



## **Recommendation 73-5**

### **Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements**

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(Adopted December 18, 1973)

The basic principle of the rulemaking provisions of the Administrative Procedure Act—that an opportunity for public participation fosters the fair and informed exercise of rulemaking authority—is undercut by various categorical exemptions in 5 U.S.C. § 553(a). More than 25 years' experience with rulemaking under the APA has shown some of these broad exemptions to be neither necessary nor desirable. The Administrative Conference has previously recommended elimination of the exemptions for matters "relating to public property, loans, grants, benefits, or contracts" (Recommendation 69-8, October 22, 1969). Since rules on those subjects may bear heavily on nongovernmental interests, the Conference concluded that their categorical exemption from generally applicable procedural requirements was unwise. For similar reasons, the breadth of the present exemption for all rules which involve a "military or foreign affairs function" is unwarranted.

As with the earlier Recommendation, elimination of the categorical exemption for military or foreign affairs functions would not diminish the power of the agencies to omit APA rulemaking procedures when their observance is found to be impracticable, unnecessary, or contrary to the public interest, or when other exemptions contained in section 553 are applicable, such as those for "general statements of policy" or for rules relating to "agency management or personnel." In addition, the present Recommendation would retain limited exemptive provisions specially directed to the needs of military and foreign affairs rulemaking.

#### **Recommendation**

(1) The APA's categorical exemption for "military or foreign affairs function" rulemaking should be eliminated.

(2) Two aspects of special concern in the military and foreign affairs areas should be dealt with by modified exemptive provisions in place of the present categorical one:

(a) Rulemaking in which the usual procedures are inappropriate because of a need for secrecy in the interest of national defense or foreign policy should be exempted on the same



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basis now applied in the freedom of information provision, 5 U.S.C. § 552(b)(1). That is, section 553(a) should contain an exemption for rulemaking involving matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.

(b) Some of the agencies affected by elimination of the categorical exemption issue numerous rules for which public procedures would be inappropriate or unnecessary. Such agencies would find it burdensome to make case-by-case findings that the usual procedures are "impracticable, unnecessary, or contrary to the public interest" under section 553(b)(B). Repeal of the categorical exemption for "military or foreign affairs functions" should not be construed to discourage use of the implicit power to apply the section 553(b)(B) exemption on an advance basis to narrowly drawn classes of military or foreign affairs rulemaking. It is therefore recommended that repeal of the exemption be accompanied by statutory clarification of the agencies' power to prescribe by rule specified categories of rulemaking exempt by reason of section 553(b)(B), provided that the appropriate finding and a brief statement of reasons are set forth with respect to each category. Though it would not be mandatory, agencies should consider using notice-and-comment procedures for adoption of the exemptive rule itself. Statutory amendment should also amplify the existing section 553(b)(B) standards for exemption by including specific reference to the national interest in the military-foreign affairs area.<sup>1</sup>

(3) Wholly without statutory amendment, agencies already have the authority to use the generally applicable APA procedures for rulemaking when formulating rules of the exempt types. They are urged to do so, wherever appropriate, in matters now excluded by the "military or foreign affairs function" exemption.

### Appendix

Section 553(a) and the relevant part of 553(b), amended in accordance with this recommendation, might read as follows:

Sec. 553. *Rule making.* (a) This section applies, according to the provisions thereof, except to the extent that there is involved—

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<sup>1</sup> An Appendix to this recommendation sets forth suggested language to effect the changes recommended by paragraph (2).



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(1) A matter pertaining to a military or foreign affairs function of the United States specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; or

(2) A matter relating to agency management or personnel [or to public property, loans, grants, benefits, or contracts].<sup>2</sup>

(b) \* \* \*

Except when notice or hearing is required by statute, this subsection does not apply—

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(B) When the agency for good cause finds that notice and public procedure thereon would be impracticable, unnecessary, or contrary to the public interest (including national interest factors if a military or foreign affairs function is involved). The agency shall incorporate in each rule issued in reliance upon this provision either (i) the finding and a brief statement of reasons therefor, or (ii) a statement that the rule is within a category of rules established by a specified rule which has been previously published and for which the finding and statement of reasons have been made.

### **Citations:**

39 FR 4847 (February 7, 1974)

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<sup>2</sup> Recommendation 69-8 proposes the deletion of the bracketed phrase.