in order to limit the power given to agencies acting in a quasi-legislative capacity, and to protect basic principles of representative democracy in rulemaking, changes to the good cause exception are necessary.

I. THE CIRCUIT SPLIT

Part I of this Comment summarizes the positions taken by each circuit. Parts I.A and B detail the position taken by the Sixth and Ninth Circuits: that the Attorney General improperly bypassed the notice and comment requirement of the APA,

(upholding SORNA against non-delegation and Due Process Clause challenges, but finding it unconstitutional under the Ex Post Facto Clause as applied to one defendant), revd and remd by Carr v United States, 130 S Ct 2229 (2010) (finding it unnecessary to pass on any of the constitutional questions).
thereby rendering the regulation invalid. Parts I.C and D detail the position of the Fourth and Eleventh Circuits, which held that the Attorney General’s public safety argument provided good cause for bypassing notice and comment.\textsuperscript{15} Part I.E discusses the Seventh Circuit’s case law, which suggests that it would likely agree with the Fourth and Eleventh Circuits that good cause existed for bypassing notice and comment.\textsuperscript{16} Part I.F details the position articulated by Judge Charles Wilson in his \textit{Dean} concurrence. Judge Wilson agreed with the Sixth Circuit that the Attorney General’s public safety argument was an insufficient justification, but he concurred in result because of the harmless error doctrine, creating a possible third position. Last, Part I.G briefly notes the Supreme Court’s silence on the issue.

A. The Sixth Circuit’s Position

The Sixth Circuit held that, in bypassing notice and comment, the Attorney General’s interim rule violated the APA because the Attorney General failed to demonstrate good cause. The Sixth Circuit considered the issue in \textit{United States v Cain}.\textsuperscript{17} In \textit{Cain}, the defendant, Marcus Cain, had been convicted in Ohio of attempted rape in October 1998. His sentence required him to “register as a sex offender with the state, verify his address annually, and notify the sheriff within seven days of changing his residence.”\textsuperscript{18} Cain moved to Georgia during the summer of 2006 and failed to update his registration, prompting Ohio to issue a warrant for his arrest.\textsuperscript{19} In March 2007, after the Attorney General had promulgated the interim rule making SORNA retroactive, Georgia authorities arrested Cain. After Ohio dismissed its charges for unspecified reasons, a federal grand jury indicted Cain for violating SORNA.

The Sixth Circuit began its analysis by emphasizing that the purpose of the notice and comment requirement is to give “interested persons an opportunity to participate in the rule making.”\textsuperscript{20}

\textsuperscript{15} See \textit{United States v Gould}, 568 F3d 459, 470 (4th Cir 2009); \textit{United States v Dean}, 604 F3d 1275, 1282 (11th Cir 2010).

\textsuperscript{16} Although the Seventh Circuit has not discussed the merits of the Attorney General’s decision to bypass notice and comment, its dismissive approach towards claims attacking the procedural merits of the regulation has caused several of its sister circuits to infer that it falls in line with the Fourth and Eleventh Circuits. See \textit{Dean}, 604 F3d at 1290; \textit{United States v Utesch}, 596 F3d 302, 309 n 7 (6th Cir 2010).

\textsuperscript{17} 583 F3d 408 (6th Cir 2009).

\textsuperscript{18} Id at 411.

\textsuperscript{19} Id.

\textsuperscript{20} Id at 420, quoting 5 USC § 553(e).
Doing so, the court argued, increases the quality of rules and "helps 'ensure fair treatment for persons to be affected by' regulation."\(^{21}\) Because the agency is acting in a quasi-legislative capacity, it is generally required to follow the APA's quasi-legislative notice and comment procedures. The court then turned to the justifications offered by the Attorney General for invoking the good cause exception.

With regard to the "uncertainty" argument, the court found that it "misses the mark" for three reasons.\(^{22}\) First, "a desire to provide guidance to regulated parties is not sufficient to show good cause to bypass the notice and comment provisions of the APA."\(^{23}\) Suspension of notice and comment for good cause must be "supported by more than the bare need to have regulations."\(^{24}\) Second, Congress chose to both "delegate regulatory authority to the Attorney General and to decline to bypass the APA's requirements."\(^{25}\) The decision inevitably meant that "some period of uncertainty would follow while the Attorney General conducted regulatory procedures."\(^{26}\) Last, by "delegating regulatory authority to the Attorney General rather than creating law itself, Congress created a period of delay at least long enough for the Attorney General to promulgate his specification."\(^{27}\) In other words, Congress had already "balanced the costs and benefits of an immediately effective rule compared to the delayed implementation of a reasoned regulation."\(^{28}\)

The court next turned to the public safety argument and determined that SORNA retroactivity "does not present the type of safety emergency that some courts have relied upon to find just cause to bypass notice and comment."\(^{29}\) The court acknowledged bypassing notice and comment may be appropriate when "a safety investigation shows that a new safety rule must be put in place immediately."\(^{30}\) But the court noted that such a considera-
tion has been “used for dispensing with notice and comment when the emergency arose after the statutory enactment at issue.” As an example, the court pointed to the Federal Aviation Administration’s (FAA) emergency regulation following several helicopter accidents causing four deaths. The FAA “cited the specific accident record that prompted it to take action” and dispensed with the notice and comment period. In contrast, the "Attorney General gave no specific evidence of actual harm to the public in his conclusory statement of reasons, and gave no explanation for why he could act in an emergency fashion when Congress had not deemed the situation so critical seven months earlier."

B. The Ninth Circuit’s Position

In *United States v Valverde*, the Ninth Circuit agreed with the Sixth Circuit’s analysis. In 2002, Mark Valverde pled guilty to eleven counts of sexual abuse of a minor and was sentenced to twelve years in prison. Before his release, Valverde signed a form notifying him that he was required to register as a sex offender in California within five days of his release, and within ten days of moving to any other state. After his release, Valverde failed to register in any state, and police apprehended him a month later in Missouri.

Like the Sixth Circuit, the Ninth Circuit dismissed the Attorney General’s “clarification” justification, noting that “[a]n interest in eliminating any possible uncertainty about the application of SORNA is not a reasonable justification for bypassing notice and comment.” The court also emphasized that the Attorney General, without explanation, waited seven months before issuing the rule.

On the public safety justification, the court also closely followed the Sixth Circuit. The court noted that the Attorney General “did little more than restate the general dangers of child sexual assault, abuse, and exploitation that Congress had sought to prevent when it enacted SORNA.” According to the court,

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31 Cain, 583 F3d at 422.
32 Id.
33 Id.
34 628 F3d 1159 (9th Cir 2010).
35 Id at 1165.
36 Id at 1160–61.
37 Id at 1166.
38 Valverde, 628 F3d at 1167.
this did not explain "why the Act’s requirements should be made retroactively applicable on an emergency basis when Congress had declined to do so." The court held that the harms cited by the Attorney General were insufficient to upset the balance that Congress had already struck in declining to make SORNA retroactive immediately. The interim rule was therefore held invalid.\footnote{39\textsuperscript{Id.}}

C. The Fourth Circuit’s Position

In United States v Gould,\footnote{40\textsuperscript{Id at 1168.}} the Fourth Circuit became the first to consider the validity of the Attorney General’s interim rule.\footnote{41\textsuperscript{568 F3d 459 (4th Cir 2009).}} In this case, a court in the District of Columbia had convicted Brian Gould of a sex offense in 1985.\footnote{42\textsuperscript{Id at 470.}} Pre-SORNA law required Gould to register as a sex offender upon his release in 2002. The laws also required him to register in any state where he chose to reside.\footnote{43\textsuperscript{Id at 461.}} Prior to 2007, Gould made several interstate moves and failed to update his registration.\footnote{44\textsuperscript{Id.}} Approximately one year after Congress enacted SORNA, Maryland police arrested and charged Gould with violating the Act for failing to register in Maryland.\footnote{45\textsuperscript{Gould, 568 F3d at 461.}} Gould argued that the district court should have dismissed his indictment because the Attorney General violated the APA in promulgating the interim regulations without a notice and comment period.\footnote{46\textsuperscript{Id.}}

In a brief discussion, the Fourth Circuit acknowledged that the good cause exception is meant to be construed narrowly but went on to hold that the Attorney General had good cause to invoke the exception.\footnote{47\textsuperscript{Id.}} The court agreed that "[t]here was a need for legal certainty about SORNA’s ‘retroactive’ application to sex offenders convicted before SORNA."\footnote{48\textsuperscript{Gould, 568 F3d at 470.}} It also recognized "a concern for public safety that these offenders be registered in accordance with SORNA as quickly as possible."\footnote{49\textsuperscript{Id.}} According to the
court, "[d]elaying implementation of the regulation to accommodate notice and comment could reasonably be found to put the public safety at greater risk."\textsuperscript{51} Additionally, the court saw the post-promulgation public comment as mitigating the potential damage done by not allowing for the initial notice and comment period.\textsuperscript{52}

The majority opinion drew a lengthy dissent from Judge Blane Michael, who argued that the Attorney General's justification was inadequate.\textsuperscript{53} Judge Michael first dismissed the Attorney General's "immediate guidance" justification. He noted that, if the need to provide "immediate guidance and information constituted 'good cause,' then an exception to the notice requirement would be created that would swallow the rule."\textsuperscript{54} For this reason, noted Judge Michael, courts have "looked askance at agencies' attempts to avoid the standard notice and comment procedures."\textsuperscript{55} And courts have consistently held that the exception be "narrowly construed and only reluctantly countenanced."\textsuperscript{56}

Judge Michael then turned to the Attorney General's public safety argument. Judge Michael argued that the Attorney General's declaration that SORNA applies retroactively "did not have the immediate effect of compelling any additional sex offenders to register; nor did it provide any additional registration information either to states or to the federal government."\textsuperscript{57} The interim rule simply gave the federal government power to prosecute unregistered sex offenders who were already subject to prosecution under state law.\textsuperscript{58} Thus, the interim rule making SORNA retroactive did not in fact increase registration requirements that would make the public safer.\textsuperscript{59}

Finally, Judge Michael argued that, if Congress wanted the Attorney General to make a decision on the retroactivity of SORNA without notice and comment, it had the option of either declaring SORNA to apply retroactively itself or expressly authorizing the Attorney General to bypass APA procedures.\textsuperscript{60} For

\begin{itemize}
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Gould, 568 F3d at 475 (Michael dissenting).
\item \textsuperscript{54} Id, quoting Zhang v Slattery, 55 F3d 732, 746–47 (2d Cir 1995).
\item \textsuperscript{55} Gould, 568 F3d at 478 (Michael dissenting), quoting Asiana Airlines v FAA, 134 F3d 393, 396 (DC Cir 1998).
\item \textsuperscript{56} Gould, 568 F3d at 478 (Michael dissenting).
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Gould, 568 F3d at 480 (Michael dissenting), citing Asiana Airlines, 134 F3d at 398.
\end{itemize}
these reasons Judge Michael concluded that “allowing the Attorney General to sidestep the requirements of the APA here establishes a dangerous precedent.”

D. The Eleventh Circuit’s Position

In *United States v Dean*, the Eleventh Circuit agreed with the Fourth Circuit that the Attorney General had good cause to bypass notice and comment. In early 1994, a Minnesota court convicted Christopher Dean of a sex offense, which meant that he was required to register as a sex offender in Minnesota or any state to which he relocated. Sometime between July 2007 and August 2007, Dean traveled to Alabama and failed to register there. Dean was arrested in 2008 and charged under SORNA. Dean challenged the validity of SORNA, arguing it violated the APA, and moved to have his indictment dismissed. The court acknowledged the split that had developed and proceeded to evaluate the Attorney General’s decision in light of the difference of opinion among the federal courts.

The court first evaluated the Attorney General’s guidance argument and found that, while it alone “may not have established the good cause exception, it does count to some extent.” The court distinguished this situation from other agency rules where the agency designed the rule based on the submissions of those to be regulated. In such a situation those being regulated already have some guidance because they essentially formulated the rule. Here, Congress granted the Attorney General sole discretion to determine whether SORNA applies retroactively. There was no guidance in place.

Before moving to the Attorney General’s public safety justification, the Eleventh Circuit distanced itself from the Fourth Circuit and joined the Sixth Circuit regarding the ameliorating ef-
fect of post-promulgation comments. The court pointed out that it had previously rejected the “harmless error argument” in United States Steel Corp v United States EPA. In United States Steel the court noted that “[s]ection 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas.” The court held that “allowing post-promulgation comments to resolve any harm caused by a lack of notice and comment would render the notice and comment provision toothless.”

The Eleventh Circuit then turned to the Attorney General’s public safety justification and concluded that it “is good cause for bypassing the notice and comment period.” The court noted that the rule allowed the federal government to immediately start prosecuting sex offenders who failed to register in state registries. It thereby reduced “the risk of additional sexual assaults and sexual abuse by sex offenders.”

The court disagreed with the Sixth Circuit’s holding that the good cause exception can only be invoked in emergency situations. The Eleventh Circuit observed that the Sixth Circuit based its contrary holding on a misreading of cases from the Ninth and DC Circuits. Citing to the same DC Circuit case mentioned by the Sixth Circuit in Cain, the court pointed out that “the exception excuses notice and comment in emergency situations, or where delay could result in serious harm.” The court went on to hold that “there does not need to be an emergency situation and the Attorney General only has to show that there is good cause to believe that delay would do real harm.”

The Eleventh Circuit also disagreed with the Sixth Circuit’s concern that Congress built in a period of delay and that the Attorney General delayed seven months in promulgating the rule, and that therefore avoiding delay cannot constitute good cause.

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70 Id at 1280–81.
71 Id at 1280, citing United States Steel Corp v United States EPA, 595 F2d 207, 214 (5th Cir 1979).
72 Dean, 604 F3d at 1280–81.
73 Id at 1281.
74 Id.
75 Id.
76 Dean, 604 F3d at 1281.
77 Id, quoting Jifry v FAA, 370 F3d 1174, 1179 (DC Cir 2004) (emphasis in Dean).
78 Dean, 604 F3d at 1281.
79 Id at 1282, citing Cain, 583 F3d at 421.
The Eleventh Circuit responded that "[a]ll Congressional directives to an agency to implement rules are subject to delay as the agency considers the rule and then promulgates it." Therefore, "[i]f Congress were required to create the substantive administrative rules by itself to avoid notice and comment, then the good cause exception would be meaningless."

The court also addressed whether retroactive application of SORNA would improve public safety given that it did not compel additional registration—an issue raised by Judge Michael in his Gould dissent. The Eleventh Circuit disagreed with Judge Michael, responding that "[p]ublic safety is improved by federal law that allows the federal government to pursue sex offenders regardless of existing state laws providing for state prosecution." Federal involvement makes additional resources available and increases the government's ability to "locat[e] and apprehend[ ]" sex offenders who fail to register.

E. The Seventh Circuit's Position

Although the Seventh Circuit has not explicitly articulated its position on the validity of the Attorney General's interim rule, its opinion in United States v Dixon suggests that it would uphold the regulation as valid, aligning itself with the Fourth and Eleventh Circuits. In Dixon, the Seventh Circuit consolidated the appeals of two defendants convicted of violating SORNA for not registering based on sex offenses committed before the act was passed. As the court turned its attention to the defendants' constitutional claims, it stated that "[t]he remaining arguments made by Dixon (other than a frivolous argument based on the Administrative Procedure Act) are based on the Constitution." While the court went no further in elaborating on the "frivolous" APA argument, other circuits have interpreted the statement as referencing the Attorney General's decision to bypass the notice and comment period for good cause.

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80 Dean, 604 F3d at 1282.
81 Id.
82 Id. See Gould, 568 F3d at 479 (Michael dissenting).
83 Dean, 604 F3d at 1281.
84 Id.
85 551 F3d 578 (7th Cir 2008) (Posner).
86 Id at 583.
87 Id at 581.
88 Id at 583 (emphasis added).
89 See Dean, 604 F3d at 1290 (Wilson concurring); Utesch, 596 F3d at 309 n 9.
F. A Possible Third Position—The *Dean* Concurrence

In his concurring opinion in *Dean*, Judge Wilson took a third position. Judge Wilson expressed concern that the majority's opinion made it easier for an administrative agency to avoid notice and comment. He agreed with the Sixth and Ninth Circuits that the Attorney General's public safety justification fell short and that there was clearly a "lack of an emergency or threat of real harm attending the promulgation of the regulation." Judge Wilson also agreed that "Congress factored delay into SORNA when it wrote the law" and could have released the Attorney General from the APA requirement had it wanted to do so. Consequently, the Attorney General did not promulgate the law in accordance with the APA because his good cause justifications were insufficient. Yet Judge Wilson upheld Dean's conviction relying instead on the harmless error rule.

Judge Wilson noted that the APA requires reviewing courts to take "due account . . . of the rule of prejudicial error." As another court has interpreted that provision, "if the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." Determining whether Dean was prejudiced by not having an opportunity for pre-promulgation comment requires that Dean show "that he could have arguably mounted a 'credible challenge' for changing the rule as it affected him." Because there was nothing in Dean's appellate brief or at oral argument suggesting a reason that might "have persuaded the Attorney General not to extend SORNA," Judge Wilson concluded that Dean suffered no prejudice. In taking this position Wilson acknowledged that he was creating a third position in the current split. He urged the Supreme Court to resolve the dispute.

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90 *Dean*, 604 F3d at 1282–90 (Wilson concurring).
91 Id at 1290.
92 Id at 1283.
93 Id at 1287.
94 *Dean*, 604 F3d at 1288 (Wilson concurring).
95 Id, quoting 5 USC § 706.
96 *Dean*, 604 F3d at 1288, quoting *PDK Laboratories Inc v United States DEA*, 362 F3d 786, 789 (DC Cir 2004).
97 *Dean*, 604 F3d at 1288 (Wilson concurring).
98 Id.
99 Id at 1290.
100 Id.
G. The Supreme Court's Silence

The Supreme Court declined to address the issue in *Carr v United States*\(^{101}\) when it reviewed the Seventh Circuit's decision in *Dixon*.\(^{102}\) In a footnote, the Court acknowledged and described the circuit split, but refused to clarify, stating, "[w]e similarly express no view as to whether § 72.3 was properly promulgated—a question that has also divided the circuits."\(^{103}\)

II. PROPOSED SOLUTION

Part II.A discusses the importance of notice and comment in informal rulemaking and the high standard for invoking the good cause exception that has emerged as a result. Part II.B discusses why none of the circuits offer a satisfactory analysis of the good cause exception in assessing the interim rule's validity. Part II.C discusses why Congress should amend section 553(b)(3)(B) of the APA to clarify the requirements for bypassing notice and comment.

A. Notice and Comment

The APA allows an agency to bypass the notice and comment period when the agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."\(^{104}\) The good cause exception is a potentially powerful tool given to agencies to provide flexibility in rulemaking. While flexibility is desirable given what can often be a long and tedious process, the potential for misuse of the good cause exception raises questions concerning agency accountability.

As an initial matter, it is important to recognize that the Attorney General acted in a quasi-legislative capacity when he passed the interim regulation. The Sixth Circuit recognized this in *Cain*: "Because the Attorney General's specification puts new criminal liability on the acts or omissions of regulated persons, it is quintessentially legislative, as compared with regulations that merely restate or interpret statutory obligations."\(^{105}\) In keeping with basic democratic principles, when an agency acts in a quasi-

\(^{101}\) 130 S Ct 2229 (2010).
\(^{102}\) Id at 2234 n 2.
\(^{103}\) Id.
\(^{104}\) 5 USC § 553(b)(3)(B).
\(^{105}\) *Cain*, 583 F3d at 420.
legislative capacity, Congress generally requires it to follow the quasi-legislative notice and comment procedures of the APA.\footnote{106} Furthermore, courts treat notice and comment as especially important when a regulation creates or broadens a criminal offense punishable by imprisonment.\footnote{107} Courts have held that in such situations exceptions to the notice and comment procedure of the APA “must be narrowly construed.”\footnote{108}

The DC Circuit has explained that the essential purpose of the notice and comment procedure is “to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.”\footnote{109} The notice and comment procedure is intended to engage the public and solicit input, thereby allowing the agency to craft the best rule possible.\footnote{110} Additionally, the notice and comment period gives persons who are likely to be affected by the regulation an opportunity to participate. This helps ensure fair treatment and that “the content of the final rule is consistent with the will of the public at large.”\footnote{111} Adherence to notice and comment requirements can also have beneficial secondary effects. A rule passed by an agency is more likely to be seen as legitimate when the public participates in its formulation.\footnote{112} In this way it serves as a “symbolic reassurance,” which promotes acceptability among the public and can alleviate some of an agency’s burdens of enforcement.\footnote{113}

Courts on both sides of the split have agreed that the post-promulgation period does not ameliorate the lack of pre-promulgation notice and comment.\footnote{114} An agency is much less likely to alter or modify a rule after it has already been promul-

\footnote{106} Id.

\footnote{107} See, for example, United States v Picciotto, 875 F2d 345, 348 (DC Cir 1989) (Mikva) (“The fact that this rule establishes a criminal offense entailing possible imprisonment for the violator is even more reason for this court to be wary of the agency’s last minute justifications.”).

\footnote{108} Id.

\footnote{109} See Batterson v Marshall, 648 F2d 694, 703 (DC Cir 1980) (supported by a citation to the APA’s legislative history).

\footnote{110} Cain, 583 F3d at 420, quoting Dismas Charities, Inc v United States Department of Justice, 401 F3d 666, 680 (6th Cir 2005) (calling Congress’s primary purpose for imposing notice and comment to “get public input so as to get the wisest rules”).

\footnote{111} Juan J. Lavilla, The Good Cause Exception to Notice and Comment Rulemaking: Requirements under the Administrative Procedure Act, 3 Admin L J 317, 422 (1989).

\footnote{112} Id at 423.


\footnote{114} See Dean, 604 F3d at 1280; Ulesch, 596 F3d at 310.
Because rulemaking is a delegation of legislative power to an unrepresentative body, providing interested members of the public an opportunity to participate is crucial to the maintenance of a representative form of government.

Courts and Congress alike have recognized the dangers of allowing the APA's procedural safeguards to be bypassed too easily. The Act's legislative history makes clear that the exception was not meant to be an "escape clause": "The exemption of situations of emergency or necessity is not an 'escape clause' in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published." Accordingly, courts have consistently held that the "good cause" exception is to be "narrowly construed and only reluctantly countenanced." Indeed, the burden on the agency to show that good cause exists when criminal sanctions are at issue is a heavy one. Both the Fourth and Eleventh Circuits acknowledged that the exception should be construed narrowly, yet neither seemed to have evaluated the Attorney General's justifications with the type of scrutiny such a standard would demand. This was precisely the criticism leveled by Judge Wilson in his Dean concurrence, where he lamented that the "majority opinion quotes but does not give due weight to our circuit's law requiring us to construe narrowly the good cause exceptions to notice and comment."

B. Why Neither Side of the Split Satisfies

The good cause exception has been applied primarily in three situations: (1) where public notice and comment prior to rule promulgation would frustrate the agency's purpose; (2) where the delay caused by notice and comment would cause the agency to miss a statutory deadline; and (3) where there is an
emergency, or where delay would result in serious harm. The Attorney General's use of good cause falls into the third category. Yet, this Comment contends that neither side of the circuit split provides an adequate analysis of the issue. The Sixth and Ninth Circuits, while correct in result, were wrong to require that the Attorney General demonstrate an emergency situation. In so doing the courts failed to give proper consideration to whether the delay would cause serious harm. The Eleventh Circuit's holding that the good cause exception is proper in situations of emergency, or where delay would cause serious harm, is consistent with the case law. It is also consistent with the rationale for having an exception. But the court wrongly concluded that the appropriate question for the Attorney General to ask when considering whether to invoke the exception is "whether further delay will cause harm." This approach fails to give enough weight to the balancing performed by Congress in determining whether immediate implementation was necessary when it passed the statute.

The Attorney General justified invoking the good cause exception by including the following statement in the interim rule as required by the APA:

The immediate effectiveness of this rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements . . . to sex offenders whose predicate convictions predate the enactment of SORNA. Delay in the implementation of this rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions. The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offend-

\[\text{States Steel, 649 F2d at 575. But see United States Steel, 595 F2d at 213 ("[T]he mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a 553(b)(B) [sic] exception.").}

\[\text{122 See Jifry v FAA, 370 F3d 1174, 1179 (DC Cir 2004) ("The exception excuses notice and comment in emergency situations, or where delay could result in serious harm."); Natural Resources Defense Council, Inc v Evans, 316 F3d 904, 911 (9th Cir 2003), quoting Hawaii Helicopter Operators Association v FAA, 51 F3d 212, 214 (9th Cir 1995), and Riverbend Farms, Inc v Madigan, 958 F2d 1479, 1484 n 2 (9th Cir 1992) ("Notice and comment procedures should be waived only when delay would do real harm. Emergencies, though not the only situations constituting good cause, are the most common.").}

\[\text{123 Dean, 604 F3d at 1281. See United States Steel, 595 F2d at 214 (The good cause exception "is an important safety valve to be used where delay would do real harm.").}

\[\text{124 Dean, 604 F3d at 1281.} \]
ers that could have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA. This would thwart the legislative objective of “protect[ing] the public from sex offenders and offenders against children” by establishing “a comprehensive national system of registration of those offenders,” SORNA § 102, because a substantial class of sex offenders could evade the Act’s registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule.125

The Attorney General’s first justification—that bypassing the notice and comment period was necessary to eliminate uncertainty—need not detain us long. The Sixth, Ninth, and Eleventh Circuits agree that the need to eliminate uncertainty and provide guidance is not sufficient, by itself, to justify bypassing the notice and comment period. But while the Sixth and Ninth Circuits dismissed the Attorney General’s guidance argument outright, the Eleventh Circuit decided it “counted for something” in justifying a good cause exception.126

1. Sixth and Ninth Circuits

Both the Sixth and Ninth Circuits argued that “SORNA retroactivity . . . does not present the type of safety emergency that some courts have relied upon to find just cause to bypass notice and comment.”127 The argument is based on the notion that Congress balanced the delay inherent in administrative decision making against the need for immediately applying SORNA retroactively when it wrote the law. If Congress had considered making SORNA retroactive in an emergency situation, it could have freed the Attorney General from the procedural requirements of the APA; Congress also could have dealt with the retroactivity issue itself. The Attorney General offered no evidence that the gravity of the situation had changed between the time Congress passed on its opportunity to free the Attorney General from the APA requirements and the time he chose to bypass the notice and comment period.

125 72 Fed Reg 8894, 8896.
126 See Cain, 583 F3d at 421; Dean, 604 F3d at 1280.
127 Cain, 583 F3d at 422.
In focusing solely on emergency situations, however, the Sixth and Ninth Circuits failed to consider what serious harm a delay in implementing the rule might cause. The Sixth Circuit stated only that “the Attorney General gave no specific evidence of actual harm to the public in his conclusory statement of reasons, and gave no explanation for why he could act in an emergency fashion when Congress had not deemed the situation so critical seven months earlier.” The Ninth Circuit’s opinion in Valverde is equally sparse. Yet several circuits have noted that emergencies, as well as situations where delay could result in serious harm, justify use of the good cause exception. The Sixth and Ninth Circuits ignored the “real harm” argument and thereby failed to fully consider the Attorney General’s justification for bypassing the notice and comment period.

2. Eleventh Circuit

The Eleventh Circuit held that an emergency is not necessary; the Attorney General only needs to show that there is good cause to believe that delay would cause real harm. The court relied on its own precedent in United States Steel, which held that the good cause exception is “an important safety valve to be used where delay would do real harm.” The court argued that the retroactive application of the rule “allowed the federal government to immediately start prosecuting sex offenders who failed to register in state registries.” In “practical terms,” the court argued, “the retroactive rule reduced the risk of additional sexual assaults and sexual abuse by sex offenders by allowing federal authorities to apprehend and prosecute them.” Thus, delay in employing these additional federal resources would do real harm.

The Eleventh Circuit’s holding that it is not necessary that there be an emergency is consistent with its own precedent, the

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128 Id.
129 See Jifry, 370 F3d at 1179 (“The exception excuses notice and comment in emergency situations, or where delay could result in serious harm.”); Natural Resources, 316 F3d at 910 (“Notice and comment procedures should be waived only when delay would do real harm. Emergencies, though not the only situation constituting good cause, are the most common.”).
130 Because both the Fourth and Seventh Circuits provided very little analysis regarding the Attorney General’s justification for invoking the good cause exception, the argument presented by the Eleventh Circuit in its Dean opinion will be the focus of this section.
131 United States Steel, 595 F2d at 214.
132 Dean, 604 F3d at 1281.
133 Id.
precedent of other circuits, and the purpose of having a good cause exception. It is important that agencies maintain some flexibility in promulgating rules. If in fact following the APA procedures would cause serious harm to the public interest, the good cause exception should become a possible avenue for mitigating that harm. But the Eleventh Circuit's reliance on serious harm to hold the interim rule valid is lacking for two reasons: (1) in order to avoid doing violence to the democratic principles articulated above, the serious harm used to invoke the good cause exception must be of a more serious nature than when Congress passed the statute granting the agency rulemaking authority; (2) more should be required of the agency than simply expressing a belief that delay would do real harm. As explained in more detail below, the agency should be required to demonstrate, in the statement accompanying the rule, details as to what that harm would be and how bypassing notice and comment would mitigate it.

As already discussed, in passing SORNA Congress was aware of the threats posed by the sex offenders it targeted. Congress was also aware of the delay that often accompanies agency actions governed by the APA, yet Congress chose not to make SORNA retroactive immediately or free the Attorney General of his obligation to follow the APA. In short, Congress balanced the potential harm of delay against the implications of bypassing the notice and comment period. It was not for the Attorney General to decide whether Congress made the right decision. Given his quasi-legislative role in the rule promulgation process, he was bound by the procedural safeguards in place.

The Eleventh Circuit's assertion that requiring Congress to create the substantive administrative rule by itself so as to avoid notice and comment would render the good cause exception meaningless is misplaced. Congress need not make the substantive administrative rule but merely free the agency from following APA notice and comment requirements. This does not render the good cause exception meaningless but rather preserves its usefulness. Invoking the exception because delay would cause serious harm should be limited to situations where circumstances have changed, making the potential harm a more serious one than was present when Congress considered the issue. The appropriate question is not whether further delay would cause harm as suggested by the court, but whether the harm caused by delay is a new or more serious harm than the harm Congress anticipated when balancing the delay inherent in using adminis-
trative agencies against the democratic principles behind public participation.

In his statement, the Attorney General failed to show that delay would cause serious harm beyond the type present when Congress passed SORNA. The Ninth Circuit noted that “the Attorney General did little more than restate the general dangers of child sexual assault, abuse, and exploitation that Congress had sought to prevent when it enacted SORNA.”134 Importantly, the Attorney General made no showing of an “increase in the incidence of sex offenses[,] no reports of underprosecution or underenforcement against pre-enactment offenders.”135 The Attorney General also failed to provide “facts to support the asserted ‘greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA,’ that were not already before Congress when it delegated rulemaking authority to the Attorney General.”136 In short, the harm that concerned the Eleventh Circuit was the same upon which Congress considered but did not act. The lack of evidence demonstrating that a more serious harm had developed failed to meet the high standard for invoking the good cause exception.

3. Judge Wilson’s Harmless Error Position

Courts have generally disregarded the harmless error doctrine as a remedy when agencies violate APA procedures.137 This position is sound. Once an agency deprives interested persons of their procedural rights to participate in rulemaking, the error cannot be considered harmless. Public participation in rulemaking affords interested parties an opportunity to be heard and is consistent with democratic principles. When the opportunity is taken away, it diminishes those principles and the individuals who rely on them.

As applied to the APA, an error is considered harmful whenever there is any “possibility that the error would have resulted in some change in the final rule.”138 Given the political environment surrounding sex offender laws, it is possible that the final

134 Valverde, 628 F3d at 1167.
135 Id.
136 Id.
137 Lavilla, 3 Admin L J at 409 (cited in note 111).
rule might have been different had comment been allowed. And the availability of post-promulgation comment does not rectify the situation. As mentioned above, the ability of public comments to shape the contents of a final rule is greatest at the beginning of the process. Not only is an agency much less likely to give weight to comments submitted after a rule has been promulgated, but there is also a disincentive for the agency to change the rule according to the post-promulgation comments it receives. If the agency bypassed notice and comment for good cause, changing the rule according to post-promulgation comment only brings into question whether bypassing notice and comment was appropriate in the first place.

C. Proposed Solution

The current circuit split brings attention to a persistent problem with the good cause exception—it is overly vague. “Good cause” remains undefined and susceptible to expansive interpretation because the language of the APA lacks specificity. It does not provide sufficient guidance to agencies or to courts reviewing agency decisions. This is particularly troublesome given the quasi-legislative function of regulatory agencies.

Certain steps should be taken to bring clarity to the exception. First, Congress should amend the statute to incorporate more specific and concrete terminology. In an effort to compensate for the vagueness of the statute, courts have turned to equally expansive language such as “emergency” and “serious harm.” This has only shifted the problem. The result is that courts come to different conclusions under nearly identical fact patterns.139 The difficulty with this solution is identifying language that will provide the desired concreteness without limiting the flexibility the exception is intended to provide.

This is not the first time there has been a call to amend the language of the APA.140 Scholars have made similar demands, and Congress has proposed bills aimed at just such modifications. Efforts to amend the language of the good cause provision began as early as 1955 and have continued since. Most proposals have sought to bring specificity to the provision by explicitly acknowledging situations of emergency. Other proposals seek to excuse notice and comment when “unnecessary due to the insig-

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139 Compare Dean, 604 F3d at 1276, with Cain, 583 F3d at 410.
140 Lavilla, 3 Admin L J at 416–22 (cited in note 111).
nificant impact of the rule."141 But these proposals have been unsuccessful. By the time they passed the Senate, most had returned to a formulation substantially similar to the existing language.

The unsuccessful attempts at amending section 553(b)(3)(B) demonstrate the difficulty in identifying language that both narrows its use and preserves its flexibility. Regulatory agencies often face unforeseeable events that require swift action. But while it remains important to maintain flexibility in administrative rulemaking, changes are needed to bring clarity to the good cause exception so as to increase consistency in judicial decisions. The APA's legislative history reveals that amending the language of the APA is an unlikely remedy. Yet the recent circuit split involving the Attorney General's interim rule may provide the necessary impetus for reconsideration.

Second, the requirements for the “brief statement” that must accompany the rule when an agency invokes the good cause exception should be made more stringent. When an agency seeks to bypass notice and comment on account of a perceived emergency or where delay would cause real harm, the APA should require agencies to include a detailed explanation of how delay would result in an identifiable, measurable, and significant impact on public safety. Requiring that the agency make such a showing would help preserve the integrity of the notice and comment procedure and would also provide the court with the information needed to balance the potential harm caused by delay against public participation in notice and comment. Additionally, the information would prevent the good cause exception from becoming a standard with an “adjustable parameter that can be invoked by an agency, and interpreted broadly by a court, in circumstances of perceived emergency.”142 The Eleventh Circuit's reasonable belief standard is inadequate for purposes of circumscribing the power given to regulatory agencies.

One concern with this approach is that in some situations it might be difficult to provide the concrete evidence a more stringent statement would require. One can imagine certain regulations where statistical or other concrete evidence would be unavailable. But this is likely to be a relatively small number of

141 Id.
situations, and they can be handled on a case-by-case basis.\textsuperscript{143}

Another potential objection to placing additional requirements on the agency seeking to bypass notice and comment is that requiring concrete evidence reduces the flexibility the exception was intended to provide regulatory agencies. While it is true that some flexibility will be lost, the result would be less ambiguity and vagueness in determining whether the good cause exception was utilized properly. For those situations where the exception is both necessary and justified, there should be little difficulty in providing the required concrete evidence.

Third, in situations where emergency or harm is used by an agency to justify the good cause exception, the emergency or harm must have become more severe since the time Congress gave the agency statutory authority to make the rule. Such a requirement would keep the exception confined to where it is most useful and appropriate. The good cause exception gives a great deal of power to agencies. In giving power to agencies to bind the nation, Congress has authority to allow the agency to bypass the notice and comment period. If Congress chooses not to explicitly exempt the agency from notice and comment requirements, it should be interpreted as Congress affirmatively denying the existence of an emergency or harm serious enough to bypass notice and comment based upon the knowledge Congress possessed at the time it passed the statute.

Congress recognizes the delay that is associated with the process of informal rulemaking and is the appropriate representative body to balance the urgency of implementation against the importance of public participation. Thus, the exception should only be available when events have transpired that Congress did not have the opportunity to consider when passing the statute granting rulemaking authority. If the agency determines that circumstances now merit invoking the good cause exception, it should detail, as mentioned above, what events have increased the need for immediate implementation of the rule that did not exist at the time Congress balanced the competing interests when it passed the statute. It is not enough to merely claim that additional delay would cause harm and therefore be against the public interest. Presumably, every regulation is in the public interest, which is why it is being promulgated in the first place. Thus, delaying its implementation is necessarily contrary to it. A higher standard is necessary.

\textsuperscript{143} Lavilla, 3 Admin L at 343 (cited in note 111).
The Attorney General's rehashing of the dangers presented by sex offenders and sexual abuse was insufficient. More must be shown. The Attorney General should have included in the statement of reasons concrete evidence as to why the dangers of sex offenders became greater seven months after Congress passed SORNA. For example, the Attorney General might provide statistical data pointing to an uptick in sex offenses. Another possibility might be providing evidence as to why the current framework for tracking sex offenders has recently become less effective or is consistently under-prosecuted. The key element is that something must have occurred to create an emergency or harm that is greater in magnitude than when Congress considered the issue. Otherwise, the agency is simply performing its own balancing act and giving it greater deference than that given to the appropriate representative body, Congress.

III. CONCLUSION

A split of authority exists among the circuit courts as to whether the Attorney General promulgated the interim rule making SORNA retroactive in accordance with the procedural requirements of the APA. This Comment rejects the position of the majority of circuits that the Attorney General's public safety argument provided sufficient justification for invoking the good cause exception to bypass the required notice and comment period. The circuits in the majority failed to give adequate weight to Congress's balancing of the need to immediately implement SORNA retroactively against the value of public participation in rulemaking. This Comment also rejects the reasoning behind the Sixth and Ninth Circuits' holding that the interim rule was invalidly promulgated. Although correct in result, these circuits focused too much on the emergency aspect of the good cause exception and neglected the argument that delay might bring serious harm to the public. The good cause exception should be equally available in situations where delay would cause serious harm, even if the urgency that typically accompanies an emergency is absent.

This Comment has suggested three changes that can be made to help ensure that the good cause exception is not abused so as to violate fundamental principles of representative democracy. First, Congress should amend the language of the section 553(b)(3)(B) to provide more clarity and guidance to agencies. Second, the requirements of the "brief statement" should be made more stringent so that the agency is required to show how
delay would result in an identifiable, measurable, and significant impact on public safety. Third, the emergency or type of harm that delay would cause must be of a greater magnitude or different nature than existed at the time Congress granted the agency rulemaking authority and chose not to free the agency from the procedural requirements of the APA.