EXHIBIT H

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Protecting Against National Security Threats	)	WC Docket No. 18-89
to the Communications Supply Chain Through	)	
FCC Programs	)	

Comment date: June 1, 2018

EXPERT REPORT

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I. INTRODUCTION

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) *In the Matter of Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, 83 Fed. Reg. 19,196 (May 2, 2018). I am the Glen Earl Weston Research Professor of Law at the George Washington University Law School, where I teach and write in the field of administrative law. My research has been published in numerous books and journals, including the *Columbia Law Review*, *Duke Law Journal*, and *Michigan Law Review*. In particular, I specialize in the role of agency procedures in promoting transparency, participation, and deliberation, and guarding against arbitrariness. I have testified before Congress on such matters, and regularly speak before federal and state agencies, professional organizations, public interest groups, and the press. I have prepared this report at the request of Jones Day; however, this report represents my independent judgment as an expert in administrative law.[1]

Indeed, I agreed to prepare this report because the NPRM raises grave concerns about the rule of law and procedural due process. Specifically, I respond to the FCC's request for comment on approaches to identifying "companies that pose a national security threat to the integrity of communications networks or the communications supply chain." The FCC has proposed to draw from the Spectrum Act of 2012, the National Defense Authorization Act for Fiscal Year 2018 (NDAA), and pending legislation to ban companies from participating in the Universal Service

[1] Moreover, I do not necessarily represent the views of my university, and provide my

Fund (USF) that: (1) are prohibited from bidding on contracts by any other federal agency for reasons of national security; or (2) have been banned by Congress from involvement in telecommunications equipment in other contexts.[2]

As detailed below in Part II(A), this approach—which concerns individualized decisionmaking and protected interests—would violate the Constitution by failing to afford procedural due process. Part II(B) explains why the FCC would need to use significant adjudicatory procedures to undertake such a determination. This result flows from a balancing of the interests at stake, but it also bears emphasis that when other agencies must undertake such nuanced, high-stakes determinations, they do so pursuant to explicit authorizing statutes in which Congress has specified rigorous adjudicatory procedures. The absence of a similar authorizing statute here—complete with specific adjudicatory procedures—strongly suggests that the Communications Act does not provide the FCC with statutory authority to make such national security judgments. Were the FCC nevertheless to proceed with its proposal, the lack of explicit statutory authorization and procedures advises that any such determinations would need to be made using stringent adjudicatory procedures. Part III canvases a number of examples that both illustrate the contemporary norms of procedure and demonstrate the unusual nature of the FCC's proposed rulemaking approach. Part IV cautions that the FCC's proposed approach would additionally violate the APA; specifically, relying on other entities' determinations is likely arbitrary and capricious, unsupported by substantial evidence, and not in accordance with law. Nor may the agency take administrative notice of such materials in the adjudicatory context without providing an opportunity to refute them. As Part V concludes, substantial procedural flaws undergird the NPRM, and I urge the FCC not to take the path proposed.

In preparing this report, I have not separately analyzed whether the FCC has statutory authority to determine whether companies pose national security threats in the context of administering the USF program. However, as the following discussion makes clear, the lack of express statutory authority suggests that the agency indeed lacks jurisdiction to adopt the proposed rule. Thus, none of the discussion in this report should be read as endorsing the FCC's statutory authority, which, if lacking, would render moot the FCC's request for input on procedures.

II. PROCEDURAL DUE PROCESS IS REQUIRED FOR DETERMINATIONS ABOUT WHETHER AN COMPANY POSES A THREAT TO NATIONAL SECURITY

If the FCC is to make determinations about whether a company poses a threat to national security, it must do so consistently with procedural due process. The Fifth Amendment to the Constitution provides that no person "shall be deprived of life, liberty, or property, without due process of law."[3] This guard against arbitrary government action extends not only to citizens and domestic entities of the United States, but also to foreign citizens and entities that have a

[2] NPRM ¶ 20. This second option appears to reference the NDAA. As discussed in more detail in Part IV, drawing solely from the NDAA would be both arbitrary and capricious and inconsistent with the provisions of that statute.
[3] U.S. Const. amend. V.

substantial connection to the United States.[4] As this Part demonstrates, the determination that a company poses a national security threat is classic individualized decisionmaking involving a protected interest and requires procedural due process.

A. Applicability of Procedural Due Process

1. The constitutional touchstone for procedural due process is individualized decisionmaking.

The Constitution requires that individualized decisionmaking must be conducted in accordance with procedural due process protections. The Supreme Court established this fundamental attribute of adjudication in its opinions *Bi-Metallic Investment Co. v. State Board of Equalization* and *Londoner v. Denver*.[5] Whereas individualized decisionmaking triggers procedural due process, government actions that are generally applicable and impact broad classes of entities are better suited to legislative-type processes like rulemaking.[6] The Court has continuously adhered to this basic distinction.[7]

The difference between rulemaking and adjudication—critical to understanding a federal agency's procedural obligations—rests on this constitutional pedigree.[8] The Administrative Procedure Act's (APA) drafters were acutely aware of these principles when they established the distinction between the two forms of agency action as a key organizing feature of the APA.[9] Whereas rulemaking procedures like those in Section 553 of the statute did not impose due process protections, the adjudicatory procedures in Sections 556 and 557 were clearly intended to address widespread constitutional flaws in agency adjudication at the time.[10]

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[4] United States v. Verdugo-Urquidez, 494, U.S. 259, 271 (1990); *see* Nat'l Council of Resistance of Iran v. Sec'y of State, 251 F.3d 192, 200-03 (D.C. Cir. 2001) (holding foreign organizations met substantial connection requirement, triggering procedural due process).

[5] Bi-Metallic Investment Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 446 (1915) (procedural due process applies for "a relatively small number of persons ..., exceptionally affected, ... on individual grounds"); Londoner v. Denver, 210 U.S. 373 (1908) (holding procedural due process requirements applied).

[6] 239 U.S. at 446.

[7] United States v. Fla. E. Coast Ry., 410 U.S. 224, 245 (1973) (observing the Court has "continued to observe the distinction adverted to in *Bi-Metallic Investment Co*."); *see also* Ohio Bell Tele. Cos. v. Pub. Utils. Comm'n, 301 U.S. 292, 304 (1937) (reasoning that due process required an opportunity for a utility to know the facts on which a commission order was based, and have an opportunity to respond).

[8] *See* 410 U.S. at 245 (explaining the *Londoner* and *Bi-Metallic* distinction as "between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.").

[9] Martin Shapiro, *APA: Past, Present, Future*, 72 Va. L. Rev. 447, 453 (1986).

[10] *See* 5 U.S.C. § 554(d) (providing for separation of prosecutory and adjudicatory functions); Wong Yang Sung v. McGrath, 339 U.S. 37-39 (1950) (describing APA's response to concerns regarding basic fairness of adjudications).

Furthermore, procedural due process adheres to individualized decisionmaking regardless of APA definitions or an agency's label of "rule" or "order" because the requirement is constitutional.[11] Even under the APA's and other contemporary definitions, however, the determination that an individual company poses a national security threat is adjudicatory. Under the APA, an "order" is an agency disposition "other than rule making,"[12] and a "rule" is a "statement of general . . . applicability and future effect."[13] Thus the general nature of rulemaking, and its prospective reach, distinguish it from individualized adjudication that finds facts already in effect.

The act of identifying "companies that pose a national security threat," is a textbook example of individualized decisionmaking. It impacts specific, named entities. Unlike a rulemaking that would account for legislative facts and rely primarily on democratic processes for oversight and legitimacy,[14] a national security threat determination would single out an individual company, rest on facts specific to that company, and necessitate evaluating whether the facts meet the requirements of a legal standard. In such circumstances, procedural due process, rather than democratic oversight, is the key mechanism for ensuring the legitimacy of government action.

It is helpful to consider more precisely how procedural due process promotes agencies' constitutional, democratic, and procedural legitimacy, and why it is crucial that national security determinations be made by adjudication, not rulemaking. A fundamental concern of the constitutional framers was the tyranny of unchecked legislative power directed against individuals.[15] Thus, for example, the Bill of Attainder Clause[16] prohibits Congress from

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[11] Vt. Yankee Nuclear Power Corp. v. Natural Resources Def. Council, Inc., 435 U.S. 519, 542 (1978) (noting that even in a rulemaking, if "a very small number of persons are exceptionally affected, in each case upon individual grounds," due process may require additional procedures) (internal quotations omitted). Note that this is true of FCC practice. Like many other independent agencies, the Commission uses the label "Order" even for rulemaking.

[12] 5 U.S.C. § 551(6).

[13] The definition also includes "particular" applicability, which was intended to account for the APA's treatment of ratemakings differently from traditional adjudicatory proceedings. *See* Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 Admin. L. Rev. 1077, 1081 (2004). That language is universally ignored. Antonin Scalia, Vermont Yankee*: The APA, The D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 383; *see also* Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 804(3) ("The term 'rule' [has the APA meaning, except that it "does not include . . . particular applicability"); E.O. 12,866 § 3(d) (defining rule as agency statement of "general applicability and future effect").

[14] E.g., *Bi-Metallic*, 239 U.S. at 445 (emphasizing role of democratic oversight for legislative determinations).

[15] *See* Edward Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371, 374-76 (1976) (describing framers' concerns about the "tyranny of shifting majorities" being wielded against individuals); *see also* INS v. Chadha, 462 U.S. 919, 960-62 (1983) (Powell, J., conc.) (citing The Federalist No. 47 (James Madison) (J. Cooke ed. 1961)).

"legislative punishment, of any form or severity, of specifically designated persons or groups."[17] More broadly, this clause was intended as "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."[18] Legislative judgments are especially unsuited to individual determinations because doing so concentrates power so deeply as to offend the Constitution. Adjudications, by contrast, include a built-in constitutional safeguard on the aggrandizement of power: procedural due process.[19]

The procedural due process protections that must accompany individualized decisionmaking also promote agencies' democratic and procedural legitimacy.[20] With respect to democratic legitimacy, unelected agencies occupy a difficult place in the constitutional scheme.[21] Procedural due process protections promote external oversight by elected officials, for example, by ensuring the availability of a record and justification for agencies' adjudicatory determinations. These protections additionally foster the rationality of government authority—and guard against arbitrariness—because they require the agency to justify its actions and consider the factual and legal arguments of the individuals whose rights are at stake.[22] As Justice Jackson emphasized, "Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on ex parte consideration."[23]

2. The proposed rule implicates protected interests.

The FCC proposes to undertake individualized decisionmaking that implicates two protected interests: (1) a property interest of participating in USF programs; and (2) a liberty interest springing from stigma plus the loss of a statutory entitlement.

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[16] U.S. Const. art. 1, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").
[17] United States v. Brown, 381 U.S. 437, 447 (1965).
[18] *Id.* at 442.
[19] *Chadha*, 462 U.S. at 966 (Powell, J., conc.) (Noting, with respect to legislature "[n]or is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights").
[20] Democratic legitimacy refers to the power of individuals over those who hold office; procedural legitimacy refers to the attributes of individualized decisionmaking that render the outcomes acceptable even to those who disagree. On procedural legitimacy in particular, see Tom R. Tyler, *Social Justice, Outcome, and Procedure*, 35 Int'l J. of Psychol. 117 (2000).
[21] *See* Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy From the Inside-Out*, 37 Harv. Envtl. L. Rev. 313, 314 (2013) ("agencies are uncomfortably positioned in the tri-partite constitutional structure").
[22] *See id.* at 322-326 (describing role of procedures in fostering agency legitimacy).
[23] Shaughnessy v. United States, 345 U.S. 206, 224-25 (1953) (Jackson, J., diss.).

a. Participation in the USF constitutes a property interest.

Statutory entitlements constitute property interests for purposes of triggering procedural due process protections under two circumstances. First, a property interest arises where there are eligibility standards to create a substantive predicate.[24] Thus, an attorney who arguably meets the published requirements to appear before the Board of Tax Appeals but is rejected,[25] an applicant for a liquor license who arguably meets the applicable requirements but is rejected,[26] and a vocational school that arguably meets the requirements to participate in a federal student financial aid program but is rejected,[27] all show sufficiently protected property interests to trigger procedural due process protections. Here, the USF program provides eligibility standards that supply the necessary predicate to create property interests for those companies that arguably meet them. Simply listing individual companies that may not participate by contributing equipment for reasons outside the eligibility requirements gives rise to a property interest that necessitates adjudicatory procedures.

Second, even stronger is the property interest that attaches to a government action to terminate an entity's participation in a regulatory program. The Supreme Court made this point clear in *Bell v. Burson*, where it considered whether suspending an already-issued driver's license triggered procedural due process protections.[28] As it explained, once a license is issued, its continued possession becomes a protected interest.[29] In fact, the Court considered the matter a "general proposition that relevant constitutional restraints limit state power to terminate an entitlement," citing a host of decisions concluding that termination of program participation required due process protections.[30] Here, companies that are already participants in providing equipment for USF-supported projects have a property interest in continued participation. If the FCC wishes to consider terminating their participation, it must do so according to adjudication and in compliance with procedural due process.

b. Prohibition from USF participation implicates a liberty interest.

Determining that a company poses a national security threat implicates a liberty interest protected by the Due Process Clause because it cuts off that company's right to participate in the USF while imposing a significant stigma. The Supreme Court has recognized that there is a distinct liberty interest in "a person's good name, reputation, honor, or integrity."[31] Under the so-

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[24] Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970).
[25] Goldsmith v. U.S. Bd. of Tax Appeals, 270 U.S. 117, 123 (1926).
[26] Hornsby v. Allen, 326 F.2d 605, 608-09 (9th Cir. 1964).
[27] Cont'l Training Servs., Inc. v. Cavazos, 893 F.2d 877, 893 (7th Cir. 1990).
[28] 402 U.S. 535 (1971).
[29] *Id.* at 539.
[30] *Id.* (citing among others Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Sherbert v. Verner, 374 U.S. 398 (1963) (disqualification for employment termination)).
[31] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

called "stigma-plus" test, a liberty interest triggering procedural due process arises where the government publicly discloses a stigmatizing statement and impacts some more tangible interest like a change of legal status.[32]

The proposition that a company poses a national security threat falls easily within a long-established understanding of stigma; accusations of disloyalty to the United States, membership in terrorist organizations, or posing a national security risk[33] are highly stigmatizing statements that impose serious hardships on those so labeled. Coupled with removing eligibility to participate in the USF program, the FCC's proposed rule to designate companies that pose a national security risk easily amounts to a constitutionally protected liberty interest. Further explanation of the importance of this interest is set forth in Part B.

B. Significant Hearing Procedures are Due

The nature of interests at stake in a determination whether a company poses a national security threat is extraordinarily high, justifying correspondingly significant procedural protections. As this section explains, to the extent that the FCC can make such determinations, it should do so only in accordance with the formal adjudicatory procedures set forth in Sections 556 and 557 of the APA.[34]

At the outset, it is notable that the FCC proposes to undertake individualized decisionmaking on a matter of utmost sensitivity, using rulemaking, without express statutory authorization. Typically, when Congress authorizes agencies to undertake this kind of decisionmaking, it does so expressly and with precision about the adjudicatory procedures the agency must use.[35] In the absence of such a congressional directive, caution is counseled and the default approach should be to rely on the formal hearing procedures set forth in sections 556 and

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[32] Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (establishing "stigma-plus" requirement for liberty claims); Latif v. Holder, 28 F. Supp. 2d 1134, 1150 (D. Or. 2014) (stigma-plus met for placement on No-Fly list); *see also* Paul v. Davis, 424 U.S. 693, 711-12 (1976) (elaborating the "plus" required).

[33] *See, e.g.*, Elhady v. Piehota, -- F. Sup. 3d --, 2017 WL 8784456, No. 1:1T6-cv-375 (E.D. Va. Sept. 15, 2017) (inclusion in Terrorism Screening Database); Latif v. Holder, 28 F. Supp. 3d 1134, 1140 (D. Or. 2014) (No-Fly List); *see also* Mohamed v. Holder, 995 F. Supp. 2d 520 (E.D. Va. 2014) (No-Fly List); Green v. Transp. Sec. Admin., 351 F. Supp. 2d 1119 (W.D. Wash. 2005) (No-Fly List). The "No-Fly List" is a government terrorist watchlist of individuals who are prohibited from boarding commercial flights over U.S. airspace; the list is maintained by the U.S. Government. Latif, 28 F. Supp. 3d at 1140.

[34] 5 U.S.C. §§556, 557.

[35] Examples are detailed in Part III below.

557 of the APA. The FCC already has ample experience with these procedures,[36] which are capable of being tailored to account for sensitive matters.[37]

Further, the APA's formal hearing procedures were designed to reverse widespread shortcomings of procedural due process within federal agencies at the time leading up to the Act's passage. As explained by the Supreme Court in *Wong Yang Sung v. McGrath*,[38] these included the concerns that agencies' adjudicatory powers were too great, exercised arbitrarily, and steeped in bias.[39] By bringing procedural regularity and separations-of-functions to agency adjudications, the APA's drafters developed adjudicatory procedures that typically satisfy even the strictest of procedural due process evaluations.[40]

An analysis pursuant to *Mathews v. Eldridge*[41]—in which the Supreme Court set forth a three-factor test to determine what procedures are due—yields a similar result. Under *Mathews*, the relevant factors are: (1) the private interest at stake; (2) the risk of error from current procedures and the value of further procedural safeguards; and (3) the burden to the government in adopting the additional procedures. As here, where the private interest involves an exceedingly strong reputational injury—coupled with the business injury of termination from participation in a government program—courts are especially cautious. This is true even when the government's interest involves national security.

In *Mohamed v. Holder*, for example, the court held that the plaintiff had stated a claim for relief where the U.S. government had allegedly placed the plaintiff on the so-called "No-Fly" list.[42] Despite the government's "significant and even compelling" national security interest, the court reasoned that the plaintiff's liberty interests, which included the stigma of being labeled a national security threat, were extraordinarily strong.[43] Indeed, the government's claim that it had conducted a "robust internal review of highly sensitive information by experts tasked with protecting national security" was insufficient to overcome the plaintiff's claim for meaningful notice and opportunity to refute the government's determination.[44]

Similarly to the strength of the liberty interests in *Mohamed*, the strong private interests at stake in the NPRM necessitate more than the FCC's invocation of a countervailing national security interest. This is particularly true because there is another government interest at play:

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[36] *See, e.g.*, Kay v. FCC, 396 F.3d 1184 (D.C. Cir. 2005) (reviewing FCC's use of formal adjudicatory procedures).
[37] *See, e.g.*, 49 C.F.R. § 46111 (providing procedure for use of classified information in the context of FAA formal hearings for suspending pilots' licenses on national security grounds).
[38] 339 U.S. 33 (1950).
[39] *Id.* at 37.
[40] *Id.* at 50-51; *see* In re NuVasive, 841 F.3d 966, 971 (Fed. Cir. 2016) (describing procedural requirements under "due-process and APA guarantees").
[41] 424 U.S. 319 (1976).
[42] 995 F. Supp. 2d 520 (E.D. Va. 2014).
[43] *Id.* at 537-38.
[44] *Id.* at 538; *see also* Latif v. Holder, 28 F. Supp. 3d 1134 (D. Or. 2014) (similar).

ensuring universal service for all Americans. The risk of error in using a rulemaking—that is, in using no individualized mechanisms for notice and an opportunity to be heard—is stark both for companies participating in the USF program and for the FCC's statutorily mandated mission to promote universal access. To reduce the risk of error and sufficiently balance the competing interests, a neutral arbiter, closed record, oral hearing with the ability to call and cross-examine witnesses, and written record of findings and conclusions are constitutional minima.

III. OTHER FEDERAL AGENCIES USE IN-DEPTH ADJUDICATORY PROCEDURES IN ANALOGOUS DETERMINATIONS

As is evident from the preceding discussion, the FCC's proposed national security determinations are fundamentally individualized, involving high stakes and necessitating procedural due process. But it is also notable that Congress typically speaks very clearly on such matters—both in authorizing these types of determinations in the first place and in specifying the procedures that apply. Especially in matters of national security, it would be suspect indeed to find an agency relying only on a broad authorizing statute[45] to undertake a rulemaking that would ban particular entities from participation in a statutory program.[46] As described in this Part, when Congress does expressly authorize such adjudicatory determinations, it also specifies the appropriate procedures and builds in structural checks such as ensuring the participation of agencies with national security expertise.

A point of distinction is appropriate before providing examples. The law makes clear that the President enjoys certain powers with respect to foreign countries and national security. Some statutes expressly authorize presidential determinations that fall within these powers and to which procedural due process does not apply.[47] Notably, even in these limited and unusual contexts, Congress has required a number of procedural and structural checks designed to guard against arbitrary and unlimited executive authority. For example, designating foreign drug kingpins under the Foreign Narcotics Kingpin Designation Act (FNKDA)[48] requires prior consultation among certain agencies with relevant expertise[49] and includes reporting

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[45] For example, the FCC's enabling provision at 47 U.S.C. § 151.

[46] The Courts are especially skeptical of agency actions that vastly expand the scope of their jurisdiction. *See, e.g.*, Util. Air Reg. Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) (rejecting agency's "enormous and transformative expansion [of] regulatory authority without clear congressional authorization"); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (rejecting FDA's assertion of jurisdiction over tobacco products in absence of express statutory authority).

[47] *See* Nat'l Council of Resistance of Iran v. Sec'y of State, 251 F.3d 192, 202 (D.C. Cir. 2001) ("sovereign states interact with each other through diplomacy and even coercion in ways not affected by constitutional protections such as the Due Process Clause").

[48] 21 U.S.C. § 1904(b); 31 C.F.R. § 501.807(a).

[49] These include the Secretary of Treasury, Attorney General, Secretary of Defense, and Director of Central Intelligence. 21 U.S.C. § 1903(a).

obligations[50] that enhance agency accountability and promote oversight. Further, persons wishing to refute their inclusion on the blocked list may seek reconsideration and obtain a written decision.[51] Likewise, the International Emergency Economic Powers Act (IEEPA)[52] requires the President to consult with Congress and provide a justification when employing national security powers.[53] Similar requirements apply under the Anti-Terrorism and Effective Death Penalty Act (AEDPA),[54] pursuant to which designating a foreign terrorist organization requires notice to Congress and in the Federal Register,[55] creation of an administrative record,[56] and an opportunity for the designated organization to challenge the designation and seek judicial review.[57] A further distinction from the FCC's implementation of the USF program is that each of these statutes delegates authority to agencies with special expertise and deep experience on matters of national security.[58]

It bears repeating that when these types of determinations involve foreign governments or individuals who lack substantial connections with the United States, such determinations do not trigger procedural due process requirements. When a designated entity does in fact have substantial connections to the United States, the statutory procedures may be inadequate for constitutional due process requirements; additional procedures may therefore be required.[59] Still, even the minimal approaches outlined above for foreign countries or individuals who lack substantial connections with the United States reinforce the points in Part II above regarding the adjudicatory nature of the FCC's proposed national security determination. They also illustrate that when Congress expressly authorizes national security determinations specific to individuals, it buttresses less formal procedures with structural oversight protections like expert agency decisionmaking and reporting requirements to Congress. These attributes are important to guarding against arbitrariness and unfounded exercises of power.

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[50] *Id.* § 1903(b).
[51] 31 C.F.R. § 501.807.
[52] 50 U.S.C. § 1701.
[53] *Id.* § 1703.
[54] 8 U.S.C. § 1189.
[55] *Id.* § (a)(2)(A).
[56] *Id.* § (a)(3)(A).
[57] *Id.* §§ (a)(4)(B), (c).
[58] The Secretary of State designates foreign terrorist organizations under AEDPA, 8 U.S.C. § 1189; the Secretary of Treasury, Attorney General, Secretary of Defense, and Director of Central Intelligence must consult under the FNKDA, 21 U.S.C. § 1903(a); the President typically designates the Secretary of Treasury, Attorney General, and Secretary of State to carry out specified functions under the IEEPA, e.g., E.O. 13,694 §§ 8-9; and export control designations are made by the Secretary of Commerce in consultation with the Secretary of Defense, 50 U.S.C. § 4604(a); further delegations by executive order are to the Secretary of Defense, Department of Commerce, Department of State, Department of Treasury, and Central Intelligence Agency, Determination of President No. 97-39, 62 Fed. Reg. 52,477 (Sept. 30, 1997).
[59] *Nat'l Council of Resistance of Iran*, 251 F.3d at 200-09.

Set forth below are concrete examples of the procedures agencies use, pursuant to express Congressional direction, when they make sensitive determinations involving interests similar to those at stake in the NPRM. Each involves significant procedural protections in the context of adjudications. In addition to underscoring the unusual nature of the FCC's proposed approach, the discussion below augments Part II's elaboration of what procedures are due because "currently prevailing standards of impartiality" are the touchstones of a fair hearing.[60]

A. Department of Commerce: Revocation of Export Privileges

The Department of Commerce is responsible for administering the Export Administration Act. Although its activities are generally exempt from the APA,[61] Congress has specified that procedures for imposing civil penalties or sanctions are to be conducted in accordance with formal APA adjudicatory procedures.[62] This includes revoking the authority to export.[63] Thus, if the Department of Commerce pursues an enforcement action against an entity or individual for violating export regulations, full formal hearing procedures apply.[64] These include, among other things: a formal charging letter,[65] the opportunity for the respondent to be represented by counsel,[66] a discovery period[67] including the taking of depositions[68] and the issuance of subpoenas,[69] a hearing on the record before an ALJ,[70] and an opportunity for review of the ALJ's recommended decision.[71] There is a separate procedure for denying export privileges to a person because of conviction for certain specified crimes, but even those procedures include notice and an opportunity to be heard.[72] Furthermore, such circumstances involve a predicate conviction of a crime, which means the respondent was already afforded full criminal procedure in a federal court.

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[60] Wang Yang Sung v. McGrath, 339 U.S. 33, 50-51 (1950) ("When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. . . . It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal . . . the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.").
[61] 50 U.S.C. § 4615(a).
[62] *Id.* § 4615(c)(1).
[63] *Id.* § 4610(c)(2)(B).
[64] *Id.*; *see also* 15 C.F.R. pt. 766 (setting forth adjudicatory procedures).
[65] 15 C.F.R. § 766.3.
[66] *Id.* § 766.4.
[67] The presiding official may take protective measures to guard against disclosure of sensitive information related to national security or business confidentiality. *Id.* § 766.11.
[68] *Id.* § 766.9.
[69] *Id.* § 766.10.
[70] *Id.* § 766.13.
[71] *Id.* §§ 766.17, .21. For an example order that outlines procedural steps, see Dep't of Comm., Decision and Order, 69 Fed. Reg. 30,610 (May 28, 2004).
[72] *Id.* § 766.25.

B. Federal Energy Regulatory Commission: Cybersecurity and the Electric Grid

The national electric grid, similar to the national telecommunications network, is increasingly attracting attention for its possible national security vulnerabilities. The regulatory framework is complex, but among other things, the Federal Energy Regulatory Commission (FERC) is responsible for approving and promulgating reliability standards developed by the self-regulatory organization the North American Electric Reliability Corporation (NERC).[73] These standards include those that relate to cyber security for physical grid assets.[74] Entities that violate the NERC standards are entitled to significant adjudicatory procedural protections akin to those provided by Sections 556 and 557 of the APA, both at NERC and on appeal to FERC.[75]

C. Nuclear Regulatory Commission: Foreign Entities and Nuclear Licensing

Under the Atomic Energy Act, Congress has expressly prohibited NRC from issuing a license to a corporation "owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."[76] NRC is expressly authorized by statute to refuse to issue a license if doing so would be "inimical to the common defense and security."[77] When NRC makes determinations pursuant to this authority, it does so in the context of a highly formal adjudicatory proceeding.[78] Furthermore, NRC has significant experience and expertise on matters involving nuclear materials and foreign entities.[79]

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[73] 16 U.S.C. § 824o. The relationship between FERC and NERC shares attributes of that between the FCC and the Universal Service Administrative Company. For further information about the administrative law (and procedural) implications of these relationships, see Emily Hammond, *Double Deference in Administrative Law*, 116 Colum. L. Rev. 1705 (2016).

[74] *See, e.g.*, NERC, United States Mandatory Standards Subject to Enforcement, Critical Infrastructure Protection, CIP-002 through CIP-014, at www.nerc.com/pa/stand/Pages/ReliablityStandardsUnitedStates.apx?jurisdiction=United States.

[75] 16 U.S.C. § 824o(e); *see* Compliance and Certification Comm., NERC, Appx. 4E: Compliance and Certification Committee Hearing Procedures, Hearing Procedures for Use in Appeals, and Mediation Procedures (Oct. 4, 2013) (detailing hearing procedures before NERC).

[76] 42 U.S.C. § 2133(d).

[77] *Id.*

[78] *See* Citizens Awareness Network v. NRC, 391 F.3d 398 (1st Cir. 2004) (holding new licensing procedures issued by NRC meet requirements of APA formality); Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 778-83 (D.C. Cir. 1968) (describing formal procedures used in licensing determinations); *see* Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355 (Sept. 28, 1999) (documenting procedures used by staff analyzing license applications).

[79] *See generally* Sachin Desai & Kathleen Schroeder, *U.S. Nuclear Foreign Ownership Policy Ready for a Refreshed Interpretation*, 37 Energy L.J. 85, 99-103 (2016) (describing various NRC authorities).

D. Office of Management and Budget: Debarment from Nonprocurement Activities

Federal agencies are authorized to debar individuals from participation in nonprocurement programs for convictions, civil judgments, and other transgressions "so serious as to affect the integrity of an agency program."[80] OMB has published guidance to federal agencies on the appropriate procedural approach.[81] Each agency must issue regulations that comply with the OMB guidance.[82] Among other things, debarment requires agencies to provide notice of the reasons for the proposed debarment,[83] an opportunity for the respondent to contest the proposed debarment,[84] and an additional opportunity to challenge disputed facts[85] (including presentation of witnesses, the right to confront witnesses, and entitlement of written findings of fact for the record[86]). The federal agency bears the burden of proof to show cause for debarment by a preponderance of evidence,[87] and a debarred person may seek reconsideration from the agency.[88] Debarment decisions are judicially reviewable under the APA.[89]

E. General Services Administration: Debarment from Procurement Activities

Similarly to OMB's debarment regulations for nonprocurement activities, the General Services Administration (GSA) has issued the Federal Acquisition Regulation (FAR), which sets forth the procedures for agencies to undertake when they seek to debar government contractors.[90] The procedures are similar to those described above and include the right to notice of the reasons for the proposed debarment, an opportunity to contest the proposed debarment in person, additional opportunities to challenge disputed facts (including the right to counsel, the right to present and confront witnesses, and entitlement to written findings of fact for the record).[91] Debarment decisions are judicially reviewable under the APA.[92]

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[80] 2 C.F.R. § 180.800. All of the transgressions relate to business integrity, contract performance, and drug-free workplace requirements. *Id.* None relate to national security. Federal agencies are responsible for implementing regulations that comply with these provisions; those regulations are set forth in Subpart B of Title 2 of the Code of Federal Regulations.
[81] 2 C.F.R. pt. 180.
[82] *Id.* § 180.25(a).
[83] *Id.* § 180.805.
[84] *Id.* § 180.810.
[85] *Id.* § 180.830.
[86] *Id.* § 180.840.
[87] *Id.* § 180.850.
[88] *Id.* § 180.875.
[89] 5 U.S.C. § 702.
[90] 48 C.F.R. § 9.400.
[91] *Id.* § 9.406-3.
[92] *See, e.g.*, Friedler v. GSA, 271 F. Supp. 3d 40 (D.D.C. 2017) (outlining procedures in further detail and holding GSA failed to afford proper notice and opportunity to respond).

F. The Federal Aviation Administration: Suspension of Pilots' Licenses

The following example of the Federal Agency Aviation (FAA) is particularly important because it highlights the importance of express statutory authority when an agency relies on other agencies' determinations—a point that is further elaborated below. After the September 11, 2001 terrorist attacks, the FAA and Transportation Security Administration (TSA) established procedures whereby the FAA suspended pilots' licenses following a national security determination by the TSA.[93] An air pilots' coalition challenged these regulations, arguing they violated procedural due process and lacked statutory authority, among other things.[94] Shortly after the lawsuit was filed, Congress remedied these flaws by expressly authorizing the FAA to automatically suspend airman certificates upon written notice from the TSA that a pilot poses a security threat.[95] Notably, Congress required that such proceedings against citizens must be according to formal APA adjudicatory procedures,[96] and the agency committed to extending significant procedural protections to resident aliens as well.[97]

These examples demonstrate a number of points. First, they make clear the adjudicatory nature of decisions whether an individual poses a national security threat or should be subject to exclusion from a regulatory program. Second, they help establish the contemporary standards for what procedures are due in high-stakes proceedings. Third, they show that when the stakes are high, Congress is specific about procedure. In the absence of such specificity, the FCC should take a cautious approach and implement significant procedural protections.

IV. THE FCC'S PROPOSED APPROACH WOULD VIOLATE THE APA

As described above, the NPRM proposes to draw from the Spectrum Act of 2012, the NDAA, and pending legislation to ban companies from supplying telecommunications equipment for USF funded projects that: (1) are prohibited from bidding on contracts by any other federal agency for reasons of national security; or (2) have been banned by Congress from involvement in telecommunications equipment in other contexts.[98] Agencies require explicit statutory authority to treat other tribunals' decisions as binding; otherwise, the proposed approach would be arbitrary and capricious, unsupported by substantial evidence, and contrary to statutory authority.[99] Furthermore, the requirement of individualized decisionmaking necessitates

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[93] Coal. of Airline Pilots Ass'n v. FAA, 370 F.3d 1184 (D.C. Cir. 2004).
[94] *Id.* at 1190-91 (recounting alleged defects).
[95] 49 U.S.C. §§ 46111(a), (b).
[96] *Id.* § 46111(b).
[97] *Coal. of Airline Pilots Ass'n*, 370 F.3d at 1190.
[98] NPRM ¶ 20.
[99] These flaws track the language of Section 706, subsections (2)(A), (E), and (C) of the APA, respectively, and are the basis for the standards discussed in Part IV.A below. As the courts have recognized, there is significant overlap among these standards. *See* Judulang v. Holder, 565 U.S. 42, 53 n.7 (2011) (noting that the arbitrary and capricious standard under § 706(2)(A) is the same as step two of the *Chevron* test under § (2)(C)); Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 683-86 (D.C. Cir. 1984) (Scalia, J.)

that an agency may not take official notice of such matters without providing notice and an opportunity to respond.

A. Relying on Statutory or Other Lists Would Be Arbitrary and Capricious, Unsupported by Substantial Evidence, and in Excess of the FCC's Statutory Mandate.

Administrative law's fundamental requirement of reasoned decisionmaking operates similarly to the procedural protections described in Parts II and III by ensuring fairness and guarding against arbitrariness. Indeed, the reason-giving requirement alleviates constitutional concerns about broad delegations of authority like those the FCC enjoys.[100] All the familiar principles of administrative law work to this effect: The record must disclose the agency's grounds for making its decision,[101] and it must include sufficient findings of fact to support the decision made.[102] The agency must make a "logical connection between the facts found and the decision made."[103] Failure to consider an "important aspect of the problem"[104] is grounds for holding the action arbitrary and capricious, as is considering information outside of the agency's statutory mandate.[105]

Here, the FCC may act only within the scope of its statutory mandate and must independently make determinations required by that mandate. If the agency has authority at all to make the national security determinations it proposes, it must do so within the confines of the precise statutory scheme. Relying on an outside entity's determination is not statutorily specified, and doing so would arbitrarily ignore the particular factors Congress instructed the agency to consider. Thus, the Supreme Court held arbitrary and capricious the Environmental Protection Agency's reliance on presidential foreign powers in its denial of a rulemaking petition because the statutory mandate—the Clean Air Act—did not make foreign powers a relevant consideration.[106] Similarly, the Second Circuit in *Levine v. Apker* struck down a Bureau of Prisons regulation that set prisoners' eligibility for community corrections centers based on the

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(describing similarity of arbitrary and capricious and substantial evidence standards, and attributing no special meaning to Congress's specification of the latter).

[100] Emily Hammond, *Deference and Dialogue in Administrative Law*, 111 Colum. L. Rev. 1722, 1735-37 (2011) (describing how modern standards of review respond to nondelegation concerns); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 Colum. L. Rev. 479, 492 (2010) (reasoned decisionmaking is crucial to "alleviating core separation of powers concerns associated with the administrative state").

[101] SEC v. Chenery Corp., 318 U.S. 80, 87 (1943).

[102] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419-20 (1971); *see* Morehead Marine Servs., Inc. v. Washnock, 135 F.3d 366 (6th Cir. 1998) (ALJ's stated reliance on physician's statement inadequate where there was no record evidence that physician had made the statement).

[103] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

[104] *Id.*

[105] Massachusetts v. EPA, 549 U.S. 497, 533-35 (2007).

[106] *Id.* at 533-34.

time remaining in their sentences.[107] The fundamental flaw in the agency's approach was its failure to consider the factors elaborated in its statutory mandate; indeed, the statute did not even contemplate that remaining time would be a factor in prisoners' placements.[108] Congress has demonstrated that it knows how to explicitly authorize the FCC to bar entities for participation in specified regulatory programs. It has not done so with respect to the USF.

Further, the FCC must do more than superficially invoke broad statutory text like "national defense" in support of its actions.[109] Instead, it must form a "reasoned judgment" why the facts found support the conclusions reached, all within the boundaries of the statute.[110] Were the FCC to merely cite a congressional determination for a statute unrelated to the USF, it would suffer an irremediable flaw. The Spectrum Act of 2012, for example, reflects Congress's judgment about the factors relevant to participating in auctions under the Spectrum Act—*not* participation in the USF.[111] The Submarine Cable Landing License Act specifies relevant factors and procedures involving foreign ownership for submarine cables—*not* participation in the USF.[112] The agency's USF authority requires consideration of other factors;[113] relying on factors outside the statutory mandate would violate the reasoned decisionmaking requirement.

The same would be true with respect to the NDAA because that statute relates to telecommunications equipment and services relevant to ballistic missile defense and nuclear command, control, and communications—*not* participation in the USF.[114] The NDAA, moreover, is a particularly dubious source of authority because it may be constitutionally suspect in its own right. By singling out two specified companies and banning the Department of Defense from using their equipment, this statute raises a red flag for a potential Bill of Attainder Clause problem.[115] Even without these considerations, it is axiomatic that the FCC cannot rewrite the terms of the NDAA to include a prohibition that extends to the USF. As the Supreme

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[107] 455 F.3d 71 (2d Cir. 2006).
[108] *Id.* at 85-87.
[109] *Cf.* 47 U.S.C. § 151 (establishing the FCC).
[110] 549 U.S. at 534-35.
[111] *Cf.* 47 U.S.C. § 1404(b) (expressly referencing spectrum licensing).
[112] *Cf. Id.* §§ 34 (prohibition without permit), 35 (calling for "due notice and hearing" prior to withholding or revoking license), 36 (vesting injunctive power with federal courts).
[113] *Cf. id.* § 254 (elaborating principles for universal service).
[114] *Cf.* Pub. L. 115-91, § 1656, 131 Stat. 1283, 1761-62 (2017) (specifying core defense missions).
[115] A statute can be a bill of attainder if it "determines guilt and inflicts punishment upon an identifiable individual without the protections of a judicial trial." Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 468 (1977); *see also* Consol. Edison Co. of New York v. Pataki, 292 F.3d 338 (2d Cir. 2002) (holding state statute that prohibited an expressly named utility from obtaining certain rate recoveries violated Bill of Attainder Clause); *id.* at 349 (element of guilt does not require express legislative finding).

Court recently emphasized, "[a]n agency has no power to 'tailor' legislation to bureaucratic goals by rewriting unambiguous statutory terms."[116]

Even more problematic would be reliance on proposed legislation, a congressional committee's report, or an oversight letter from a congressional committee.[117] It is fundamental that agencies gain authority from *statutes*, not the tea leaves of other legislative activities.[118] Proposed legislation does not reflect the constitutional requirements of binding law; committee reports and oversight letters similarly represent only certain individuals' politically influenced views.[119] Worse, some of these non-legal documents referenced by the NPRM single out individual companies for disfavored treatment; they suffer the same evils that the Bill of Attainder Clause was designed to protect against. Once again, procedural protections must be brought to bear on any individualized determinations.

B. Procedural Protections Must Accompany Any Taking of Administrative Notice.

For the reasons set forth in Part II above, identifying companies that pose a national security risk is adjudicatory in nature. An alternative interpretation of the NPRM is that the FCC proposes to take administrative notice of other proceedings and the documents described above in the context of adjudications. Not only is the FCC just as constrained by its statutory mandate in adjudications as in rulemakings, but it is further constrained in adjudications regarding administrative notice. Specifically, due process and the APA require that when an agency takes administrative notice of other facts, it must provide the respondent an adequate opportunity to respond.[120] That, in turn, requires the agency to be specific about the matters noticed; this "requirement of specificity" derives from administrative law and its role in ensuring fundamental fairness in agency decisionmaking.[121]

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[116] Util. Air Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014) (quotations in original). Nor would the FCC be entitled to *Chevron* deference for its interpretation of the NDAA if the terms were ambiguous; the NDAA is not a statute the FCC administers. *See* Epic Sys. Corp. v. Lewis, -- S. Ct. --, Nos. 16-285, 16-300, 16-397, 2018 WL 2292444, at *14 (S. Ct. May 21, 2018) (refusing to extend *Chevron* deference to agency's interpretation of Federal Arbitration Act, and cautioning against agency "effectively bootstrapping itself into an area in which it has no jurisdiction") (internal quotations omitted)).

[117] The NPRM specifically references the following: a 2012 House Permanent Select Committee on Intelligence Report (NPRM ¶ 4), a December 20, 2017 letter from eighteen senators and representatives to FCC Chairman Pai (NPRM ¶ 5), and "pending legislation" (NPRM ¶ 6).

[118] *See* Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 891 (D.C. Cir. 1992) ("It is only the statute itself that is law.").

[119] INS v. Chadha, 462 U.S. 919, 945-56 (1983) (emphasizing mandatory constitutional roles for legislative and executive branches for the legislative process).

[120] Heckler v. Campbell, 461 U.S. 458, 469 (1983).

[121] *See, e.g.*, Decker v. Harris, 647 F.2d 291 (2d Cir. 1981) (referencing "procedural fairness to the claimant and preservation of an adequate record for review").

V. CONCLUSION

At its core, due process is "the protection of the individual against arbitrary action."[122] Many of our country's darkest moments are marked by exercises of legislative and executive power against individuals without due process of law.[123] Using a rulemaking proceeding to blacklist entities from participation in a federal program harkens back to these times and is anathema to the rule of law and the U.S. Constitution. Recall, for example, that during the first Red Scare, J. Edgar Hoover famously developed a list of 200,000 "radicals" for Attorney General A. Mitchell Palmer's use, which largely consisted of anyone who dared criticize the government.[124] And after World War II, the period of McCarthyism included the CIA developing files on 300,000 Americans, while the FBI "monitored and harassed individuals and groups believed to be subversive."[125] As Justice Marshall reflected, these "are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it."[126]

Indeed, when Congress tried, by statute, to ban enumerated individuals from receiving compensation from the U.S. government amid concerns about "subversives" within the government, the Supreme Court in *United States v. Lovett* held the statute unconstitutional, noting, "[w]hen our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned."[127] *Lovett* holds important insights for the FCC's proposed action. Just as the Bill of Attainder Clause prohibits legislative singling out of specific individuals for punishment, so too does the Fifth Amendment prohibit federal agencies from undertaking individualized decisionmaking without procedural protections.

The FCC proposes to engage in individualized decisionmaking implicating both property and liberty interests. This is adjudication. Not only would it be contrary to the Constitution to use a rulemaking proceeding to ban entities from participation in the USF program, it would violate the APA and principles of good governance. Should the FCC go forward with adjudicating whether companies pose a threat to national security, I urge it to implement significant procedural safeguards.

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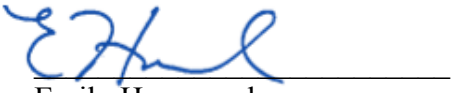
[122] Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio, 301 U.S. 292, 302 (1937).
[123] A particularly striking summary of such times may be found at Brief of Amicus Curiae Fred Korematsu In Supp. of Pet'r's Pet'n for Writ of Certiorari, Al Odah v. United States, Nos. 03-0343, 03-334 (S. Ct. filed Jan. 14, 2004) (documenting unnecessary government restrictions on civil liberties including the Alien and Sedition Acts of 1798, the suspension of *habeas corpus* during the Civil War, the Espionage Act of 1917, the Red Scare from 1919-20, internment of Japanese Americans during World War II, and McCarthyism following World War II).
[124] *See* Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from* History, 87 Mass. L. Rev. 72-79 (2002) (recounting post-World War I Red Scare).
[125] *Id.* at 81.
[126] Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).
[127] U.S. v. Lovett, 328 U.S. 303, 318 (1946).

Respectfully submitted,



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