

**MILITARY AND FOREIGN AFFAIRS FUNCTION
RULE-MAKING UNDER THE APA**

Arthur Earl Bonfield

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I. INTRODUCTION

THERE is an obvious need to conduct our governmental affairs effectively, expeditiously, and inexpensively. No administrative rule-making procedure is acceptable unless it fairly takes account of this consideration. Consequently, procedural requirements that unduly fetter agency action, or frustrate its purposes, are obviously unwise. What is needed, therefore, is a system of rule-making that will strike a sensible balance between the need for adequate public participation in that process, and the need for efficient government. In striking that balance, society's interest in involving affected members of the public in administrative rule-making at an early stage is not so slight that it should be set aside solely on the basis of minor inconvenience or expense to government.

Schemes meant to assure public participation in administrative rule-making guarantee interested persons an opportunity to communicate their views and information to the relevant government officials before the latter take final action on rules.¹ This is desirable for a number of reasons. Such participation helps to elicit from those who are in the best position to provide it, the information necessary for intelligent action by the agency making rules. A single agency's accumulated knowledge and expertise are rarely sufficient to provide all the data upon which rule-making decisions should be based. Even if it has the relevant factual information, an agency's view may be so myopic that outside feed-in is necessary to put the information properly in perspective and to give it meaning.

Public participation in rule-making is important for another

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This Article is based upon a report prepared by the author under the auspices of the Administrative Conference of the United States (ACUS). The Conference, however, does not in any way approve it or evaluate its content, which is the sole responsibility of the author. The Administrative Conference has not yet taken action of any sort on this subject. The Conference was established by Congress in 1964 to study the efficiency, adequacy, and fairness of federal administrative practices and procedures. It is empowered to make recommendations for improvements in those procedures by which the administrative bodies of our national government determine private rights and obligations. See 5 U.S.C. §§ 571-76 (1970); UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1970-71, at 394-95.

1. On the following three paragraphs, see Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 527-30 (1972); Grossbaum, *Procedural Fairness in Government Contracts: The Procurement Regulations*, 57 VA. L. REV. 171, 261-62 (1971).

reason. Because agency staffs must synthesize the varying interests and competing policies that are related to the scheme they are charged with implementing, they cannot usually be relied upon to present forcefully, on their own motion, the views of environmental, consumer, minority, or other inadequately represented groups. And some agencies may not be trusted to vindicate the public interest without outside input because they may have been captured by those whose interests they regulate or represent. Furthermore, absent an ability of the concerned public to participate in the rule-making process and thereby prod the agencies, officials satisfied with the status quo may neglect to re-examine their positions in light of new views or information that becomes available.

Through public participation, individuals can attempt to defend themselves against an exercise of rule-making power that may be detrimental to their interests and unwarranted or unnecessary. It also is one of the most effective ways by which such decision-making may be kept responsive to the wishes of the citizenry. Administrators will probably be more responsive to commonly felt needs and desires if they must give interested people an opportunity to present their views before rules are finally promulgated. After all, agencies have an inducement to respond to the articulated needs of those who provide input into the process. Response to those needs will earn agencies the approbation of individuals or groups whose interests may be advanced or protected by such official action. Moreover, in some cases people may be less likely to sabotage a rule they dislike if they have had an adequate opportunity to present their objections to the relevant officials prior to its promulgation.

According to the federal Administrative Procedure Act (APA)² the term "rule-making" means "agency process for formulating, amending, or repealing a rule."³ Another provision of the APA provides:

"[R]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.⁴

2. Act of June 11, 1946, ch. 324, 60 Stat. 237, as amended, 5 U.S.C. §§ 551-59, 701-06 (1970).

3. 5 U.S.C. § 551(5) (1970).

4. 5 U.S.C. § 551(4) (1970).

The breadth of this statutory definition means that much may be swept within the compass of the terms "rule" and "rule-making" that might not, at first blush, ordinarily be deemed to constitute a "rule" or "rule-making." That fact should be kept in mind throughout the remainder of this Article.

For example, whether or not they affect the public in any way, day-to-day internal agency planning, operations, and administration that culminate in a fixed policy of any sort, contingent or otherwise, may be deemed "rule-making." The all-encompassing open-ended language defining a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization" suggests the propriety of this conclusion. Nevertheless, much internal agency planning, administration, or operations of this sort may not, in the end, be treated as "rules" under the APA despite this very broad language, for a large portion of these activities would not traditionally have been considered "rule-making."⁵ Indeed, a large part of the internal activities described above could, instead, constitute a *sui generis* species of unlabeled function not defined by the APA and not meant to be within its ambit. The scope of the term "rule" used in the APA may, therefore, be somewhat unclear at its fringes.

This Article, however, will proceed on the assumption that all internal agency planning, administration, and operations culminating in a fixed policy of any sort, contingent or otherwise, would be deemed "rule-making" within the Act's literal language whether or not they substantially affect the public. In subsequent discussion, then, some things which arguably may not be "rule-making" will be treated as such because of the open-ended, broad definition of "rule" in the APA, and the negative implications that can be drawn from existing exemptions in the rule-making section such as that for "general statements of policy" and that for "rules" relating to "agency management or personnel."⁶ By clearly assuming that all such planning, operations, and administration resulting in a fixed policy of any sort are "rule-making" for purposes of this study, several possible objections to, and difficulties with, the ultimate point of this entire exercise may be avoided. As noted, however, this will be done with

5. Despite the breadth of language in section 551(4), that provision was not intended to convert into a rule anything not considered a rule prior to adoption of the APA. The traditional distinction between rule-making and adjudication is, therefore, continued under this provision despite the inclusion of the "or particular applicability" phrase or the potentially limitless scope of the definition. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.02 (1958).

6. 5 U.S.C. §§ 553(a)(2), (b)(A) (1970).

the full recognition that, despite the broad statutory definition of "rule," much of this kind of internal agency planning, operations, and administration may be neither "rule-making" nor "adjudication" and, therefore, entirely outside the intended scope of the APA.

To assure adequate public participation in rule-making, section 4 of the original Act, now section 553, provides mandatory procedures to be followed in all rule-making to which it applies. However, section 553(a) makes these procedures inapplicable "to the extent that there is involved—(1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." The categorical exclusions from section 553 for rule-making relating to "public property, loans, grants, benefits, or contracts," have been investigated and found to be unjustified,⁷ with the result that the Administrative Conference of the United States⁸ and the Administrative Law Section of the American Bar Association⁹ have recommended that they be repealed. A bill has been introduced in Congress to accomplish this result.¹⁰ In the meantime, many federal agencies have voluntarily bound themselves to ignore the exemptions from usual rule-making procedures for rules relating to "public property, loans, grants, benefits, or contracts."¹¹ No comprehensive study, however, has yet been undertaken

7. See Bonfield, *Report of the Committee on Rulemaking in Support of Recommendation No. 16*, in 1 ACUS, RECOMMENDATIONS AND REPORTS 306 (1970).

8. Recommendation No. 16, *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, in 1 ACUS, *supra* note 7, at 29 [hereinafter Recommendation No. 16].

9. Resolution No. 2, in Crowther, *et al.*, *Report to Council of Administrative Law Section of Special Committee on Revision of Administrative Procedure Act 8* (ABA 1972) [hereinafter Crowther]. See also 95 ABA, REPORTS 548 (1970), in which the House of Delegates approved the recommendation that amendments should be enacted to the APA in order to assure: Broadening the coverage of provisions for notice and opportunity for public participation in rulemaking where formal procedures are not required by limiting, in appropriate instances, exemptions now included in the Administrative Procedure Act so far as it may be done without occasioning delay or expense disproportionate to the public interest.

10. S. 1413, 92d Cong., 1st Sess. (1971). See also 116 CONG. REC. 6478-79 (1970) (remarks of Senator Kennedy).

11. See 29 P. & F. Ad. L. Newsletter, 2d Ser., No. 2, Sept. 21, 1971, at 1 (Department of the Treasury, Department of Labor, Federal Home Loan Bank Board); 36 Fed. Reg. 2532 (1971) (Department of Health, Education, and Welfare); *id.* at 4291-92 (Department of Housing and Urban Development); *id.* at 8336-37 (Department of the Interior); *id.* at 13804 (Department of Agriculture); *id.* at 16716 (Small Business Administration); letter from Donald Johnson to Senator James Eastland, Jan. 24, 1972 (Veterans' Administration). See also 30 P. & F. Ad. L. Newsletter, 2d Ser., No. 2, Feb. 22, 1972, at 91 (Veterans' Administration). See generally ACUS, 1971-72 REPORT (1972): "About 20 departments or agencies have published rules or policy statements which commit the agency to the use of notice and comment rulemaking procedures in these areas."

with respect to the other section 553(a) categorical exemptions from the rule-making provision of the federal APA—the exemption for rule-making involving a “military or foreign affairs function,” and the exemption for rule-making “relating to agency management or personnel.” Only the former exemption will be the subject of this Article.¹²

The question that will be considered here is whether the particular exemption from section 553 for rule-making involving a “military or foreign affairs function” is justified and should be continued. As noted earlier, strong reasons favor public participation in the administrative rule-making process. This exemption may, therefore, be justified only insofar as it is narrowly tailored to preserve, in a degree related to their comparative importance, other important conflicting public interests. Exemptions from an obligation otherwise imposed on agencies to implement public participation in rule-making should be countenanced only to the extent to which they are necessary to preserve other values of equal or greater significance.

II. THE EXEMPTION AND SECTION 553

Section 553(b)-(d) attempts to assure that the public has an opportunity to participate meaningfully in the rule-making process. More specifically, section 553(b) requires that an agency contemplating the issuance of a substantive rule¹³ must publish a notice in the Federal Register of the proposed rule-making, indicating the time, place, and nature of the public rule-making proceedings, and a statement of the specific legal authority under which the rule is proposed.¹⁴ The agency must include either the actual provisions

12. The desirability of the various exclusions of 5 U.S.C. § 553(a) (1970) would seem most feasibly and wisely ascertained by a separate analysis of each. The exclusions of section 553(a)(1) will, therefore, be examined as isolated, operable entities in order to determine whether they are independently justified. In doing so, this Article will proceed as if the “public property, loans, grants, benefits, or contracts” exclusion had been repealed, and as if the elimination of subsection (a)(1) would automatically subject that rule-making now excluded by it to the strictures of section 553, subject only to other existing exemptions found in that provision.

13. Section 553(b)(A) expressly exempts “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” from the notice requirements. See DEPT. OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL], which states that this restricts the application of the notice and participation requirements in what is now 5 U.S.C. §§ 553(b)-(c) (1970) “to substantive rules issued pursuant to statutory authority,” citing SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong., 2d Sess. 19 (1947) [hereinafter LEGISLATIVE HISTORY].

14. The House Report on the APA stated: “The required specification of legal

of the proposed rule, or a summary statement of the subjects or issues to which they relate. The notice "must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or arguments relating thereto" as they are entitled to do under section 553(c).¹⁵ The agency also has the option of dispensing with such publication if the notice requirement is functionally satisfied because all "persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law."¹⁶

After giving notice, agencies are required by section 553(c) to accord interested persons a chance to participate in the particular rule-making "through submission of written data, views, or arguments with or without opportunity for oral presentation." In practice the procedure utilized

may take a variety of forms: informal hearings (with or without a stenographic transcript), conferences, consultation with industry committees, submission of written views, or any combination of these. . . . In each case, the selection of the procedure to be followed will depend largely on the nature of the rules involved. The objective should be to assure informed administrative action and adequate protection to private interests.¹⁷

It must be reiterated, however, that the statutory opportunity to submit "written data, views, or arguments with or without opportunity for oral presentation" states only "the *minimum* requirement . . . of public rule making procedure."¹⁸

An agency must review the materials presented to it in the course of public rule-making proceedings, and include in any rules resulting from this process a statement of their basis and purpose. "The agency must analyze and consider all relevant matter presented. The required statement of the basis and purpose of rules issued should not

authority must be done with particularity. Statements of issues in the general statutory language of legislative delegations of authority to the agency would not be a compliance with the section." LEGISLATIVE HISTORY, *supra* note 13, at 258.

15. *Id.* at 200, 258. See also *California Citizens Band Assn. v. United States*, 375 F.2d 43, 48-49 (9th Cir. 1967) (notice of rule-making is sufficient if it provides a description of subjects and issues involved, and agency is not required to publish every precise proposal which it may ultimately adopt as a rule).

16. 5 U.S.C. § 553(b) (1970).

17. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 31. The legislative history indicates that section 553(c) "leaves agencies free to choose from the several common types of informal public rule making procedures, the simplest of which is to permit interested persons to submit written views or data . . ." LEGISLATIVE HISTORY, *supra* note 13, at 19.

18. LEGISLATIVE HISTORY, *supra* note 13, at 200, 259 (emphasis added).

only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule."¹⁹ Nevertheless, it is clear that the statute "does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rule-making proceedings."²⁰ However, where statutes require a particular kind of rule to "be made on the record after an opportunity for an agency hearing,"²¹ other provisions of the APA outlining more formal hearing requirements will govern that proceeding instead of these informal section 553 provisions;²² and in such a case, the rule must be made on the formal "record" so adduced.

According to section 553(b)(B) neither the advance notice nor public participation requirements outlined above apply in those cases where "the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This provision will be discussed in more detail later in this Article.

In addition to general notice of proposed regulations, and an opportunity for interested persons to communicate their views thereon to the relevant government officials, adequate public participation in the rule-making process also requires that the exact terms of a new rule be published a reasonable time *before* its effective date. Otherwise, even if the public has participated in the preliminary formulation of a rule, the final details of its text may not be known to interested parties until the date of its promulgation as law. As a result, a procedure for delayed effectiveness is necessary "to correct error or oversight in regulations before, rather than after, they become effective."²³ Such a safeguard will "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of the rules may prompt."²⁴

A further requirement may, therefore, be found in section 553(d) relating to the time period that agencies must allow between the pro-

19. *Id.* at 201, 259.

20. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 31, citing *Hearings on S. 674, S. 675 and S. 918 Before a Subcomm. of the Senate Comm. on the Judiciary, 77th Cong., 1st Sess., pt. 1, at 444 (1941)* [hereinafter *1941 Hearings*], which is limited authority for the otherwise sound conclusion of the *Manual* on this point because the testimony referred to is that of only a single person, Commissioner Aitcheson of the ICC.

21. 5 U.S.C. § 553(c) (1970).

22. 5 U.S.C. §§ 556-57 (1970).

23. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 114 (1941).

24. LEGISLATIVE HISTORY, *supra* note 13, at 201, 259.

mulgation of a substantive rule and its effective date. It states that the required publication of a substantive rule under section 552, the freedom-of-information provision of the Act, must be made at least thirty days prior to its effective date.²⁵ It is clear that the thirty-day notice provision is applicable even where the public rule-making procedures of section 553(b)-(c) are not because they are found to be "impracticable, unnecessary, or contrary to the public interest."²⁶ Exceptions are provided to this time requirement, however, for those situations in which the substantive rule "grants or recognizes an exemption or relieves a restriction."²⁷ An exemption is also provided where the agency decides, "for good cause found and published with the rule,"²⁸ that a minimum thirty-day period between the time of a rule's publication and its taking effect is unnecessary. This last exemption will also be discussed in more detail later in this Article.

All of the above requirements—advance public notice of rule-making, opportunity to submit views, and delayed effectiveness of rules—are applicable only to substantive rules and not to rules of agency procedure.²⁹ Nor are any of the above requirements applicable to "interpretative rules [or] general statements of policy."³⁰ A report written under the auspices of the Administrative Conference of the United States examined the justification for the latter two exemptions and found their continuation justified.³¹ The Conference itself, however, has taken no official action on the subject of that report.

Meaningful public participation in the rule-making process would

25. See ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 36:

The discussion on section [553(d)] in the reports of both the Senate and House Committees on the Judiciary makes clear the phrase "The required publication or service of any substantive rule" does not relate back or refer to the publication of "general notice of proposed rule making" required by section [553(b)]; rather it is a requirement that substantive rules which must be published in the Federal Register (see section [552(a)(1)(D)]) shall be so published at least thirty days prior to their effective date.

The language of section 553(d) does, of course, lend itself readily to the opposite construction, but it seems to have been construed only in the manner suggested by the *Attorney General's Manual*. See, e.g., *Lansden v. Hart*, 168 F.2d 409 (7th Cir. 1948). See also COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 160 (1955). The congressional discussion referred to may be found in LEGISLATIVE HISTORY, *supra* note 13, at 201, 259.

26. LEGISLATIVE HISTORY, *supra* note 13, at 200-01, 259.

27. 5 U.S.C. § 553(d)(1) (1970).

28. 5 U.S.C. § 553(d)(3) (1970).

29. 5 U.S.C. §§ 553(b)(A), 553(d) (1970).

30. 5 U.S.C. § 553(b)(A) (1970). See also 5 U.S.C. § 553(d)(2) (1970).

31. Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 AD. L. REV. 101 (1971).

also seem to demand recognition of another administrative obligation and private right. Interested parties should be able, on their own motion, to induce a reasoned consideration of the propriety of the issuance, amendment, or repeal of a rule by those authorized to make and modify rules. Otherwise, administrators satisfied with the status quo might neglect to re-examine their position in light of new views or information that becomes available. A right to petition is not only valuable as a protection for private interests, but is also necessary to assure sound government. It forces agencies to reconsider their position on existing or proposed rules in light of petitioners' objections, and therefore makes it more likely that wise policies will be pursued.

Section 553(e) insists, therefore, that even if the notice, public participation, and delayed effectiveness requirements of section 553 (b)-(d) are not applicable because they come within the "good cause" exceptions noted earlier, every agency must give interested persons "the right to petition for the issuance, amendment, or repeal of a rule"—substantive or otherwise. It seems clear, however, that the filing of such a petition does not itself require an agency to engage in a public rule-making proceeding on that subject.³² All the agency must do is to act on the petition in accordance with the procedures it has promulgated under other provisions of the APA.³³ The agency may, of course, either grant such a petition, undertake public rule-making proceedings in relation to it, or deny the petition. The chief practical significance of this express right-to-petition requirement seems to be that the denial of a section 553(e) petition calls into play the provisions of section 555(e),³⁴ which insist that

[p]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person . . . Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

No mention has yet been made of the exemptions contained in section 553(a) for rule-making that involves "a military or foreign affairs function," a "matter relating to agency management or personnel," or a matter relating to "public property, loans, grants, benefits, or contracts." The language of section 553(a) operates to

32. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 38; LEGISLATIVE HISTORY, *supra* note 13, at 201, 260.

33. 5 U.S.C. §§ 552(a)(1)(B)-(C) (1970); LEGISLATIVE HISTORY, *supra* note 13, at 260.

34. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 39, *citing* LEGISLATIVE HISTORY, *supra* note 13, at 201, 260.

exclude *entirely*, and *without qualification*, all rule-making in the categories enumerated therein from *every* provision of section 553 (b)-(e). Consequently, in *no* case are *any* of the requirements imposed on administrative agencies by the provisions previously discussed applicable to these specifically exempted classes of rule-making. This means, for example, that unless some other statute specifically directs the contrary,³⁵ agencies making rules involving a "military or foreign affairs function" of the United States are never obliged as a matter of law to (1) publish notice of proposed rule-making in the Federal Register according to the specifications of section 553(b); (2) give interested persons a chance to participate in the formulation of rules through submission of views or data, according to the terms of section 553(c); (3) publish substantive rules at least thirty days before their effective date as required by section 553(d); or (4) give interested persons "the right to petition for issuance, amendment or repeal of a rule," according to the terms of section 553(e).³⁶

The blanket section 553(a) provisions make no allowance whatsoever for the possibility that rules involving the excluded subjects may differ in their need to be exempted from one or more of the requirements of subsections (b)-(e). That is, section 553(a) does not recognize the possibility that certain rule-making involving a "military or foreign affairs function" may need to be exempted from some of the subsection (b)-(e) requirements, and not from others. Similarly, this exclusionary provision does not recognize that certain rule-making within its terms may need exemption from all of those requirements and other such rule-making from none of them.

The exemptions currently found in section 553(a) obviously proceed upon the assumption that as to the exempt categories of subjects one can make an across-the-board judgment. The policies favoring public participation in rule-making are outweighed by the consequences of subjecting these particular categories of rule-making to the requirements of subsections (b)-(e), or by the consequences of utilizing a more flexible approach to determine whether in any given case rule-making in these categories should be subjected to those requirements. In this Article, the validity of the assumption

35. Another statute will control if it directs that certain kinds of rules relating, for example, to loans, grants, or benefits be made in accordance with the requirements of section 553(b)-(e). *See, e.g.*, 5 U.S.C. § 559 (1970). This conclusion is supported by a statement made during the congressional hearings on the APA: "These exceptions would not, of course, relieve any agency from requirements imposed by other statutes." LEGISLATIVE HISTORY, *supra* note 13, at 199.

36. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 39; LEGISLATIVE HISTORY, *supra* note 13, at 199, 257.

underlying section 553(a) must be carefully examined and tested with respect to the particular section 553(a)(1) exemption for rule-making involving a "military or foreign affairs function." As noted earlier, such an assumption has already been rejected with respect to rule-making relating to "public property, loans, grants, benefits, or contracts."

When rule-making is excepted from the requirements of section 553(b)-(e) by section 553(a), agencies may use any rule-making procedure they please unless, of course, another statute specifies otherwise. This means that with respect to rule-making involving a "military or foreign affairs function," it is completely up to the agency to decide whether there shall be any public participation in rule-making at all. And if the agency decides that some such participation is desirable, it may determine the form or extent of that participation.

The legislative history of the APA indicates that none of the blanket introductory exemptions from the section

is to be taken as encouraging agencies not to adopt voluntary public rulemaking procedures where useful to the agency or beneficial to the public. The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rulemaking procedures they will adopt in a given situation within their terms.³⁷

In practice, however, most agencies do not usually exercise their discretion to follow the requirements of section 553(b)-(e) when they are not bound to do so because the rule-making involves a "military or foreign affairs function." A survey distributed under the auspices of the Rulemaking Committee of the Administrative Conference of the United States during the summer of 1969 asked each federal agency:

Does your department or agency follow the procedures specified by § 553(b)-(e) for any rulemaking exempted from those provisions by § 553(a)(1)-(2)? If it does, list the particular kinds of rulemaking exempted by § 553(a)(1)-(2). Explain. Also list the frequency with which it voluntarily follows those requirements for such exempted rulemaking, and the specific circumstances under which it does so.

Responses to this question by those agencies reporting that they make rules involving a "military or foreign affairs function"³⁸ reveal

37. LEGISLATIVE HISTORY, *supra* note 13, at 199, 257.

38. Agencies that responded to the 1969 Survey and indicated specifically that they made rules of the sort covered by the "military or foreign affairs function" exemption were the Atomic Energy Commission, Department of Agriculture, Department of Commerce, Department of Defense, Federal Power Commission, Post Office Department,

a pattern with respect to such rule-making. The subsection (a)(1) exclusion of these specified types of rule-making from the mandatory procedural terms of section 553(b)-(e) means that most rule-making of this sort will not be conducted according to these procedures.³⁹ And while a number of agencies indicated that they engaged in a contrary practice with respect to some rules involving a "military or foreign affairs function,"⁴⁰ such rule-making seems to account for only a small portion of the regulations of this type.

The procedures actually utilized by administrators with respect to regulations involving a "military or foreign affairs function" are usually inadequate substitutes for those found in section 553(b)-(e). The 1969 Survey asked reporting agencies:

What rulemaking procedures does your department or agency use in those cases where its rulemaking is exempted by § 553(a)(1)-(2) from the requirements of § 553(b)-(e) and it does not choose, in its

and Treasury Department. The State Department must obviously be added to this group, but a questionnaire response from that agency has not yet been received.

39. Consider, for example, the following responses: Atomic Energy Commission—"The AEC does not follow the procedures specified by [section] 553(b)-(e) for the rule-making described above, which is exempted from such procedures."; Department of Agriculture (Food for Peace Program)—"[T]here is no formal published procedure for such rulemaking."; Department of Commerce (Domestic and International Business Bureau)—"No."; Department of Defense—"No."; Post Office Department—does not follow those procedures with respect to rules relating to international mail service or military mail service; Department of the Treasury (Office of Foreign Assets Control)—"does not follow the procedures specified by section 553(b)-(e) for any rulemaking exempted from those provisions by section 553(a)."; Department of the Treasury (Bureau of Accounts and Treasurer's Office)—"No."

See also HOUSE COMM. ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., SURVEY AND STUDY OF ADMINISTRATION, ORGANIZATION, PROCEDURE, AND PRACTICE IN THE FEDERAL AGENCIES (Comm. Print 1957) [hereinafter 1957 HOUSE SURVEY], pt. 3 (Department of Defense), at 267, 277, 324, 332, 347; pt. 9 (Department of State), at 931 ("The Education Exchange Service does not afford direct public participation when not required by statute."), 944 (The Office of Special Consular Service "has not afforded public participation in rulemaking when not required by statute to do so."), 946 (The Passport Office "does not use advisory groups or invite public participation in rulemaking."), 951 ("Inasmuch as the publication of visa regulations is considered to be a foreign affairs function and, therefore, to be exempt from the requirement of general notice of proposed rulemaking, this Office has not established any procedure whereby interested parties may formally present their views and briefs.").

40. The following agencies responded with respect to the indicated programs that they usually did not rely on the section 553(a)(1) exemptions: Department of Agriculture (Regulatory Division)—Regulations under the Defense Production Act of 1950, 50 U.S.C. App. §§ 2061-168 (1970), and Regulations under the plant and animal quarantine acts; Department of Commerce (Office of Direct Foreign Investments)—Regulations under Trading with the Enemy Act, 50 U.S.C. App. §§ 1-39 (1970); Federal Power Commission—Regulations relating to export and import of electricity and natural gas, and construction, operation, or maintenance of certain energy facilities on the borders of the United States; Department of the Treasury—Regulations under treaties or the Internal Revenue Code dealing with international tax affairs. See also 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense, Army Corps of Engineers), at 286.

discretion, to follow § 553(b)-(e)? Be as specific as possible. Include a concrete example of each of the different kinds of rulemaking procedures utilized by your department or agency when it does not follow § 553(b)-(e) because the rulemaking involved is exempted by § 553(a)(1)-(2).

Responses indicate that substitute procedures are not always consistent and frequently do not assure adequate notice to affected parties and a sufficient opportunity for their participation. In some cases involving rules of the type under consideration here, the agencies simply determine the rule they think appropriate and promulgate it, without first notifying or consulting with anyone outside of government.⁴¹ In other such cases agencies give notice to, and engage in informal consultation with, whomever they deem appropriate under the circumstances.⁴²

41. *E.g.*, Atomic Energy Commission—"AEC staff recommendations are presented to the Commissioners. These recommendations are then approved, disapproved, or approved with modifications. If approved, they are promulgated as rules."; Department of Commerce (Domestic and International Business Bureau)—The Bureau simply "[p]repares the rule or regulation in the form prescribed by the Federal Register and has it published in the register."; Treasury Department (Bureau of Accounts and Treasurer's Office)—

When rulemaking involving one of the parts under consideration is exempted by [section] 553(a)(1)-(2), the Department publishes in the Federal Register the text of the revision or amendment of the part, prefaced by an introductory statement of the purpose therefor and of the specific exemption under which it has been determined that notice and public procedure thereon are unnecessary, with a statement of the immediate or soon impending effective date of the revision or amendment and the authority therefor. The foregoing procedure is used in all cases of rulemaking exempted by [section] 553(a)(1)-(2).

See also 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 292 (Administration of the Resettlement Acts: "Public participation in the formulation of these regulations is not considered necessary or desirable."); pt. 9 (Department of State), at 946 (The Passport Office "does not use advisory groups or invite public participation in rulemaking.").

42. For example, the Department of Defense responded that "in the writing and coordination of [exempted] regulations affecting a segment of the public the suggestions and views of that segment are sometimes sought." Elsewhere it noted with respect to exempted regulations:

[Such] regulations are promulgated in the Department of Defense in accordance with a concept of staff responsibility. Therefore, responsibility of initiating, drafting, and issuing regulations lies with the staff agency primarily concerned with the subject matter of the proposed regulation. Almost all proposed regulations are staffed internally for comment by any organizational entity within the Department of Defense that has an official concern with its subject matter. On appropriate occasion, the views of other Executive Branch departments are also obtained. Modifications in the proposed "rule" are made to meet objections and suggestions for improvement. Unresolved disagreements between staff elements on the content of a regulation are normally forwarded to the approval authority for the regulation, with recommendations for the resolution of the disagreement through a policy decision on the point or points in issue.

The initiation of a regulation or a regulation change is frequently stimulated by criticism, objections, or suggestions by members of Congress, the information media, or the public at large.

Responses from other agencies include: Department of Agriculture (Foreign Agriculture and Special Programs Divisions)—"The Department, in connection with such rulemaking, seeks advice from advisory committees composed of representatives of

Of course, some credit should be given to the appropriate agencies for those cases in which they do utilize section 553 procedures for the exempted rule-making, or use substitute procedures that in fact assure adequate notice to affected parties and a sufficient opportunity for their participation. However, the procedures actually utilized for much of the rule-making involving a "military or foreign affairs function" often result in the following undesirable consequence: persons who should be apprised of such proposed rule-making, and be given an opportunity to participate therein, are not so apprised, or afforded an adequate chance to communicate their views. To the extent that this occurs without a justification sufficient to warrant that result, it should not be tolerated. As noted previously, the reasons supporting the section 553(b)-(e) requirements for public participation in rule-making are very compelling. The potential damage to sound government policy formulation and to private rights is great in any case where such participation is not assured. The scope and importance of the subsection (a)(1) exemption under examination here and the specific reasons advanced for its existence must, therefore, be examined with special care.

III. THE SCOPE AND PRACTICAL IMPORTANCE OF THE SECTION 553(a)(1) EXEMPTION

A. Generally

A few general comments should be made about the linguistic form in which subsection (a)(1) is cast. By its terms, section 553(a)(1) only excludes rule-making from section 553(b)-(e) "to the extent that there is involved . . . a military or foreign affairs function of the United States." The legislative history emphasizes the "to the extent" language, stating that section 553(a) exemptions "apply only

various segments of the public affected by specific programs and, on occasion, consults with representatives of affected members of the public."; Post Office Department—"Rulemaking by negotiation [with foreign governments] is used most frequently in international postal matters, [and with the Department of Defense] in developing regulations for postal service to the Armed Forces."; Department of the Treasury—"Wherever possible, it is the practice of the Office of Foreign Assets Control to hold informal consultations with interested groups or persons before the issuance of rules changing aspects of the Control."

See also 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 951 (In lieu of adherence to section 553 procedures "it has been the practice of the [visa] office to confer with representatives of other public agencies as well as private voluntary agencies, and to solicit their comments on proposed regulations. In addition, representatives of the Visa Office meet periodically with representatives of the private voluntary agencies for the purpose of discussing specific visa problems and procedures."), 931 (In lieu of adherence to section 553 the Education Exchange Service consults with the Board of Foreign Scholarships and the Advisory Commission.).

'to the extent' that the excepted subject matter is clearly and directly involved."⁴³ This suggests that where an agency makes some rules that come within these introductory exemptions and some rules that do not, it may ignore the procedures of subsections (b)-(e) in the former cases but must follow them in the latter. Even a single scheme of proposed regulations must abide by this principle if it is practically divisible into particular provisions that involve the excluded functions and ones that do not. The report of the Senate Committee on the Judiciary on the bill that was to become the Administrative Procedure Act stated that the proposed legislation

has avoided the mistake of attempting to over-simplify the measure. It has therefore not hesitated to state functional classifications and exceptions where those could be rested upon firm grounds. In so doing, it has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their functions.⁴⁴

Every federal agency is, therefore, exempted from the usual section 553 requirements *to the extent* that it performs the listed functions. Drafters of the statute stated that "[w]here one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted."⁴⁵ Moreover, the particular purpose or effect of the rules involving either of the excepted functions under examination is irrelevant since *all* such regulation-making is excepted from section 553 by subsection (a)(1).

On the other hand, rule-making is arguably not exempt under subsection (a)(1) unless it "directly" or "clearly and directly" relates to the excluded subject matter.⁴⁶ This language drawn from the

43. LEGISLATIVE HISTORY, *supra* note 13, at 257. See also *id.* at 199.

44. *Id.* at 191. See also *id.* at 13, reporting a comment made on an earlier draft of the APA:

It is suggested that all functions of the War and Navy Departments as well as of the Army and Navy should be exempted. However, since the bill relates to functions rather than agencies, it would seem better to define functions. All departments may, and often do, exercise civil and regulatory powers which should be subject to an administrative procedure statute.

This seems to be the position adopted by Congress when it finally enacted the APA.

45. *Id.* at 250.

46. *Id.* at 199, 257. "Directly" is the language from the Senate Report on the APA, and "clearly and directly" from the House Report. See also ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 26:

The exemption for military and naval functions is not limited to activities of the War and Navy Departments but covers all military and naval functions exercised by any agency. Thus, the exemption applies to the defense functions of the Coast Guard and to the function of the Federal Power Commission under section 202(c) of the Federal Power Act [16 U.S.C. § 824a(c) (1970)].

statute's legislative history suggests that rule-making only indirectly or tangentially related to the exempted functions is not to be treated as within the exemptions, and that close cases should be treated as outside the exemption. There are additional strong reasons to construe the introductory exceptions narrowly, and to resolve close cases by treating them as outside the intended scope of the "military and foreign affairs function" exclusion. Most important is the fact that the subsection (a)(1) exemptions are cast in the form of broad, unqualified exceptions to provisions implementing an important general governmental policy favoring public participation in rule-making. Each of these usually operative provisions individually contain special, detailed exemptions for peculiar cases. In addition, a principal reason for the enactment of the APA was to secure some standardization of administrative procedure.⁴⁷ Exceptions from any of its provisions should, therefore, usually be construed narrowly to achieve that result.

Narrow construction of these exemptions is further supported by the statute's legislative history. The Senate and House Reports on the APA specifically stated that the "foreign affairs function" exemption, for example, "is not to be loosely interpreted."⁴⁸ This led one commentator to suggest that "Congress intended general application of the APA, subject only to individual instances of exemption when foreign affairs functions become implicated in particular proceedings."⁴⁹ Our prior discussion may also suggest that despite the usual presumption of administrative regularity,⁵⁰ the burden of proving that particular agency rule-making is exempted from section 553 because it involves a "military or foreign affairs function" should be on the agency. That this is so as a matter of law, however, is less than clear. We will return to this subject again later.

Significantly, this exemption from usual rule-making requirements only attaches "to the extent *there is involved* . . . a military or foreign affairs function." This seems a narrower exemption than that found in section 553(a)(2) for rule-making wherein "*there is involved* . . . a matter relating to agency management or personnel or

47. McFarland, *Analysis of the Federal Administrative Procedure Act*, in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 16, 22 (G. Warren ed. 1947) [hereinafter G. WARREN]. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950). See also *LEGISLATIVE HISTORY*, *supra* note 13, at 187, 249.

48. *LEGISLATIVE HISTORY*, *supra* note 13, at 199, 257.

49. Freedman, *Administrative Procedure and the Control of Direct Foreign Investment*, 119 U. PA. L. REV. 1, 5 (1970).

50. 2 K. DAVIS, *supra* note 5, § 11.06; 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 355, 360 (1965).

to public property, loans, grants, benefits, or contracts." An attempt to minimize the significance of the additional "relating to" language in subsection (a)(2) of the statute can be made by arguing that there is little if any difference between rule-making where there is "involved" a certain stipulated matter and rule-making where there is "involved . . . a matter relating to" that stipulated matter. Since there is ordinarily a difference in meaning between these phrases, and the inclusion of the phrase "relating to" in subsection (a)(2) is unnecessary except as a contrast to subsection (a)(1) in which it is omitted, a conclusion that the usage only constitutes a choice of style and does not affect content seems difficult to accept. The lesson to be drawn from this would seem to be in accord with the legislative history referred to earlier. Only rule-making "*directly*" and intimately involving a "military or foreign affairs function" is meant to be exempted from usual rule-making procedures.

Nevertheless, the language of the section 553(a)(1) exemption is very broad. The functions excluded are written in terms easily susceptible to wide application. The following discussion will, therefore, attempt to state the main thrust of each of the section 553(a)(1) exclusions and to provide examples of rule-making they may be deemed to exclude.⁵¹ One last point is relevant, however, to any effort to define the scope of these exemptions with precision.

Rule-making exempted by the "military and foreign affairs function" provision of section 553(a)(1) overlaps to a considerable extent with the rule-making also exempted from section 553 by the "agency management or personnel, or public property, loans, grants, benefits, or contracts" provision of section 533(a)(2). Consider, for example, rule-making with respect to Department of Defense property used in military functions. Rule-making of that sort is exempted from section 553 by both the "military function" exclusion of section 553(a)(1) and the "public property" exclusion of section 553(a)(2). An overlap also exists between the "military function" exemption

51. Data with respect to the manner in which administrators actually construe these exemptions in their everyday affairs have been obtained from the 1969 Survey. One question asked:

What rulemaking does your department or agency engage in that is exempted from the requirements of §§ 553(b)-(e) by §§ 553(a)(1)-(2)? Be as specific as possible by listing the particular programs you administer whose rulemaking is exempt, and for each such program the particular part or parts of §§ 553(a)(1)-(2) under which it is exempted. Where some rulemaking for a particular program is exempt and some not, indicate which kinds of rulemaking for that program are exempt and which kinds are not. Very briefly describe the purpose of each such exempted or partially-exempted program and provide citations to the statutes under which it is administered.

Most of the illustrations of exempted rule-making used in the following section are drawn from the questionnaire responses.

and the "foreign affairs function" exemption, since many military operations of our government are intimately related to, and a part of, the nation's foreign affairs program. A consequence of this overlap is that there has been little pressure on the agencies concerned or on the courts to define the precise scope of the "military function" exemption, for example, as an exclusion with operative effect distinguishable and distinct from the exemptions for "agency management or personnel," "public property," "contracts," or "foreign affairs."

When the Department of Defense was asked what proportion of its procurement regulations came under each separable exemptive portion of section 553(a)(1)-(2), it replied:

It would be very difficult to allocate the proportion of procurement regulations assignable to each of the categories of this question. In a fundamental sense [however] all regulations and directives of the Department are incident to its essentially military function of national defense.⁵²

The Department answered in this manner despite the fact that such procurement regulations are also obviously exempt from section 553 as a "matter relating to public . . . contracts" under subsection (a)(2). Similarly, the United States Navy Judge Advocate General has stated with respect to the Department of the Navy that "matters of agency management and personnel are, in the case of this Department, 'military functions' " and that "[t]hose regulations specifically commanded of the Secretary of the Navy by Statute fall easily into either the exception for military functions or the one for agency management or personnel"⁵³

Since the overlap between the various section 553(a) exemptions has resulted in a conspicuous absence of authoritative constructions of each of them as separate entities, the following effort to state the main thrust of the "military function" exemption and the "foreign affairs function" exemption is to some extent speculative. After an examination of the legislative history and the language of each exemption, some possible rules of construction will be suggested by which their individual scope may be defined. Illustrations of rule-making arguably within the ambit of each exemption will then be supplemented by an analysis of the exclusion's significance, measured in terms of its practical exemptive impact. For definitional purposes the following discussion will assume that the particular exemptions

52. 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 278.

53. 1969 Survey Response (Department of Defense).

under examination are exclusive; their scope will be examined without regard to the fact that some rule-making within their ambit may also be exempt under other portions of section 553(a).

B. "Military Function"

Rule-making is exempted by subsection (a)(1) from the requirements of section 553(b)-(e) "[t]o the extent that there is involved . . . a military . . . function of the United States." It should be emphasized that section 553(a)(1) does not exempt all rule-making to the extent the "military" is involved. What is exempted, rather, is rule-making that implicates "military functions." Rule-making involving *any* "function" that is "military" is entirely excluded from the requirements of the rule-making provision. Whosoever performs the "function" that is "military" is exempt to the extent of that performance. Obviously, there is a substantial difference between an exemption for rule-making "clearly and directly" involving the "military," and an exemption for rule-making "clearly and directly" involving a "military function." As noted earlier, the legislative history of the statute demonstrates that this distinction was fully understood and relied upon in drafting the APA. The drafters intended to deal with "types of functions as such and in no case with administrative agencies by name."⁵⁴

The term "military" is defined by *Webster's* as "of or relating to, soldiers, arms, or war . . . belonging to, engaged in, or appropriate to the affairs of war . . . performed or made by armed forces."⁵⁵ *Random House* defines military as "of, for, or pertaining to the army, armed forces, affairs of war, or a state of war" or "of or pertaining to soldiers . . . performed by soldiers . . . befitting, characteristic of, or noting a soldier."⁵⁶ The term "function" may be defined as "the action for which a person or thing is specially fitted, used, or responsible or for which a thing exists: The activity appropriate to the nature or position of a person or thing." "Function" signifies the "acts, activity, or operations expected of a person or thing by virtue of his or its nature, structure, status, or position."⁵⁷

The definitional problem comes to this. The term "military function" might encompass rule-making "clearly and directly" involved in (1) matters specially fitted for, appropriate to, or expected

54. LEGISLATIVE HISTORY, *supra* note 13, at 191. See also *id.* at 13.

55. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1433 (1966) [hereinafter WEBSTER'S].

56. RANDOM HOUSE UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 909 (1966).

57. WEBSTER'S, *supra* note 55, at 920-21.

of the armed forces in light of their peculiar nature and qualifications, or (2) matters specially fitted for, appropriate to, or expected of war and preparation for war generally; or it might encompass both. Some things "clearly" expected of, appropriate to, or specially fitted for war or preparation for war would not be "clearly" expected of, appropriate to, or specially fitted for the armed forces as such; and some things "clearly" expected of, appropriate to, or specially fitted for the armed forces would not be considered as such for war or preparation for war. For example, it may be argued that national rationing is "directly" involved in, specially fitted for, and appropriate to the waging of war. Yet, the armed forces are not specially suited, by their peculiar nature and qualifications, to create or administer such a program; nor is it "clearly" an appropriate activity for the armed forces as such.

There is some reason to argue that the term "military function" was used exclusively in the first sense noted above. Congress could have, had it so intended, used the term "war function" or "national defense function," rather than "military function," if it wished to indicate unambiguously a broader range of rule-making activity to be exempted than that usually expected of, or deemed peculiarly appropriate to the armed forces. Furthermore, the more colloquial use of the term "military" probably denotes something related to the armed forces rather than something related to war or preparation for war generally.

In construing the term "military function," of what relevance, if any, is the fact that section 551(1) (F)-(H) specifically exempts from the entire APA "courts martial and military commissions," "military authority exercised in the field in time of war or in occupied territory," and functions conferred under a number of enumerated statutes relating to war and national defense matters?⁵⁸ Do these express exclusions from the entire Act suggest anything about the precise scope of the exemptions for matters involving a "military function" found in both the rule-making and the adjudication provisions?⁵⁹ Some clues may be drawn from a more complete excursion into the legislative history of the APA.

A provision in an earlier draft of the APA would have expressly excluded from almost the entire Act "war and defense functions" arising out of the Second World War, and scheduled to terminate shortly thereafter. The provision (section 13) stated:

58. 5 U.S.C. §§ 551(1)(F)-(H) (1970).

59. 5 U.S.C. § 554(a)(4) (1970).

Except as to the requirements of section 3 [the freedom of information section], there shall be excluded from the operation of this Act war and defense functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, as well as those conferred by the following: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944 [and so forth].⁶⁰

This section was to be in addition to the specific "military function" exemptions from the rule-making and adjudication provisions.⁶¹ It was suggested, however, that section 13 should be deleted. As a substitute, the definition of "agency" in section 2(a) of the proposed act should be amended to expressly exclude from the Act's coverage "war and defense functions which by law expire on the termination of present hostilities," and "courts martial, military or naval authority exercised in the field in the time of war or in occupied territory, and the functions conferred by the following statutes." The purpose of this suggestion was "to remove any question of the application of the [entire APA] to purely military functions."⁶²

The result of the above suggestions with respect to an earlier version of the APA was that proposed section 2(a) was amended so that, when finally adopted by Congress, it provided:

Except as to the requirements of section 3 [the freedom of information section], there shall be excluded from the operation of this Act . . . (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.⁶³

The addition of section 2(a)(2) relating to courts martial not "exercised in the field in time of war or in occupied territory" might have been the result of doubt about whether the term "military function" used later in the Act would clearly cover such tribunals in those cases. A suggestion had been made with respect to an earlier draft of what has now become section 553(a)(1) that "[t]he phrase 'military

60. LEGISLATIVE HISTORY, *supra* note 13, at 43.

61. *See id.* at 17, 21.

62. *Id.* at 43-44.

63. Administrative Procedure Act of 1946, ch. 324, § 2(a), 60 Stat. 237 (codified at 5 U.S.C. § 551(1) (1970)).

functions' should be clarified, particularly for the purpose of including within it all proceedings relating to court martial."⁶⁴

It may be contended that the exclusionary term "military function" that appears in the rule-making and adjudication provisions of the APA is congruent with the much more specific exemptions that were finally included in APA section 2(a)(2)-(4) "to remove any question of the application of the [entire APA] to purely military functions." There are, however, serious objections to this approach to construing the term "military function" as it is used in section 553(a)(1). The legislative history relied on is at best muddy in meaning and small in quantity. There is no evidence that the several specific exclusions from the entire APA found in its section 2(a)(2)-(4) were intended to constitute an exclusive and exhaustive catalogue of "military functions." Any effort to confine the meaning of "military function" to those functions excluded by section 2(a)(2)-(4) is also at odds with the normal meaning of the former term. Most things excluded from the APA by section 2(a)(2)-(4) are clearly "military functions"; but it is equally clear that the term "military function" has a broader connotation than, for example, merely courts martial and orders of military commanders in the field in time of war.

In addition, if the enumerated section 2(a)(2)-(4) exclusions were meant to be exhaustive of all "military functions," why include the more generally phrased, therefore potentially broader scoped, "military function" exemptions in the rule-making and adjudication provisions of the same act? Those latter exclusions would have been superfluous if section 2(a)(2)-(4) already excluded from virtually the entire Act, including the rule-making and adjudication provisions, *all* that the term "military function" was meant to exclude. The term "military function" must, therefore, have been intended to encompass more than the specifically enumerated functions listed in APA section 2(a)(2)-(4), but not *necessarily* to include all those functions. The most likely reason for adding the courts martial and military field authority in time of war exclusions to the definition of "agency" in section 2(a) was that the drafters deemed it necessary to exclude those particular "military functions" from *all* provisions of the APA except section 3—the freedom-of-information provision. Standing alone, the "military function" exemptions of APA sections 4 and 5 would have excluded those particular enumerated functions from

64. LEGISLATIVE HISTORY, *supra* note 13, at 17. See also *id.* at 22, to the same effect with regard to the same exemption in the adjudication section of the APA.

only the rule-making and adjudication provisions of the Act but not, for example, from the judicial review provision, section 10.⁶⁵

A further point should be made with respect to the exclusion of other war-related functions from virtually the entire Act by APA section 2(a)(4)—functions that would expire at the termination of the Second World War, or soon thereafter, and functions conferred by the Selective Training and Service Act of 1940, Contract Settlement Act of 1944, and Surplus Property Act of 1944. It is certainly not apparent that when the exemptions for these enumerated subjects were added to the proposed APA section 2(a) definition of "agency," they were *all* deemed to be "military functions" as such. Despite the one shred of evidence to the contrary,⁶⁶ the legislative history is not clear that every function that would expire at the termination of the Second World War or within any fixed period thereafter, or every function conferred by the specifically enumerated war statutes, was viewed as a "military function."

Not all "war or defense"⁶⁷ functions of the type listed in 2(a)(4) are necessarily "military functions," since many may be only indirectly or tangentially linked to a mission specifically fitted for, appropriate to, or expected of the armed forces. Was civilian price control and rationing administered by the OPA during the Second World War, and scheduled by law to expire at its termination or at a specified date thereafter,⁶⁸ a "military function"? Probably not, if we resort to the more probable meaning of "military," because it did not "clearly and directly" involve activities normally deemed within the special capacity and expertise of the armed forces because of their peculiar attributes or nature.

The real reason for the exemption of these particular functions in section 2(a)(4) appears to have been something other than a concern that all "military functions" should be exempted from the Act. "[I]t would take at least a year for any adequate [Administrative Procedure Act] proposal to be placed in operation."⁶⁹ As a result,

65. Section 10 of the original APA did not separately define "agency" as does its current codification, 5 U.S.C. § 701 (1970). The definition found in section 701(b)(1) includes an identical reproduction of that found in section 551(1)(F)-(H).

66. See text accompanying note 62 *supra*.

67. LEGISLATIVE HISTORY, *supra* note 13, at 43. Section 13 of the proposed Act used the term "war and defense functions" to describe the specific functions later exempted by APA § 2(a)(4).

68. Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23.

69. LEGISLATIVE HISTORY, *supra* note 13, at 43. See also Freedman, *supra* note 49, at 6: "Prior to 1966, the APA excluded from its reach 'functions which by law expire on the termination of present hostilities.' . . . [T]he revision of the APA in 1966 resulted in the deletion of the phrase 'functions which by law expire on the termina-

“war agencies” could not comply with the requirements of this 1946 statute, or it was believed that they should not be put to the expense of complying with it in carrying out these particular enumerated functions, since these functions would expire shortly. A decision was made on this basis, therefore, to exempt the specific functions in question from virtually the *entire Act*—without any implication that they were or were not “military functions.”

In light of this discussion, it appears that section 2(a) of the APA, now section 551(1), does not help to define, in any more precise way, the scope of the term “military function” as it is used in section 553(a)(1). It might also be worth considering, however, whether language used in the 1967 revision of the freedom-of-information provision of the APA,⁷⁰ section 552, is relevant to the construction of “military function” in the rule-making provision. The new freedom-of-information provision contains an exemption for matters that are “specifically required by Executive order to be kept secret in the interest of the *national defense* or foreign policy.”⁷¹ This provision was enacted subsequent to the APA and, therefore, is not of direct relevance to any original congressional intention with respect to the scope of the term “military function” used in the rule-making and adjudication provisions. It may, however, indicate Congress’ more recent impression as to the meaning of that term.

Why, for instance, did Congress exempt from section 552 matters that are “specifically required by Executive order to be kept secret in the interest of *national defense*”? If section 553(a)(1) language were used, Congress would have exempted from the new freedom-of-information provision matters that are “specifically required to be kept secret by Executive order in the interest of the proper performance of *military functions*.” Did Congress consider what, if any, difference in scope inhered in the term “military function” as compared to the term “national defense” or “national defense function”? Nothing has been found in the legislative history to suggest that this particular question was even considered.⁷²

Indeed, it seems reasonably clear that in choosing language for the above exemption from the freedom-of-information provision, Congress was exclusively concerned with assuring some conformity to

tion of present hostilities.’ The Reviser’s Notes explain that the phrase was omitted ‘as executed.’ See 5 U.S.C. § 551, Historical and Revision Notes (1970).

70. Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (codified at 5 U.S.C. § 552 (1970)).

71. 5 U.S.C. § 552(b)(1) (1970) (emphasis added).

72. See, e.g., H.R. REP. NO. 1497, 89th Cong., 2d Sess. (1966).

a pre-existing Executive Order—more precisely, Executive Order 10501 of November 5, 1953, entitled “Safeguarding Official Information in the Interest of the Defense of the United States.”⁷³ This Order stated that government information requiring “protection in the interests of *national defense*” was to be limited to three classification categories: top secret, secret, or confidential. It went on to provide: “No other designation shall be used to classify defense information, *including military information*, as requiring protection in the interests of national defense, except as expressly provided by statute.”⁷⁴ This seems to suggest that “national defense,” as used in the Executive Order, was understood to be broader in scope than the term “military.” Further possible corroboration exists in the context of this Executive Order for the notion that “national defense” connoted a broader range of matters than the term “military.” The information described in the Order as requiring protection in the interests of “national defense” included information the disclosure of which might lead to “a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to national defense.”⁷⁵

Since the “national defense” exclusion from the freedom-of-information provision was based upon the above Executive Order, there is reason to assume that when Congress enacted section 552, it used the term “national defense” in the same way—as a broader notion than “military,” the latter, however, being assumed to be included within the former. *Webster’s* defines “defense” as “capability of resisting attack . . . practice or manner of self protection.”⁷⁶ The provision of grants to educate college students in fields that are helpful to the capacity of our country to protect itself and resist attack involves a “national defense” function; but it is not likely to be considered as involving a “military function” within the meaning of section 553(a)(1). Similarly, construction of the interstate highway system or the general stockpiling of strategic raw materials may be viewed as part of the “national defense” function but should not properly be deemed to involve a “military function.” These examples do not “clearly” involve an activity expected of, appropriate to, or specially suited for the armed forces because of their peculiar attributes or qualifications; they do, however, “clearly” involve our capacity to resist attack and our manner and practice of self protection.

73. *Id.* at 9-10.

74. Exec. Order No. 10501, § 1, *as amended*, 3 C.F.R. 306 (1972) (emphasis added).

75. Exec. Order No. 10501, § 1, 3 C.F.R. 306.

76. WEBSTER’S, *supra* note 55, at 591.

This discussion seems to suggest two things. First, as a matter of common usage and understanding, the term "national defense" may easily be applied to a broader scope of governmental activity than the term "military function." Second, Congress probably did not directly consider the relationship between the term "national defense," which appears in the freedom-of-information provision, and the term "military function," which is used in the rule-making and adjudication provisions. Its use of a term in section 552 that is inconsistent with that used to exempt some related matters in the rule-making and adjudication provisions seems, therefore, to be of little significance when viewed in isolation. However, in adopting section 552 Congress probably did intend the term "national defense" to be broader than the term "military function" because it desired to adopt the principles embodied in an existing executive order which seemed to have recognized such a distinction. This indicates that in 1967, when Congress amended the already recodified APA, it would probably have read the section 552 term more expansively than the section 553(a)(1) term.

This conclusion is, of course, not mandatory. Both at the time the APA was adopted in 1946 and at the time the new freedom-of-information provision was added in 1967, Congress might have believed the terms "national defense" and "military" function to be fungible. Certainly a number of federal agencies have thought that these terms are synonymous;⁷⁷ and there is no authoritative judicial construction of the terms to the contrary.

In this connection it should be noted that the precise exemptive language used in the rule-making provision of the original APA, section 4,⁷⁸ and in the adjudication provision, section 5,⁷⁹ was any "military, *naval* or foreign affairs function." The APA was recodified in 1966 without any intention of changing its substance.⁸⁰ At that time the word "naval" was omitted in both provisions because it was considered to be included within the term "military."⁸¹ In omitting the term "naval" on this basis Congress obviously meant to reject any notion that the word "military" meant "of or related to the army—distinguished from naval."⁸² Obviously, also, Congress believed

77. See, e.g., text accompanying notes 90-93 & 110 *infra*.

78. Administrative Procedure Act of 1946, ch. 324, § 4, 60 Stat. 238, as amended, 5 U.S.C. § 553 (1970) (emphasis added).

79. Administrative Procedure Act of 1946, ch. 324, § 5, 60 Stat. 239, as amended, 5 U.S.C. § 554 (1970) (emphasis added).

80. Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 383.

81. See 5 U.S.C. § 553, Historical and Revision Notes (1970).

82. WEBSTER'S, *supra* note 55, at 1433.

that the term "naval" used in section 4 of the original APA and deemed by it to be included within the term "military," was intended solely in its military sense—"of, relating or belonging to, connected with or used in a navy,"⁸³ and not in its general maritime sense—"of or relating to ships or shipping" generally.⁸⁴

It has been asserted that since "the statutes governing the Coast Guard constitute it a military organization . . . the authorized rules for its governance would clearly fall in the first category" of section 553(a)(1)—rules involving a "military function."⁸⁵ Similarly, a "special notice" or rule issued by the Coast Guard that restricted access to a portion of a harbor during the launching of a Polaris missile firing submarine of the United States Navy was held to be "within the exception to [section 4 of the APA] for 'any military, naval, or foreign affairs function of the United States.'"⁸⁶ These examples seem to be consistent with a construction of the term "military function" that is narrower than the term "national defense" function. However, in a statement regarding a draft of the proposed APA section 4, the Attorney General of the United States stated: "The term 'naval' in the first exception clause is intended to include the *defense* functions of the Coast Guard and the Bureau of Marine Inspection and Navigation."⁸⁷ This seeming equation of "defense function" with "military function" may be of no significance, or it may suggest that any attempt to distinguish between these terms here is improper.

Of interest in this connection is the holding of *McBride v. Roland*.⁸⁸ It suggests that a denial by the Coast Guard Commandant of a special validation endorsement of the plaintiff's merchant mariner's documents on the grounds that his presence aboard a civilian ship would be inimical to the national security was not governed by the APA because this decision came within the exceptions of sections 4 and 5 for "naval or military affairs."⁸⁹ The function being performed by the Coast Guard in this circumstance was a "national defense" function. But did it "clearly and directly" in-

83. WEBSTER'S, *supra* note 55, at 1508.

84. *Id.*

85. 1957 HOUSE SURVEY, *supra* note 39, pt. 10 (Department of the Treasury), at 1017. See also *United States v. Aarons*, 310 F.2d 341, 347 (2d Cir. 1962) (Coast Guard is a military service).

86. 310 F.2d at 348 n.3.

87. LEGISLATIVE HISTORY, *supra* note 13, at 225 (emphasis added).

88. 248 F. Supp. 459 (S.D.N.Y. 1965).

89. 248 F. Supp. at 465.

volve an activity specially fitted for, appropriate to, or expected of the armed forces as such, because of their peculiar nature, attributes, or qualifications? Is the exclusion of seamen from civilian ships in the interest of national security really an activity of this type? Perhaps so, in light of the fact that both the Navy and the Coast Guard must be considered armed forces. But if this conclusion is wrong, *McBride* would suggest that the scope of the term "military function" may be congruent with the potentially broader term "defense function."

A number of agencies seem to have taken the view that "military function" is synonymous with "national defense function" or "war function." Agencies have read the section 553(a)(1) term "military function" as applying to anything involving, and not necessarily "clearly and directly," activities expected of, appropriate to, or specially fitted for war or preparation for war generally, as well as activities expected of, appropriate to, or specially fitted for the armed forces as such because of their peculiar nature, structure, or capacity. In addition, agencies have sometimes construed "military function" to mean anything involving or affecting the armed forces, rather than as anything "clearly and directly" involving an armed forces "*function*." Consequently, there is no general agreement as to the precise scope of the "military function" exemption. The following examples demonstrate, however, that in practice section 553(a)(1) is construed in a number of different ways—and frequently very broadly.

For instance, the Federal Power Commission reported in 1969:

The Commission's functions which appear to come within the "military function" exemption of 5 U.S.C. § 553(a)(1) include: (1) its emergency power pursuant to section 202(c) of the Federal Power Act to order temporary connection of electric facilities and to require generation, delivery, interchange or transmission of electric energy; (2) those under section 16 of the Federal Power Act which authorizes the United States to take temporary possession of licensed hydroelectric projects for the purpose of manufacturing nitrates, explosives or munitions of war; (3) to the extent that a war emergency is involved, the Commission's authority under section 7(c) of the Natural Gas Act to issue temporary certificates of public convenience and necessity to construct and operate facilities of a natural gas company. With respect to these "military functions", the Commission would agree that the present policy of the Administrative Procedure Act exempts it from the rulemaking requirements of 5 U.S.C. § 553 (b)-(e), since in time of war, the public interest may require the use of certain hydroelectric facilities for military purposes, the alloca-

tion of electric or natural gas energy to meet emergency demands and/or the reestablishment of disrupted utility services with the utmost dispatch.⁹⁰

Similarly, the Department of Agriculture has noted that "the only rulemaking [in which it engages] that might involve a 'military function' as mentioned in 5 U.S.C. 553(a)(1), would be, possibly, regulations under the Defense Production Act [of 1950]" dealing with expansion of civilian productive capacity to provide for "national defense."⁹¹ In 1969 the Post Office Department claimed that in the "implementation of the statutes relating to postal services for the Armed Forces," its rule-making was exempt from section 553 by the subsection (a)(1) "military function" exclusion.⁹² And the Atomic Energy Commission stated that its "rulemaking relating to permits for Access to Restricted Data . . . insofar as Category C-24 'Isotope Separation—Gas Centrifuge Method' is concerned . . . [is] exempt under § 553(a)(1) as involving 'a military . . . function.'"⁹³

Of more importance is the Department of Defense's position as to the meaning of the term "military function." Obviously that exemption has its most practical relevance to the activities of this particular agency. Recall that the legislative history of the APA supports the assumption that some of the functions performed by the Department of Defense are *not* "military functions" within the meaning of section 553(a)(1) and, therefore, are not excluded on that basis from section 553.⁹⁴ Such a nonmilitary function performed by this Department might be the domestic flood control and protection of navigable waters activities conducted by the Army Corps of Engineers.⁹⁵ The domestic activities of this sort undertaken by the Corps do not "clearly and directly" involve activities expected of, appropriate to, or specially fitted for the armed forces as such⁹⁶ because of their special nature, qualifications, or attributes. In 1957 the Department of Defense tacitly admitted that not all activities of the Corps of Engineers were "military functions." It stated:

90. 1969 Survey Response. The statutory authorizations to which the Commission referred are codified at 16 U.S.C. §§ 809, 824a(c), and 15 U.S.C. § 717f(c) (1970) respectively. See also 1941 Hearings, *supra* note 20, pt. 2, at 502-03.

91. 1969 Survey Response. The Defense Production Act of 1950 is codified at 50 U.S.C. App. §§ 2061-163 (1970).

92. 1969 Survey Response.

93. 1969 Survey Response. Cf. 10 C.F.R. § 2.905 (1972).

94. See note 44 *supra* and accompanying text.

95. See, e.g., 33 U.S.C. §§ 701-09a (1970).

96. Most of the personnel of the Corps are not even members of the armed forces. The exemption, however, is for "military functions" and not "the military."

Many of the rules considered herein [relating to the Corps of Engineers] are of military or naval significance. Since the procedures in paragraph 4 of the Administrative Procedure Act are followed in all cases, there has been no need to characterize particular rules as involving or not involving military or naval functions.⁹⁷

Of course, there is no doubt that if strategic military planning constitutes rule-making within the meaning of the APA, it is exempted from section 553 as a "military function" under subsection (a)(1). Nothing is more plainly adapted to, specially fitted for, or appropriate to the armed forces because of their peculiar qualifications or attributes than planning "battlefield" strategy in the event of armed hostilities. So, too, any rules concerning the organization, deployment, or use of the armed forces as such are plainly "military functions."

Beyond this, it has been alleged, however, that in light of the mission of the Department of Defense as a whole, "the rule-making provisions do not apply to the *usual* functions of the [Defense] Department"⁹⁸ or to the "typical" functions of that Department.⁹⁹ The Department has also maintained that in "a fundamental sense *all* regulations and directives of the Department [of Defense] are incident to the essentially military function of national defense."¹⁰⁰ Therefore, the Department of Defense would probably take the view that, for example, all of the following regulations involve "military functions" and are consequently exempt from section 553:

(1) The Armed Services Procurement Regulation; (2) claims and litigation procedures; (3) distribution of surplus property; (4) the correction of military records; (5) support of military dependents and paternity claims; (6) labor surplus area set-asides; (7) indebtedness, financial transactions, and commercial affairs of military personnel; (8) payments under the Missing Persons Act and death benefits; and (9) standards of conduct for civilian employees.¹⁰¹

While section 553(a)(2) now provides exemptions for most, if not all, of the above activities, repeal of those exemptions for rules relating to "public property, loans, grants, benefits, or contracts" would almost surely induce the Department of Defense to rely on the "military function" exclusion in an effort to reach a result it

97. 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 286.

98. Reich, *Rulemaking Under the Administrative Procedure Act*, in G. WARREN, *supra* note 47, at 492, 498 (emphasis added).

99. Reich, *Administrative Procedure Act: Analysis of its Requirements as to Rule-making*, 33 A.B.A.J. 315, 317 (1947).

100. See text accompanying note 52 *supra* (emphasis added).

101. 1969 Survey Response.

desires—the continued exemption of all such rule-making from section 553.

Indeed, the Department of Defense already appears to have taken this view. The Senate Committee on the Judiciary recently queried that Department with respect to its attitude toward a bill—S. 1413¹⁰²—that would have repealed the section 553(a)(2) exemptions for rule-making relating to “public property, loans, grants, benefits, or contracts.” The Department’s reply indicates a belief that virtually all of its rule-making is exempted from section 553 by the “military function” exemption. It commented:

Since S. 1413 would leave intact the current exemption in 5 U.S.C. 553(a)(1) for “a military or foreign affairs function of the United States,” it appears that the Department of Defense would not be affected by the proposed legislation. . . . If, however, notwithstanding 5 U.S.C. 553(a)(1), S. 1413 should be so intended and construed as to apply to rulemaking concerning contracts and the other enumerated matters of this department, the Department of Defense is strongly opposed to S. 1413.¹⁰³

More specifically, the Department has stated that the subsection (a)(1) “military function” exemption excludes from usual procedures

the issuance of regulations governing such widely diverse military functions as the operation of the Reserve Officers’ Training Program in civilian education institutions, the determination and designation of vital industrial facilities in support of military mobilization production programs, the implementation of the defense scientific and technical information program, . . . [and] the choice between commercial or military transportation facilities for military supplies or personnel.¹⁰⁴

It went on to note that “[s]uch regulations govern military functions which do not appear to fall within the exception for ‘any matter relating to internal management or personnel of an agency.’ ”¹⁰⁵

The Defense Department has taken the position that rule-making relating to discharge review boards and boards for the correction of

102. 92d Cong., 1st Sess. (1971). See notes 7-10 *supra* and accompanying text.

103. Letter from Fred Buzhardt, General Counsel, Department of Defense, to Senator James Eastland, Jan. 18, 1972.

104. *Hearings on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 493 (1964) [hereinafter *S. 1663 Hearings*].

105. *Id.* at 493-94. The present language of section 553(a)(2) is “agency management or personnel.” The language quoted is from an analogous provision that was to be included in S. 1663.

military records involves "military functions."¹⁰⁶ Similarly, the Department has stated that all rules relating to the administrative settlement of personal injury and property damage claims are exempt because they "involve military functions in the sense that the claims are generated by personnel of the military departments within the scope of their employment."¹⁰⁷ The Department has also maintained that all rules relating to administration of the Resettlement Acts governing purchase and acquisition of land for the military, and resettlement of previous owners, are exempt from usual rule-making requirements because "[t]hese rules involve military and naval functions in that the rules apply to certain acquisitions of land by the military departments."¹⁰⁸

Similarly, it has been suggested that rule-making concerning property owned by the Department of Defense and used in the performance of military functions, and rule-making involving "virtually all contracts for military procurement," would be excluded from section 553 under the "military function" exemption of subsection (a)(1).¹⁰⁹ The Department of Defense has specifically stated that it would be "difficult to allocate the proportion of procurement regulations assignable" to each of the categories specifically exempted by section 553(a)(1)-(2) because all regulations of the Department are "incident to its essentially military function of national defense."¹¹⁰ It has also been asserted that rule-making dealing with "United States military surplus [property] located abroad" is exempt from section 553 because it involves a "military function" within the meaning of subsection (a)(1).¹¹¹ Less debatable, of course, is the assertion that rules "pertaining to access to a secret missile base" would be deemed to involve a "military function."¹¹²

Some of the previous claims as to the scope of the exemptive provision in question are at best dubious. As suggested earlier in this section, the term "military function" should be construed as encompassing only those activities or operations, by whoever performed, that are specially tailored for, appropriate to, or expected of the armed forces as such because of their peculiar nature, capacities, or qualifications. Only rule-making "clearly and directly" in-

106. 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 332, 346.

107. *Id.* at 324.

108. *Id.* at 292.

109. Bonfield, *supra* note 7, at 312.

110. 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 278.

111. *Id.*, pt. 2 (Department of Commerce), at 128.

112. S. 1663 Hearings, *supra* note 104, at 679.

volving such activities should be deemed excluded by section 553(a)(1) as a "military function." There is, however, as illustrated by at least some of the examples cited above, disagreement over the correctness of this construction by those who are charged with applying section 553.

Even if we assume the soundness and acceptability of the construction of "military function" proffered here, promulgation of the Armed Services Procurement Regulations (ASPR), for instance, may arguably be deemed such a function. However, one commentator has suggested that these regulations are not excludable as section 553(a)(1) "military functions":

The ASPR are not peculiar to military functions. They merely represent a comprehensive restatement of those policies thought to be necessary in applying sound business practices to the acquisition of goods and services by the military departments of the Government; they are not tailored to the necessities of military operations as such. The ASPR are no more entitled to exemption as a "military function" than is the rather skimpy State Department Procurement Regulation to be excluded from section 4's requirements as a "foreign affairs function."¹¹³

This view seems questionable for several reasons. It is true that rule-making for the acquisition, use, and disposal of government property *generally* does not involve an activity specially fitted for, appropriate to, or expected of the armed forces as such because of their peculiar nature, capacities, or qualifications. However, that characterization views rule-making of this type at an unduly high level of generalization and abstraction. A more realistic formulation of the relevant question might be: Does rule-making for the acquisition, use, and disposal of property and materiel needed by the armed forces to perform their admittedly "military functions" "clearly and directly" involve such a function?

The acquisition, superintendence, and disposal of combat weapons, weapons systems, and other materiel peculiarly designed for use by combat forces and their support units is unique to the armed forces. Acquisition of materiel of this type frequently presents special problems and peculiar requirements. In many cases, the same may also be said about other materiel specifically required by the armed forces in their performance of "military functions." No doubt, this is one of the reasons for Armed Services Procurement Regulations, rather than one single set of General Services Administration regulations governing all procurement of property and materiel by every agency

113. Grossbaum, *supra* note 1, at 260.

of the United States Government—including the armed forces. Department of Defense rules tailored to provide for the acquisition of these kinds of things seem, therefore, “clearly” to involve an activity specially appropriate to, expected of, or fitted for the armed forces by virtue of their peculiar nature, qualifications, or capacities. The armed forces have special problems in procurement of materiel for use in admittedly “military functions”; therefore, they have special competence and are specially suited to deal with that procurement process, which means that ASPR may be “clearly and directly” involved in a “military function.”

To be sure, an argument to the contrary may be made: The acquisition, as opposed to use, of the property and materiel necessary to create and maintain a governmentally organized armed fighting force is not specially fitted to, appropriate for, or expected of the armed forces by virtue of their peculiar capabilities. Procurement as such is not a “military function”; nor is procurement for the armed forces generally, or procurement of specially designed military hardware specifically, such a function. In fact, the performance of none of these tasks requires any special attributes or qualifications peculiar to the armed forces.

This last factual assumption is very dubious, however, especially in the context of materiel designed specifically for combat use or for other peculiar requirements of the armed forces. It may also be dubious, though less so, in the context of procurement for the armed forces of materiel generally; peculiar problems with which the armed forces are specially fitted to deal may arise out of the unusual needs of the armed forces in the acquisition of even common materials and equipment. The need for special speed and peculiarly large quantities are examples. All of the above, however, are debatable issues upon which reasonable men may disagree.

Nevertheless, the conclusion that ASPR does not “clearly and directly” involve a “military function” is also difficult to accept for other reasons—the general terminology of that particular exemptive term, and the very direct involvement of the procurement process for materiel in the successful execution of other indisputable “military functions.” One may agree with the undesirability of the “military function” exemption generally, or the exemption of ASPR particularly, without necessarily concurring in the optimistic conclusion that the courts or Defense Department would, as a result, construe ASPR as being beyond the scope of subsection (a)(1).¹¹⁴

114. Grossbaum specifically notes as part of the justification for deeming ASPR to be beyond the scope of section 553(a)(1):

Of course, the relevant decision makers might conclude that ASPR is neither *entirely* inside nor *entirely* outside the scope of section 553(a)(1). Alternative positions are possible. One view might be that such procurement regulations are exempt only when they are applied to the acquisition of materiel specially designed for the peculiar requirements of the armed forces in the performance of their "military functions." The theory here is that only the acquisition of such materiel "clearly and directly" involves a "military function" as such, and that section 553(a)(1) operates by its terms only "to the extent that" a function of this sort is involved. This approach would suggest that public participation could be avoided by issuing two sets of Armed Forces Procurement Regulations—one set, promulgated without public participation, for the acquisition of materiel specially designed for the peculiar requirements of the armed forces in their performance of "military functions," and one set, formulated with public participation, for the acquisition of all other materiel needed by the armed forces. The difficulty with this approach is that an ordinary antibiotic pill may be as involved in and necessary to the performance of "military functions" as a specially designed item of military hardware.

Another view might be that only those provisions of ASPR—if there are any—that are specially designed to handle the peculiar problems that arise in the acquisition of materiel for use in "military functions," as distinct from those provisions designed to handle problems that arise in the acquisition of materiel for the government in general, would be deemed to involve "clearly and directly" such a "military function." The theory would be that only the issuance of those particular sections of ASPR involve an activity specially fitted for, appropriate to, or expected of the armed forces as such due to their special qualifications, expertise, and nature. The problem with this view, however, is its underlying assumption that if a "military function" is performed by means similar to, or indistinguishable from, those used to execute a nonmilitary function, rules involving that function are not exempt under section 553(a)(1). Neither the language nor legislative history of the provision exempting rules involving a "military function" from usual rule-making procedures justifies this conclusion.

Furthermore, to exclude ASPR from the requirements of section 4 would be tantamount to locking the barn after the horse had been stolen, since the preponderance of government contract rules are first made by the ASPR Committee and subsequently aped by civilian agencies. Imposing the notice and comment requirements of section 4 only with respect to proposed civil agency contract rules, rules that have already become *faits accomplis* by incorporation in ASPR, offers neither timely nor adequate protection to the public interest.

Id. at 260-61.

Realistically, of course, most of the previous discussion as to the scope of the "military function" exemption in general, or its application to ASPR in particular, is highly speculative. Comfortable or clear solutions with a likelihood of wide acceptance do not abound. Furthermore, a meaningful test of these arguments about ASPR, for example, will come only after the "contracts" exemption of section 553(a)(2) is repealed, since no one questions the exclusion of ASPR from normal rule-making procedures under that more specific and clear exemption. The exact scope of the "military function" exemption thus remains unclear. Some things, however, are worth noting about it by way of summary.

Not *all* rule-making undertaken by the Department of Defense involves a "military function." Nor is Defense the only department that engages in "military function" rule-making. Although it is not certain, the term "military function" probably means "armed forces function" rather than "war function" or "defense function." Section 553(a)(1) does not exclude all rules involving the armed forces; it is only rule-making involving "military functions" that is excluded. Consequently, only rule-making involving an activity that is specially fitted for, appropriate to, or expected of the armed forces as such because of their peculiar nature, qualifications, or attributes is exempted. Furthermore, to be excluded under subsection (a)(1) the rule-making in question must "clearly and directly" involve such an activity. But what is "clear and direct" is not adequately defined.

It is apparent that the term "military function" is unduly vague, hard to define, and harder yet to apply—especially in marginal cases. This alone presents significant problems. It is, for instance, not clear to what extent, if at all, rule-making involving procurement for the armed forces is exempt from section 553 by the "military function" exclusion. The term "military function" is viewed by those who must apply it as being very broad in scope. The imputed scope is also likely to increase rather than decrease. The Department of Defense, for example, is likely to rely on the "military function" exemption as a substitute for the section 553(a)(2) exclusions for rule-making relating to "public property, loans, grants, benefits, or contracts," if they are repealed. The reason for this is that it desires to continue the exclusion from section 553 of a whole range of rule-making now clearly exempt under section 553(a)(2), and arguably also exempt under section 553(a)(1).

One last point concerning the scope of the "military function" exemption should be noted. As a matter of predictable predilection and practical reality, rule-making claimed by the Department of

Defense to be exempt from section 553 because it involves a "military function" may more easily be treated as such by various other governmental authorities—including the courts—than similar claims by other agencies. After all, the Department of Defense is the specific agency whose reason for being is "to provide for the future [military] security of the country."¹¹⁵ Furthermore, the judgment of the Department of Defense on this issue, or for that matter the judgment of any agency on this issue, may also be presumed correct as a matter of law. Of course, it was argued earlier that, for a number of reasons, the burden of proof should probably rest on the agency to prove that rule-making sought to be exempted under this provision "clearly and directly" involves a "military function." But the law on this subject is unsettled, and the presumption of administrative regularity deeply ingrained. All of this magnifies the practical significance of the "military function" exemption of section 553(a)(1).

C. "Foreign Affairs Function"

Rule-making is also exempted by subsection (a)(1) from the requirements of section 553 "to the extent that there is involved a . . . foreign affairs function of the United States." *Webster's* defines "foreign affairs" as "matters relating to foreign countries: affairs other than domestic; esp: matters having to do with international relations and with the interests of the home country in foreign countries."¹¹⁶ A "function," it should be recalled, is an activity "specially fitted for," "appropriate to" or "expected of" something because of its peculiar nature, attributes, or qualifications. A "foreign affairs function," then, may be an activity specially fitted for, appropriate to, or expected of international relations—the interests of this country in foreign countries—due to the peculiar nature or attributes of such relations. And all rule-making "clearly and directly" involving such an activity is exempt from section 553.

There is a conflict of evidence as to whether the term "foreign affairs" was intended to be limited to strictly diplomatic functions—that is, activities "belonging to or proper to the personnel responsible for the conduct of international relations."¹¹⁷ On the one hand, a Congressman stated that the "exempted foreign affairs are those diplomatic functions of high importance which do not lend themselves to public procedures and with which the general public is

115. UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1968-69, at 130-31.

116. WEBSTER'S, *supra* note 55, at 889.

117. *Id.* at 638.

ordinarily not generally concerned."¹¹⁸ More persuasive, however, is the argument that "the exemption is not limited to strictly diplomatic functions, because the phrase 'diplomatic function' was employed in [an earlier draft of the APA] and was discarded in favor of the broader and more generic phrase 'foreign affairs function.'"¹¹⁹

Both the Senate and House reports on the APA may limit the term somewhat, because they took the position that

[t]he phrase "foreign affairs functions," used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those "affairs" which so affect relations with other governments that, for example, public rule-making provisions would clearly provoke definitely undesirable international consequences.¹²⁰

However, in light of the more general and unqualified statutory language stating the exemption for rule-making involving a "foreign affairs function," it is unclear whether the legislative history just referred to constitutes an effective or meaningful restriction of the term.¹²¹ This question will be discussed at greater length later in the present section.

Another bit of legislative history is worthy of note. In a comment on an earlier draft of the APA the following appears:

It has been suggested that "foreign-affairs functions" should be defined and added to section 2 in order to exclude from the operation of [the entire APA] all passport and visa functions as well as all duties of consular and diplomatic officers abroad. However, so far as these are not foreign affairs functions "requiring secrecy in the public interest," there would seem to be no reason why they should not be subject to the simple public information requirements of section 3.¹²²

Although not completely clear, this seems to suggest that "foreign affairs function" was intended to encompass at least "all passport and visa functions as well as all duties of consular and diplomatic officers abroad." Rule-making "clearly and directly" involving those subjects is, therefore, exempt under section 553(a)(1) from usual rule-making

118. LEGISLATIVE HISTORY, *supra* note 13, at 358 (remarks of Representative Walter).

119. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 27. The earlier bill can be found in LEGISLATIVE HISTORY, *supra* note 13, at 157.

120. LEGISLATIVE HISTORY, *supra* note 13, at 199, 257.

121. It is probable, in any event, that it would constitute no greater limitation of the exemption than the subsequent specific exclusion found in 5 U.S.C. § 553(b)(B) (1970) for rule-making in which the required notice and opportunity for public participation are found to be "impracticable, unnecessary, or contrary to the public interest."

122. LEGISLATIVE HISTORY, *supra* note 13, at 12.

procedures. How much further the exemption goes is another issue. It is not easy to determine what rule-making involves activities specially fitted for, appropriate to, or expected of international relations as such due to their peculiar nature or attributes.

No clearer definition of the exact scope of the section 553 "foreign affairs function" exemption is supplied by the fact that when Congress amended the freedom-of-information provision of the APA in 1967, it expressly excluded from that section matters that are "specifically required by Executive order to be kept secret in the interest of . . . foreign policy."¹²³ There is no evidence that the term "foreign policy" in section 552 was in fact considered in juxtaposition to the term "foreign affairs function" in sections 553 and 554.

However, even if Congress had expressly considered the term "foreign policy" in comparison to the term "foreign affairs function," and purposefully chose the former over the latter for use in the freedom-of-information section, the message conveyed would be less than clear. "Foreign policy" has been defined as "the underlying basic direction of the activity and relationship of a sovereign state in its interaction with other sovereign states typically manifested in peace, war, neutrality, and alliances or various combinations or approaches to these."¹²⁴ It might be argued that an exemption for a "foreign policy function" would be narrower than an exemption for a "foreign affairs function" because the former concerns only activities specially fitted for, appropriate to, or expected of the making or formulation of such policy, while the latter includes that and also all activities involving the execution of such policy. But it is very unlikely that Congress intended to permit exemptions from the freedom-of-information provision only for matters involving the formulation of foreign policy, as opposed to its execution. In any event, Congress did intend to exclude from usual rule-making procedures all rule-making "clearly and directly" involved in "foreign affairs functions"; and that term certainly includes both the making *and* execution of "foreign policy."

The "foreign affairs function" exemption may be coextensive with our nation's foreign affairs capacity. Since rule-making is exempted from section 553 only "to the extent that" it "clearly and directly" involves such a function, however, this exemption may apply only to agency rule-making under authority granted it specially for *foreign affairs purposes*. If that is the case, an agency would

123. Pub. L. No. 90-23, § 1, 81 Stat. 54 (codified at 5 U.S.C. § 552(b)(1) (1970)) (emphasis added).

124. WEBSTER'S, *supra* note 55, at 889.

not be entitled to an exemption under subsection (a)(1) for rule-making undertaken pursuant to some general nonforeign affairs authority, even though it in fact acted with such foreign affairs considerations in mind. This line, however, may be difficult to draw, and also unjustifiable in light of the purpose and general language of the particular exemption in question.

In any case, it is clear that the "foreign affairs" exception is applicable to many functions of the State Department.¹²⁵ In 1957, the State Department estimated that about forty per cent of its rules involved foreign affairs functions and were, therefore, exempt for that reason from section 553.¹²⁶ Certainly, if strategic foreign policy formulation is deemed to constitute rule-making within the meaning of the APA, it is exempt as a "foreign affairs function." Nothing is more clearly adapted to, especially fitted for, or appropriate to the conduct of our international relations by virtue of its peculiar nature than strategic foreign policy planning. Consequently, formulation of all the specific details of our foreign policy toward France when she left NATO would be an exempt "foreign affairs function." So, too, after the coup in Greece, the determination as to whether we should communicate with the new government, what our attitude toward the seizure should be, and whether any action should be taken to protect Americans in Greece, would also be exempt as a "foreign affairs function."¹²⁷ Similarly, it has been implied that "rules pertaining to . . . methods of subsidizing the military operations of friendly powers" are exempt as a "foreign affairs function."¹²⁸ Presumably, all rule-making directly involving a foreign aid program would also be exempt from usual procedures under subsection (a)(1).¹²⁹

Many other kinds of rules made by the State Department, however, are allegedly claimed to be exempted by the "foreign affairs function" provision of section 553(a)(1). For example, the Department considers all rules made by the Educational Exchange Service, which "is empowered to promote, facilitate, and conduct programs for the exchange of persons between the United States and foreign countries," exempt from section 553 by subsection (a)(1) because

125. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 27.

126. 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 927.

127. *Hearings on S. 518 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 321-22 (1967) [hereinafter *S. 518 Hearings*].

128. *S. 1663 Hearings*, *supra* note 104, at 679.

129. Wallace, *The President's Exclusive Foreign Affairs Power over Foreign Aid*, 1970 DUKE L.J. 453, 454-94.

they "involve foreign affairs functions of the United States."¹³⁰ The same has been said of all rules involving the relief, protection, and regulation of American seamen and ships abroad.¹³¹ The Department of State also claims that "[a]ll rules made by the Passport Office relate to foreign affairs functions of the United States" and are, therefore, exempt under section 553(a)(1).¹³² The reason offered by the Department for this view is that "a passport is a formal letter issued by the Secretary of State to officials of foreign governments attesting to the identity and citizenship of the bearer and requesting that certain courtesies and privileges be extended to him."¹³³ In addition,

[t]he Visa Office takes the position that all of its regulations involve a foreign-affairs function of the United States and, hence, their publication is considered to be within the exemption from notice of proposed rule-making as provided in section 4 of the Administrative Procedure Act.¹³⁴

Under the Immigration and Nationality Act,¹³⁵ that office makes rules dealing with all aspects of immigration into this country and the determination of nationality of a person not in the United States.¹³⁶

The Department has even stated that rule-making involving "[s]tudies contracted for at the request of the Historical Division," which "prepares the foreign relations volumes which date from 1861 and constitute the only official record of United States diplomacy," is entitled to an exemption under the "foreign affairs function" provision because those studies "may indirectly affect the formulation of foreign policy on that particular subject."¹³⁷ And rule-making by the Authentications Section, which establishes a schedule of fees based on cost of service, is also claimed to be exempt under section

130. 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 928. *See also id.* at 931: "There is no statutory provision relating to any rulemaking function of the Educational Exchange Service requiring notice, hearing, or record of the hearing" because the "Administrative Procedure Act (foreign affairs exemption) does not require notice or public rulemaking proceedings concerning" such rules.

131. *Id.* at 924-44.

132. *Id.* at 946. Consequently, such things as the "determination of geographical limitations of general applicability on issuance of passports" are excluded under section 553(a)(1). *S. 1663 Hearings, supra* note 104, at 387.

133. 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 946.

134. *Id.* at 952. The Department does claim, however, that it follows usual procedures in cases of "routine visa procedures." *S. 1663 Hearings, supra* note 104, at 387.

135. 8 U.S.C. §§ 1101-503 (1970).

136. 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 950-52.

137. *Id.* at 931, 933.

553(a)(1) on the grounds that “[a]ll authenticated documents have a foreign affairs interest.”¹³⁸ Note also that “[o]f the approximately 14 pages of rules relating to the tariff of fees” which Foreign Service officers are supposed “to collect for [their] official services,” the Department stated that “[a]pproximately 10 per cent relate to foreign affairs functions.”¹³⁹

Of course, the “foreign affairs function” exemption is also applicable to agencies other than the State Department when they engage in rule-making involving such functions.¹⁴⁰ Many federal agencies other than the Department of State claim to make rules of this sort. For example, the Post Office Department asserted that its regulations involving the international postal service were exempt “foreign affairs functions.”¹⁴¹ And the Atomic Energy Commission maintained that its “rulemaking relating to Export of Byproduct Material . . . insofar as the establishment of export restrictions for certain countries [is involved], e.g. Southern Rhodesia . . . [is] exempt under § 553(a)(1) as involving a ‘foreign affairs function.’”¹⁴² Similarly, the Federal Power Commission has noted that

the Commission’s power to authorize the export of electricity . . . the export and import of natural gas . . . and to issue Presidential permits authorizing the construction, operation or maintenance of electric power and natural gas facilities on the borders of the United States . . . would appear to be encompassed within the exemption of [section] 553(a)(1) relating to foreign affairs.¹⁴³

The Department of Agriculture has also suggested that its rule-making under the Food for Peace Program,¹⁴⁴ which is designed to develop and expand markets for United States agricultural commodities and combat hunger, is exempt from section 553 because it involves a “foreign affairs function.”¹⁴⁵ So, too, that department has

138. *Id.* at 936.

139. *Id.* at 940-41.

140. ATTORNEY GENERAL’S MANUAL, *supra* note 13, at 27. See also note 44 *supra* and accompanying text.

141. Delaney, *The Federal Administrative Procedure Act and the Post Office Department*, in G. WARREN, *supra* note 47, at 196, 202; 1969 Survey Response: “Rule-making by the Post Office Department in implementation of various international postal conventions as authorized by [39 U.S.C. §§ 505-06 (1970)] . . . [is] exempted . . . by [section] 553(a)(1).” See also 1957 HOUSE SURVEY, *supra* note 39, pt. 8 (Post Office Department), at 874: “All our regulations concerning our international mail fall within . . . [section 553(a)(1)].”

142. 1969 Survey Response. The regulations may be found at 10 C.F.R. §§ 36.1-.50 (1972).

143. 1969 Survey Response.

144. See 7 U.S.C. § 1702 (1970).

145. 1969 Survey Response.

noted that its "regulations relating to exports and imports under the plant and animal quarantine acts, meat and poultry products inspection acts, and other regulatory laws" may be exempt under section 553(a)(1) because they "affect foreign relations."¹⁴⁶

The Department of the Treasury's Office of Foreign Assets Control is responsible for the Foreign Funds Control Regulations,¹⁴⁷ the Foreign Assets Control Regulation,¹⁴⁸ the Transaction Control Regulations,¹⁴⁹ the Cuban Assets Control Regulations,¹⁵⁰ and the Rhodesian Sanctions Regulations.¹⁵¹ It reported:

The kinds of rules [developed in these programs] which are exempt from the rulemaking procedures under section 553(a)(1) as involving a "foreign affairs function" are . . . [g]eneral blocking rules . . . [.] [g]eneral licenses and authorizations unblocking classes of property or persons or authorizing classes or transactions . . . [.] and [r]ules related to the blocking orders requiring reports and records of blocked property and of prohibited transactions.¹⁵²

The Department of the Treasury explained:

All of the above described kinds of rules issued by the Office of Foreign Assets Control clearly involve "a foreign affairs function of the United States." There can be no question that the blocking actions taken under the authority of Section 5(b) of the Trading with the Enemy Act and Section 620(a) of the Foreign Assistance Act, were taken exclusively because of urgent foreign policy considerations of the United States Government and that they clearly have a direct bearing on our relations with foreign countries. To an equal degree, the actions in the form of general licenses taken simultaneously with the blocking orders or subsequent thereto to exempt from or license out certain classes of transactions or persons from their prohibitions as well as the related reporting requirements are actions involving the foreign affairs functions of the United States.

It is equally evident that the actions taken by the Treasury Department to prohibit financial and commercial dealings with Southern Rhodesia, and the corollary rules exempting or licensing classes of prohibited transactions deemed desirable in order to maintain a flexible system, involve a foreign affairs function since they form an

146. 1969 Survey Response.

147. 31 C.F.R. §§ 520.01-809 (1972).

148. 31 C.F.R. §§ 500.101-809 (1972).

149. 31 C.F.R. §§ 505.01-60 (1972).

150. 31 C.F.R. §§ 515.101-809 (1972).

151. 31 C.F.R. §§ 530.101-809 (1972).

152. 1969 Survey Response. See also 1957 HOUSE SURVEY, *supra* note 39, pt. 10 (Department of the Treasury), at 1017.

important part of the United States Government's implementation of resolutions of the United Nations.¹⁵³

The Department of the Treasury has also claimed exemption under the "foreign affairs function" provision for all its rules involving "Delivery of Checks and Warrants to Addresses Outside the United States, Its Territories and Possessions."¹⁵⁴ Similarly, regulations dealing with "International Traffic in Arms" previously issued by the Secretary of State¹⁵⁵ and now issued by the Secretary of the Treasury in "the administration of the firearms import control program pursuant to . . . the Mutual Security Act of 1954," are deemed in "the exempt category relating to foreign affairs."¹⁵⁶

The Department of Commerce has noted that rule-making involving a number of its programs is exempted from the requirements of section 553 by the "foreign affairs function" language. More specifically, all rule-making involving the following is said to be exempt:¹⁵⁷ "The Textile Quota Program," which limits exports of textiles from foreign countries to the United States;¹⁵⁸ the "Implementation of United Nations Resolution Regarding Trade with Southern Rhodesia";¹⁵⁹ "Required Reports on Foreign Investments and on International Receipts and Payments and Fees";¹⁶⁰ and "Determination of Bona Fide Motor-Vehicle Manufacturers Under the Automotive Products Trade Act."¹⁶¹ In response to a 1957 survey the Department also suggested that its rule-making "in connection with vessel operations in foreign commerce includ[ing] such matters as description of foreign-trade routes . . . [and] approval of United States Vessels to foreign flag" was an exempt "foreign affairs function."¹⁶² At the same time, it asserted that rule-making pursuant

153. 1969 Survey Response. On blocking actions, see 22 U.S.C. § 2870(a) (1970); 50 U.S.C. App. § 5(b) (1970).

154. 1969 Survey Response. See 31 C.F.R. §§ 211.1-6 (1972).

155. Exec. Order No. 10,978, 3 C.F.R. 493 (Comp. 1965).

156. 1969 Survey Response. See 22 U.S.C. § 1934 (1970).

157. 1969 Survey Response.

158. See 7 U.S.C. § 1854 (1970); Exec. Order No. 11,052, 3 C.F.R. 253 (Comp. 1962), as amended, Exec. Order No. 11,214, 3 C.F.R. 122 (Comp. 1965). A similar claim was asserted by the Department of Labor, S. 518 Hearings, *supra* note 127, at 241, when that program was under its jurisdiction. See text accompanying note 208 *infra*.

159. See 22 U.S.C. § 287c (1970); Exec. Order No. 11,322, 3 C.F.R. 635 (Comp. 1968), as amended, Exec. Order No. 11,419, 3 C.F.R. 442 (Comp. 1968).

160. See 22 U.S.C. §§ 286-86l (1970); Exec. Order No. 10,033, 3 C.F.R. 70 (Comp. 1949), 22 U.S.C. following § 286f (1970).

161. See 19 U.S.C. §§ 2001-33 (1970); 30 Fed. Reg. 13683 (1965).

162. 1957 House Survey, *supra* note 39, pt. 2 (Department of Commerce), at 126.

to the Export Control Act of 1949,¹⁶³ which empowered the President to prohibit or curtail exportation from this country of any articles, materials, supplies, or technical data "except under such rules and regulations as he shall prescribe,"¹⁶⁴ involved "foreign affairs functions" exempted by section 553(a)(1) from usual procedures, or at least, that "[a]pproximately 80 to 90 percent of [those] rules involve[d] either military or foreign affairs functions."¹⁶⁵ In addition, the Department of Commerce has stated:

It could be argued that rule-making by the Office of Foreign Direct Investments is exempt from the requirements of [section] 553(b)-(e), since the OFDI program is based on the President's authority under section 5(b) of the Trading with the Enemy Act, a "foreign affairs" function.¹⁶⁶

Some agencies take a narrower view of the scope of the "foreign affairs function" exemption. For example, the Legislation and Regulations Divisions of the Department of the Treasury jointly issue "rules under the provisions of the Internal Revenue Code which affect international transactions, including the interest equalization tax provisions, as well as provisions under the Income and Estate Tax Treaties to which the United States is a party."¹⁶⁷ These divisions have recently stated with respect to the issuance of such regulations:

We do not believe this exception [section 553(a)(1)] applies to any regulations issued jointly by our offices because none of these regulations affect "only those 'affairs' which so affect relations with other governments that, for example, public rulemaking provisions would clearly provoke definitely undesirable international consequences."¹⁶⁸

A recent analysis of the "foreign affairs function" exemption found in section 554 of the APA, which governs adjudication, employed a similar approach to construction of that provision. It concluded that Congress intended the adjudication provision to apply "except 'to the extent that' a particular proceeding would interfere with the conduct of foreign affairs functions and, as two congressional committees said, 'clearly provoke definitely undesirable international

163. Ch. 11, 63 Stat. 7.

164. Ch. 11, § 3(a), 63 Stat. 7.

165. 1957 HOUSE SURVEY, *supra* note 39, pt. 2 (Department of Commerce), at 138, 140.

166. 1969 Survey Response. See 50 U.S.C. App. § 5(b) (1970). In any event, OFDI follows usual procedures when it makes rules. See note 40 *supra*.

167. 1969 Survey Response.

168. 1969 Survey Response, quoting ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 25-26. See text accompanying note 120 *supra*.

consequences.’”¹⁶⁹ These narrow readings of the “foreign affairs function” exemptions in the rule-making and adjudication provisions are bolstered by the bit of legislative history quoted to support them.

When applied to the adjudication provision, however, the narrow reading of “foreign affairs function” proffered above may also be justified on a more compelling ground than the legislative history of the APA. Denial of an adjudicatory hearing, even on the basis of an asserted governmental interest in the unrestrained conduct of foreign affairs, may in some instances raise serious constitutional due process problems. For example, the argument that enforcement hearings of the Office of Foreign Direct Investment “may not have to comply with the otherwise applicable constitutional requirement of a trial-type hearing [of the kind imposed by the adjudication provision] because OFDI exercises the plenary power of the President and Congress over foreign affairs [in such cases] seems doubtful.”¹⁷⁰ If, however, the “foreign affairs function” exemption in the adjudication provision is read to exclude only those particular compliance proceedings that would interfere with our nation’s conduct of “foreign affairs functions” because they would “clearly provoke definitely undesirable international consequences,” constitutional objections would probably be satisfied “[b]ecause Congress has supplied a responsible resolution of the competing interests involved.”¹⁷¹ Further support for this restrictive reading of the adjudication provision’s “foreign affairs function” exemption might be gleaned from the action of the United States Supreme Court when it subjected deportation proceedings to the APA’s adjudication provision despite its “foreign affairs function” exemption.¹⁷² But the Court did not discuss the scope of this exemptive language and the holding was seemingly dictated by constitutional concerns.¹⁷³ These concerns would not be present with regard to any effort to define the scope of this exemption in the rule-making provision. The Constitution does not

169. Freedman, *supra* note 49, at 27, quoting LEGISLATIVE HISTORY, *supra* note 13, at 199, 257.

170. Freedman, *supra* note 49, at 26.

171. *Id.* at 27.

172. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

173. The Court appeared worried that if such a proceeding were excluded from the statutory requirements of a trial-type hearing imposed by the adjudication provision, a serious question of due process would be presented. 339 U.S. at 49-51. This conflict between the interpretation of the term “foreign affairs function” in the rule-making provision and the interpretation of the term in the adjudication provision is noted in Parker, *Federal Administrative Regulations: A General Survey*, 6 *MIAMI L.Q.* 324, 347-48 n.172 (1952).

require any public participation in administrative rule-making of the sort prescribed by section 553(b)-(e).¹⁷⁴ As a consequence, the most important consideration supporting such a restrictive reading of the term "foreign affairs function" in the adjudication provision is absent with respect to a reading of that term in the rule-making provision.

But there are, after all, other very good reasons for a similar reading of the term in the two provisions. The language of the two provisions is the same; the legislative history of both provisions on this question is also the same and would justify this result; and the House Report on the APA specifically noted that "the term 'foreign affairs' is used in [the adjudication provision, section 5] in the same sense as section 4 [the rule-making provision]."¹⁷⁵ Furthermore, as noted earlier, the section 553(a)(1) exemptions should be read narrowly anyway. If, therefore, the "foreign affairs function" exemption must, in order to satisfy possible constitutional objections, be read to exclude from the adjudication provision only cases in which compliance with its requirements would interfere with the conduct of foreign affairs by clearly provoking undesirable international consequences, it should be read the same way in the rule-making provision. A number of possible difficulties with this conclusion exist, however.

As previous discussion has demonstrated, this "undesirable consequences" construction of section 553(a)(1) has certainly not been accepted by most of the agencies claiming to issue rules in the foreign affairs area. And it is also at odds with the exemptive provision's much more general language—*all* rule-making is excluded from section 553 "to the extent that there is involved . . . a foreign affairs function." No qualifying language of any sort appears in the exemption. This construction is also inconsistent with the very slight and perhaps unreliable judicial authority on the subject. One court maintained by way of a very general dictum that "immigration, dealing with the admission and expulsion of aliens, is an exercise of a sovereign power in international relations" and, therefore, *all* rule-making on that subject is excluded from section 553 by the "foreign

174. 1 K. DAVIS, *supra* note 5, §§ 6.05, 7.06, 7.08. See also R. LORCH, *DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW* 96 (1969): "Common law does not require a lawmaker (by that is meant a statute maker or an ordinance maker or a rulemaker) to listen. Nor does the U.S. Constitution. However, the U.S. Administrative Procedure Act does require agencies in most situations" to follow the procedures specified therein requiring agencies to listen before they make rules.

175. *LEGISLATIVE HISTORY*, *supra* note 13, at 261.

affairs function" exemption.¹⁷⁶ However, the significance of this judicial language may be small in light of the Justice Department's contrary position on the issue.¹⁷⁷

Exemption from section 553 of only that particular rule-making which involves "foreign affairs functions," and whose compliance with usual procedures would harm the conduct of our international relations by producing undesirable international consequences, may also be objected to on another basis. Sections 553(b)(B) and (d)(3) exclude rule-making covered by section 553 from usual procedures when those procedures would be "impracticable, unnecessary, or contrary to the public interest." There can be no doubt that any rule-making which involves "foreign affairs functions," and whose compliance with usual requirements would interfere with these functions by producing undesirable international consequences, would be exempted by these provisions. Consequently, it may be argued that such a narrow reading of the "foreign affairs function" exemption would make that provision redundant and unnecessary because it would then be virtually congruent with the more specific exclusions of sections 553(b)(B) and (d)(3). Congress, therefore, must have intended the section 553(a)(1) exclusions to be broader than these more narrowly tailored provisions. Certainly this view is supported by the fact that, under the language of section 553(a)(1), rule-making need only involve a "foreign affairs function" to be exempt.

This argument against the "undesirable consequences" construction of the section 553(a)(1) exemption is not convincing. Even if the subsection (a)(1) exemption were read as suggested by this construction it would not be redundant because it would be broader than the more specific "good cause" exemptions of sections 553(b)(B) and (d)(3). Unlike the latter two, the former exemption would apply to the right to petition granted by section 553(e) and would not require any statement of reasons in each case to justify its use. Furthermore, the "undesirable consequences" construction of the "foreign affairs function" exemption of section 553(a)(1) has other virtues: uniformity with the similar adjudication provision exemption—a result specifically intended by Congress—and also consistency with the specific legislative history of the APA on this subject. It is worth re-

176. *Yiakoumis v. Hall*, 83 F. Supp. 469, 472 (E.D. Va. 1949). *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), also referred in a general way to the exclusion of dangerous aliens as a foreign affair.

177. 1957 HOUSE SURVEY, *supra* note 39, pt. 6 (Department of Justice), at 650 (Immigration and Naturalization Service reported that none of its rules "involved" "foreign affairs" within the meaning of section 553(a)(1)).

iterating that Congress did not intend this phrase "to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that for example, public rule making provisions would clearly provoke definitely undesirable international consequences."¹⁷⁸

Nevertheless, this construction of the exemption has not been accepted in practice or theory by most federal agencies making rules arguably within its ambit; nor has it been accepted by any court. It is, in addition, inconsistent with the broad language employed in section 553(a)(1). To complicate matters further, it should also be noted that "when the total situations dealt with by the State Department [for example] are analyzed in terms of their constituent facts, the distinction between 'foreign' and 'domestic' affairs frequently turns out to be quite illusory."¹⁷⁹ The particular provision in question here is, therefore, vague in application under the "undesirable consequences" construction or, for that matter, under any broader construction. When these points are added to the fact that the burden of proof is likely to be on the person who challenges an agency's claim to exception under the "foreign affairs function" provision of section 553(a)(1), the significance of this exclusion may be fully appreciated. And just as the courts may be particularly solicitous of claims made by the Department of Defense for exemption under the "military function" language, they may be equally solicitous of claims made by the State Department for exemption under the "foreign affairs function" language.

IV. IS SECTION 553(a)(1) NECESSARY?

Federal agencies that make most of the rules involving "military or foreign affairs functions" take the position that this exemption is both justified and desirable. It is their view that repeal of section 553(a)(1) would somehow detrimentally interfere with the performance of their responsibilities in connection with such rule-making. The specific reasons advanced to justify the exemption of rule-making involving "military and foreign affairs functions" range in character from the purely theoretical to the intensely practical. In the following discussion an attempt will be made to enumerate and

178. LEGISLATIVE HISTORY, *supra* note 13, at 199, 257.

179. Timberg, *Wanted: Administrative Safeguards for the Protection of the Individual in International Economic Regulation*, 17 AD. L. REV. 159, 164 (1965), citing *Briehl v. Dulles*, 248 F.2d 561, 591 (D.C. Cir. 1957) (Bazelon, J., dissenting), quoting DEPARTMENT OF STATE, OUR FOREIGN POLICY 4 (General Foreign Policy Ser. No. 26, 1950): "There is no longer any real distinction between 'domestic' and 'foreign' affairs."

evaluate all of the possible reasons for the incorporation of section 553(a)(1) exclusions in the statute. Only then can it be ascertained whether this exemption is justified in light of the important competing policies that favor public participation in rule-making.

One practical justification for the subsection (a)(1) exclusions may be that their elimination would expand agencies' work loads, increase the costs of carrying on these functions, and delay and thereby generally interfere with the government's performance of these particularly vital and sensitive functions. For example, with respect to one set of rules that may involve a "military function," the Department of Defense claimed:

The necessity for notice, public hearing, and publication, as well as the opportunity for any interested person to petition for change or repeal of a rule, would have the effect of so hindering and delaying the supplementation and modification of these rules that [they] would become unresponsive to the changing needs of both the Department of Defense and [those affected by them].¹⁸⁰

The Department of Defense has also noted that the purpose of some of the acts entrusting to it "military functions" "can be effectively implemented by rules promulgated without the expense and administrative effort involved in participation by [the] general public."¹⁸¹ A comment made by the Department of the Treasury also seemed to suggest that subjecting rules involving the subsection (a)(1) functions to section 553 "would be unduly burdensome upon the agencies."¹⁸² It has also been stated as a general proposition that adherence to the requirements of section 553 for some rule-making involving "military functions" may "interfere unduly with the operation and administration of the Office of the Secretary of Defense and the military department" and, therefore, the "military function" exemption is necessary.¹⁸³

Elimination of the present subsection (a)(1) exemptions may also appear undesirable because it would cause adherence to the procedures of section 553(b)-(e) in many cases where the public has little interest in the rule-making or is unlikely to make a significant con-

180. Letter from Neil E. Harlan, Assistant Secretary of the Air Force, to Senator James Eastland, Feb. 20, 1964, in *S. 1663 Hearings*, *supra* note 104, at 307.

181. 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 292.

182. Letter from Fred B. Smith, Acting General Counsel of the Treasury, to Senator James Eastland, Feb. 11, 1964, in *S. 1663 Hearings*, *supra* note 104, at 389.

183. 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 347 (made in regard to rules relating to correction of military or naval records). *See also id.* at 332-33 (in regard to rules involving the Discharge Review Boards); *S. 1663 Hearings*, *supra* note 104, at 389 (Department of Treasury).

tribution to it. So, too, many rules involving one of these functions may be so limited in their application or, for that matter, have such a minimal public impact, that any solicitation of comment from the public would be fruitless. It has, therefore, been argued that the section 553(a)(1) exemptions are justified because many such rules are not controversial, or would elicit no response from the public. The Department of the Treasury has stated, for example, that "many rules which must, or normally would, be adopted prior to any public participation are not controversial."¹⁸⁴ And the Post Office has argued that these exemptions are justified with respect to those of its rules involving "military or foreign affairs functions" because "[e]xperience has shown that the bulk of the Departmental regulations relating to management of the mails are not of sufficient substance or general interest to elicit responses when statutory rule-making procedures are followed."¹⁸⁵

Additionally, it has been suggested that the section 553(a)(1) exclusions are justified because there is often no specially interested and identifiable public whose views should be solicited with regard to such rules, or because the affected members of the public have not yet been identified or are not yet identifiable. As a consequence, adherence to the requirements of section 553 in such cases is a waste. The Department of State sees this as a justification for the section 553(a)(1) exclusion, noting that many rule-making decisions involving such functions "are a matter of general concern to the American public, and no one individual has a greater interest than any other."¹⁸⁶ (The dubious logic here seems to be that since everyone is interested, *no one* should have an opportunity to participate and thereby possibly influence the decision makers!) And the Department of Defense has stated in justification for continuance of the "military function exemption" that with respect to some rules implementing that function there is "no way of ascertaining, at the time rules are made, which members of the public will be affected by the rules";¹⁸⁷ no one, therefore, is likely in such cases to utilize the opportunity for participation that would be created by agency adherence to section 553 requirements. It has also been more generally alleged that requiring notice and public participation with respect

184. *S. 1663 Hearings*, *supra* note 104, at 389.

185. 1969 Survey Response.

186. *S. 518 Hearings*, *supra* note 127, at 322.

187. 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 292 (justifying the administration of the resettlement program of reimbursement for moving expenses to the owners and tenants of land acquired by the military departments).

to rules involving a "military or foreign affairs function" would "not be particularly helpful or desirable."¹⁸⁸ In this connection the Department of Defense has stated:

[B]earing in mind the broad definition in section 2 of "rulemaking," would it be wise to subject to the requirements of notice, formal consultation, and hearing the issuance of regulations governing such widely diverse military functions as the operation of the Reserve officers' training program in civilian educational institutions, the determination and designation of vital industrial facilities in support of military mobilization production programs, the implementation of the Defense scientific and technical information program, or the choice between commercial or military transportation facilities for military supplies or personnel? Such regulations govern military functions which do not appear to fall within the exception for "any matter relating to internal management or personnel of an agency." Yet subjecting the promulgation of such regulations to the formal requirements of rulemaking is not likely to be of benefit to anyone either within or outside the Department of Defense.¹⁸⁹

Furthermore, if rule-making relating to "military and foreign affairs functions" is subjected to the requirements of section 553(b)-(e), in some cases the agencies involved in such rule-making and those members of the public most directly affected may be placed in adversary positions, thereby discouraging mutual cooperation toward finding the best solution to common problems. On that basis, it may be argued, the present exemption for rule-making involving these functions should be maintained.

Repeal of subsection (a)(1) may also be objected to on another general ground. Forcing adherence to the mandates of section 553 for any subsection (a)(1) rule-making would inevitably result in some loss of flexibility for such rule-making. The Post Office stated, as an example, that repeal of these exemptions "would be disadvantageous in that it would require the following of formalized procedures with attendant delays and loss of flexibility without corresponding benefit."¹⁹⁰ A related argument is that elimination of these exemptions would discourage agencies from making worthwhile changes in rules involving these functions because of the more formal and particularized procedures that would be required. The Post Office also suggested that subjugation of these rules to section 553 "would result

188. 1969 Survey Response (Commerce Department, OFDI).

189. Letter from L. Niederlehner, Acting General Counsel of the Department of Defense, to Senator James Eastland, July 23, 1964, in *S. 1663 Hearings*, *supra* note 104, at 492-94.

190. 1969 Survey Response.

primarily in the . . . discouragement of desirable changes and would result in an overformalization of mail management."¹⁹¹ Other agencies promulgating such rules might well make a similar point.

Section 553(a)(1) is also said to be justified on the ground that in its absence, there would be uncertainty in some cases about whether public rule-making procedures must be followed, and thus litigation or use of those procedures in inappropriate situations would result. The Department of Defense reported, for example, that the primary disadvantage to that agency of eliminating the broad exclusions in section 553 would be "uncertainty," because the extent to which its rule-making fits under the more limited exemptions found within section 553(b)-(e) was unclear. This "leads the Department of Defense to fear a rash of litigation testing . . . [its] interpretation of these [other exemptions]."¹⁹²

The current exemptions may also be considered necessary for another reason. In some cases, section 553 procedures may be an insufficient means by which to assure that the relevant people participate adequately in rule-making relating to the exempted subjects. Requiring adherence to those procedures in the subsection (a)(1) situations, therefore, might sometimes force an agency to follow two sets of procedures in order to involve the proper people. In addition, it may be alleged that "military and foreign affairs function" exemptions are necessary because some rules involving these functions may require joint action by two authorities. In such cases, one may argue, the procedures of section 553 may be irrelevant, wasteful, and useless. They would only induce communication by the public to an agency with respect to proposed rules that the agency does not have a completely free hand in shaping. (The dubious logic here seems to be that if two agencies have to agree on the rules the public should have an opportunity to influence neither!) The Post Office has seemingly accepted this view. It has noted that

[t]his would be particularly true in the international area where Departmental regulations are developed by negotiation with foreign postal authorities and are not subject to unilateral variation by the Department. Similarly in the administration of the mail service for the Armed Forces regulations are developed by or in conjunction with the Department of Defense and are not subject to unilateral modifications.¹⁹³

191. 1969 Survey Response.

192. 1969 Survey Response. See also *S. 1663 Hearings, supra* note 104, at 307 ("Absent a decision by a court of competing [sic] jurisdiction in each particular case, the validity of any rule could be subject to challenge"); Letter from Frederick G. Dutton, Assistant Secretary of State, to Senator James Eastland, Dec. 6, 1963, in *id.* at 385-87.

193. 1969 Survey Response.

There are significant difficulties with all of these general justifications for the current section 553(a)(1) exclusions. In the first place, they do not distinguish rule-making relating to these particular exempted categories *as a class* from rule-making now subjected to the requirements of section 553(b)-(e). Every one of the arguments outlined as justifications for excluding subsection (a)(1) rule-making from section 553's procedures could also be made with respect to those classes of rule-making already subject to the usual rule-making procedures. If these exclusionary justifications were found wanting with respect to that rule-making currently within the scope of section 553, should they not be found similarly wanting with respect to the kinds of rule-making currently exempt from section 553?

For example, the complaint that increased cost and work load, general delay, duplication, and the like will result if the currently excepted rule-making must follow the requirements of section 553(b)-(e) could also be made with respect to the run-of-the-mill rule-making that we have already decided to subject to those provisions.¹⁹⁴ The argument that adherence to usual rule-making procedures in these cases will, as a general proposition, reduce needed flexibility, cause uncertainty and litigation, be a waste in many cases, and discourage needed changes in rules, could also undoubtedly be used to support the exemption of all the currently included rule-making. Similarly, the assertion that subjugation of such rule-making to section 553 will, in many cases, be unfruitful, or of no real benefit to the agency or the public, could be made about much rule-making already included in section 553. If the policy of public participation is deemed sufficiently important to risk some of these possible consequences for the rule-making already subject to the APA rule-making provision, it is also worth risking them to bring rule-making involving "military and foreign affairs functions" within those requirements.

A second major defect with many of the arguments discussed above is that they do not apply to *all* such rule-making. That is, arguments seeking to justify an unqualified, across-the-board exemption for *all* rule-making involving "military and foreign affairs functions" on the ground that it is unreasonable or unwise to require *some* or even a large part of such rule-making to be conducted in accordance with section 553, must necessarily be considered inadequate. If public participation is as important as our society seems to

194. The Administrative Conference has concluded that these burdens are insufficient to exclude all rule-making relating to "public property, loans, grants, benefits, or contracts" from section 553. See Recommendation No. 16, *supra* note 8.

think it is, exemption should only be granted for those particular cases in which the benefit is not worth the burden. Although the arguments discussed previously may suggest that the benefit is not worth the burden in some or even many cases of rule-making involving these particular functions, they do not demonstrate that conclusion for *all* of such rule-making as a class.

It has been claimed, however, that inclusion within the coverage of section 553 of *all* rule-making involving "military and foreign affairs functions" *as a class* would be more deleterious than the inclusion of other classes of rule-making within that provision. The Department of State noted specifically that the general "need for speed and flexibility in making decisions . . . [has] necessarily led to different procedures [for foreign affairs function rule-making] than would otherwise prevail."¹⁹⁵ The Department of Defense would, no doubt, take a similar position with respect to rule-making involving "military functions." It has also been claimed that the general nature of the subjects involved in this kind of rule-making, or the general nature of these functions, justifies the unqualified exemptions found in section 553(a)(1), since rule-making involving "military or foreign affairs functions" touches on matters of a peculiarly sensitive and delicate nature. Thus, the Department of State has noted that "where foreign policy considerations may be paramount . . . it is readily apparent that the Department requires a free hand to be able to discharge its missions."¹⁹⁶ Application of section 553 to rule-making involving "foreign affairs functions" is consequently said to be inappropriate. Also of significance is the statement that "freedom of executive action has long been regarded as necessary and desirable" in any function involving "foreign affairs of the United States."¹⁹⁷ "[S]uch rules, by their very nature, are not generally adaptable to notice or public rulemaking proceedings."¹⁹⁸

More specifically, the Department of Commerce has stated that the "processes of international negotiation and the administration of international agreements . . . simply do not lend themselves to the formal rulemaking requirements set out in section 4"¹⁹⁹ The Department of the Treasury has made a similar statement with regard to the operations of its Office of Foreign Assets Control. It main-

195. Letter from William B. Macomber, Jr., Assistant Secretary of State, to Senator James Eastland, April 10, 1967, in *S. 518 Hearings*, *supra* note 127, at 388.

196. *S. 1663 Hearings*, *supra* note 104, at 387.

197. 1969 Survey Response (Department of the Treasury, Office of Foreign Assets Control).

198. 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 927.

199. *S. 518 Hearings*, *supra* note 127, at 373 (Department of Commerce).

tained that section 553 procedures were inappropriate to the "foreign affairs functions" of the Office for the following reason, among others:

[W]hen a partial relaxation of an embargo is contemplated in a particular area, the basic policy decision is either a foreign policy decision which it is not practicable to hold hearings on—or it is an administrative policy decision that the economic warfare objectives of the Control would not be jeopardized by the contemplated relaxation. In either case, the decision is not one which can usefully be subjected to public hearings.²⁰⁰

The Department of State has similarly suggested that the actual formulation of foreign policy as such is a singularly inappropriate subject, by its nature, for formal rule-making procedures. The Department noted:

Last year the Government of France made clear that it was no longer willing to participate in the military activities of the North Atlantic Alliance. This French decision required the United States to re-examine its policies toward France and in relation to the North Atlantic Treaty Organization. These policy determinations ranged from the most specific—such as where NATO headquarters should be relocated and what claims the United States and NATO should press vis-a-vis France—to the most general—such as how to organize and operate an effective NATO without France and how to conduct Western relations with the Soviet Union and Eastern Europe.

Could a formal rule-making proceeding have made a meaningful contribution to policy determinations such as these? . . . [W]e should note that there are no statutory standards here to be interpreted or developed through rule-making. The problem of the Executive Branch in dealing with questions of European security is quite different from that confronting a regulatory agency operating under a statutory grant of authority.²⁰¹

As a result, the Department concluded, "The inappropriateness and impracticability of applying the formal procedures of the Administrative Procedure Act to the functioning of the Department of State in the field of foreign policy" is clear.²⁰²

On a similar basis it may, of course, be argued that "the inappropriateness and impracticability of applying the formal procedures of the Administrative Procedure Act to the functioning of the Department of Defense in the performance of its "military functions" is clear. It can be maintained with a vigor equal to that of the Department of State that formulation of strategic military

200. 1969 Survey Response (Department of the Treasury, Office of Foreign Assets Control).

201. *S. 518 Hearings*, *supra* note 127, at 321-22.

202. *Id.* at 321.

policy, including the drawing up and adoption of battle plans for various eventualities, and the organization, deployment, and use of the armed forces as part of those plans, is also, by its nature, a singularly inappropriate subject for formal rule-making procedures. There are typically "no statutory standards here to be interpreted or developed through rule-making," just as there are said to be none in the foreign policy example offered by the Department of State.

There are a number of difficulties inherent in the above arguments. In the first place, is it a foregone conclusion that merely because there are no statutory standards to guide an administrator in his formulation of policy, public participation is either unsuitable or undesirable? The answer to this question seems clearly to be "no." One of the chief benefits of public participation is the education of the administrator with respect to any and all matters that may be relevant to his making a wise rule-making decision. The public's ability to do this is in no way diminished by the lack of statutory standards ultimately available to guide the decision maker. Indeed, because of this lack, public participation may be even more desirable in such cases than where more detailed strictures are provided by Congress.

Second, is it also clear, for instance, that the public would have had nothing of value to contribute to foreign policy formulation, which the Department of State viewed as singularly unfit for section 553 procedures? If it had been provided an opportunity to do so, might the public have had something worthwhile to contribute to the formulation of Viet Nam policy in the early 1960's? Only a firm belief in official omniscience and public impotency would dictate a negative answer for *all* such situations. Such a conclusion would also be particularly out of place in a country like ours committed to the democratic process and sovereignty of the people.

Nevertheless, section 553 procedures are undoubtedly inappropriate in the formulation of armed forces strategic war plans, or in the formulation of foreign policy, such as our posture toward France when she terminates her association with NATO. But, as will be noted shortly, there are *other* reasons than the mere lack of statutory standards or the particular nature of the policy decision in question that dictate the unreasonableness of any requirement of public participation in "military or foreign affairs" decisions of this particular type. The fact that these types of policy formulation or "rule-making" will be shown to deserve exemption from usual section 553 procedures does not, however, justify the much wider scoped

and unqualified exemption of subsection (a)(1). These examples prove only that there are specific types of rule-making or specific situations—perhaps encountered more frequently in rule-making involving “military or foreign affairs functions” than with most other kinds of rule-making—in which usual rule-making procedures are inappropriate. These examples of situations in which an exemption from usual procedures is warranted do not, however, prove that *all* subsection (a)(1) rule-making, or even the overwhelming bulk of it for that matter, would suffer any more from subjugation to the terms of section 553 than other rule-making already included therein. Nor do they *prove* that section 553 procedures are any more inappropriate to *all* such rule-making because of its peculiar nature, than to other rule-making currently covered by that section.

Was the Department of Defense correct when it offered as an example of a “horrible” the fact that absent the “military function” exemption—which it thought necessary and desirable—its rule-making involving ROTC programs at civilian universities would become subject to section 553? Is the Department of State correct when it assumes that all rule-making involving the International Educational Exchange Service is necessarily inappropriate for the application of section 553 procedures?²⁰³ One is hardly shocked by the general proposition that rule-making involving these programs should be subjected to the normal requirements imposed by section 553(b)-(e) including, of course, its narrow exceptions for special circumstances that will be discussed in more detail later.

There is no doubt, however, that agencies making rules involving “military and foreign affairs functions,” as with other functions, must be able to react quickly in emergency situations, or in any other circumstance where the proper performance of their functions requires rapid action. There are many such situations, and they probably occur with greater frequency in rule-making involving subsection (a)(1) functions than in rule-making involving other functions. The Treasury Department has stated, as an example, that three recent changes in rules involving “foreign affairs functions” could not have followed usual procedure because they “were prompted by the immediately impending effective date of amendments to social security legislation effecting payments to certain alien beneficiaries, and implemented assurances, which had to be acted upon expeditiously.”²⁰⁴ The same department has also stated

203. 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 931.

204. 1969 Survey Response (Department of the Treasury, Bureau of Accounts and Treasurer's Office).

with regard to the rule-making conducted by the Office of Foreign Assets Control that "it is often essential in issuing public documents, that the Control act without delay."²⁰⁵ Consider also the following comment by a Department of State official dealing with the need for an exclusion from usual rule-making procedures for the formulation of certain foreign policy, based upon the need for speed alone.

Let us take another, very recent example of a problem situation in foreign policy—one in which the speed of developments would have made impractical the application of Administrative Procedure Act procedures to the decision-making process. I invite the Subcommittee to consider last month's military coup in Greece.

Immediately upon the occurrence of that coup and in the days thereafter the Department of State was confronted with a range of issues, some of which required immediate decision. There was the question whether to communicate with those who had seized power and in what fashion, what attitude to take toward the seizure, whether action needed to be taken for the safety of Americans, how we might most effectively promote a return to democracy within Greece, and a number of other issues. I do not think it can seriously be argued that there was time for such a proceeding.²⁰⁶

In order to discharge their obligations properly, therefore, agencies making rules involving "military or foreign affairs functions" must be able to respond quickly when the need arises. That is, they must be able to alter their rules at once when immediate action is necessary to accomplish or preserve the objectives of their programs. In such a situation there is no time to publish advance notice of the rules in question, to provide an opportunity for public participation therein, or to delay their effective date. These requirements must be set aside where necessary speedy action would be impaired. The formulation of foreign policy and strategic military plans will very often fit within this circumstance because speed is frequently of the essence in those particular sorts of policy-making.

There are also specific occasions involving subsection (a)(1) rule-making in which advance public procedures of the type listed in section 553 may either cause the very evil that the proposed rules are designed to avoid, seriously impair the ability of the agency to perform its "military or foreign affairs function," or produce other serious undesirable consequences. In those particular circumstances an exemption from usual procedures for subsection (a)(1) rule-mak-

205. 1969 Survey Response.

206. *S. 518 Hearings*, *supra* note 127, at 322 (Mr. Leonard Meeker, Legal Adviser, Department of State).

ing is obviously necessary. An example is furnished by the Department of the Treasury:

In general, rule-making by the Office of Foreign Assets Control involves foreign affairs functions of the United States. The chief rule-making activity of the Office involves the imposition of a trade and financial embargo on quasi-enemy countries. It would be impossible to have notice and public hearing prior to imposition of such an embargo. For example, if it were publicly known that the United States were definitely going to impose a financial embargo on a particular country at a certain time, there would within a matter of several hours be a virtually complete transfer of all its public and private liquid assets to other countries. Obviously, therefore, public hearings would nullify the proposed embargo entirely.²⁰⁷

A similar point may be made about the Textile Program administered by the Department of Labor. That rule-making is said to be exempt from section 553 because of the "foreign affairs function" exclusion:

The program includes negotiation of international bilateral agreements with foreign countries concerning cotton textiles and cotton textile products; requests by the United States that a country or countries voluntarily limit their exports to the United States of categories of cotton textiles or products not to exceed a specific level; and, under certain circumstances, unilateral imposition by the United States of import controls on such shipments to the United States. The program also includes administration of the multilateral agreement (the Long Term Arrangement Regarding International Trade in Cotton Textiles, of February 9, 1962).

Compliance with the notice requirements of section 4 could stimulate exports from foreign countries and imports into the United States of great quantities of goods which might later be subject to ceiling limits. Such action might have an adverse effect on the textile program.²⁰⁸

Other statements of a more general nature have suggested different evils that might be caused if some section 553(a)(1) rule-making were required to follow usual procedures. For example, the Department of Justice noted that a

207. 1969 Survey Response. See also *S. 1663 Hearings*, *supra* note 104, at 392 (Department of the Treasury):

If, for example, notice of an order (a rule under the definitions in the bill) to block the assets in the United States of certain foreign nationals were given, the holders of the assets would have opportunity to withdraw them before the action could be taken. If notice were given of proposed regulations restricting the export or import of gold or its use abroad by persons under U.S. jurisdiction, speculation would be inevitable and the effectiveness of the regulations would be reduced.

208. *S. 518 Hearings*, *supra* note 127, at 241.

requirement of public participation in all proceedings for the promulgation of rules to govern our relationship with other nations . . . inevitably would encourage public demonstrations by extremist factions which might embarrass foreign officials and seriously prejudice our conduct of foreign affairs.²⁰⁹

This suggestion that the possibility of public protest over proposed rules involving our foreign affairs should itself be deemed a sufficient ground upon which to dispense with the normal procedures seems, at best, dubious. One need not, however, agree with that conclusion to agree with another. Federal agencies making rules involving "military or foreign affairs functions" must be freed from the rule-making requirements of advance notice and public participation when adherence to these requirements would induce serious undesirable consequences that the government has a right to avoid, such as frustrating the immediate or ultimate purposes for which the rules are made.

Most strategic military policy formulation and most strategic foreign policy formulation, if they are "rule-making," will need to be exempted from usual rule-making procedures on this basis. Adherence to section 553 requirements for these particular kinds of rule-making will usually either cause the very evil sought to be avoided, or will frustrate the immediate or ultimate purposes of the rule-making involved, or will otherwise seriously impair the ability of the agency to perform its "military or foreign affairs functions" properly. That is, publication of advance notice prior to the adoption of strategic military or foreign policy plans will usually seriously interfere with or destroy their utility; such advance publication may also cause serious harm to our nation's ability to defend itself effectively or to protect its interests abroad. Illustrations of this kind of policy-making for which an exemption from usual procedures is necessary for the above reasons probably include the State Department's examples with respect to France and Greece, cited earlier in this section. Other examples are such things as policy formation with regard to the military steps we will take in any given circumstance if our country, its possessions, or our armed forces or citizens abroad are attacked or threatened, and the precise nature of our political and military response to the capture of an American ship at sea by a foreign power.

Of course, any rule-making that is exempted from the publica-

209. *S. 1663 Hearings*, *supra* note 104, at 363. See also *id.* at 392 (Department of Treasury).

tion requirements of the freedom-of-information provision of the APA because it is "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy"²¹⁰ must similarly be excepted from the usual advance notice and public participation requirements of section 553. After all, if the rules involved "should be kept confidential in the national interest,"²¹¹ it is hardly possible, without violating this confidentiality, to give advance notice of the type required by section 553 and to accord the public an opportunity to comment thereon. This, too, would have the effect of excluding most strategic military planning, most strategic foreign policy planning, and some other rule-making that involves "military and foreign affairs functions" generally, from usual rule-making procedures required by section 553.

Another situation in which some section 553(a)(1) rule-making should be exempt from the usual requirements of public participation may be posited. In certain instances *all* of the pertinent or useful information relating to the form and desirability of a given rule is necessarily within the *exclusive* possession of the national government because, for example, that information is a military secret or otherwise privileged from disclosure. Advance notice of the proposed rule and an opportunity to participate therein would be useless and a predictable waste in that situation because the public could not, by definition, contribute anything of real value to improve the product of the agency's decision-making process. Requiring adherence to usual procedures in such cases would, therefore, be unreasonable. Situations of this type undoubtedly occur more frequently in rule-making that involves a "military or foreign affairs function" than in rule-making that involves other functions.

The Department of Treasury, for example, has justified the exemption of section 553(a)(1) rules promulgated by its Office of Foreign Assets Control on the ground that

the matters with which the Control deals are almost invariably confidential. Frequently, the most important and confidential foreign or military affairs activities of the United States are involved. From the private viewpoint substantially all activities of the Control cover privileged matters.²¹²

A somewhat expanded version of this last view has been expressed by the Department of State as a basis for excluding rule-making in-

210. 5 U.S.C. § 552(b)(1) (1970).

211. *S. 1663 Hearings*, *supra* note 104, at 392 (Department of Treasury).

212. 1969 Survey Response.

volving "military or foreign affairs functions" from usual procedures. It first notes that "in the making of foreign policy decisions much of the information that must be relied upon is not publicly available and indeed cannot be made public."²¹³ This has "necessarily led to different procedures than would otherwise prevail."²¹⁴ The rationale for the different procedures was more fully explained as follows:

[F]ormal rule-making procedures seem primarily intended for and work best in situations where the rule-maker can be assisted through a presentation of the interplay of all interests at stake. In the case of a rule-making proceeding in the field of foreign policy, however, it seems clear that in many cases the most important considerations would fail of representation. Only the Department would be privy to many such considerations and often it could be awkward and of possible embarrassment to relations with other countries for the Department to bring these considerations to the fore. The result would be that the rule-making proceeding, far from affording an elucidation of the reasons behind a policy decision, would provide a distorted picture of the decision-making process.²¹⁵

More specifically, the Department of State noted in 1957 that the Passport Office "does not . . . invite public participation in rule-making. Many of the changes are quickly made as the result of confidential information concerning the international situation, the disclosure of which might affect foreign relations."²¹⁶

One can hardly quarrel with the assertion that exemption from usual rule-making procedures should be provided in those particular cases where *all* relevant or useful information necessary to the making of the specific policy decision involved is within the exclusive possession of the government because it is secret "in the interest of the national defense or foreign policy,"²¹⁷ or because it is otherwise privileged. However, one may question why normal rule-making procedures should also be dispensed with when only *some* of the information relevant to a fully informed policy choice is in the exclusive possession of the government. To the extent that the public can, through normal participation procedures, add to the storehouse of information maintained by the agency on the subject, the ultimate decision may be improved. That is, the mere fact that *some* information directly relevant to the rule-making decision in question is within the exclusive possession of the government does not vitiate

213. *S. 518 Hearings*, *supra* note 127, at 322 (Mr. Leonard Meeker).

214. *Id.* at 388 (Department of State).

215. *Id.*

216. 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 946.

217. 5 U.S.C. § 552(b)(1) (1970).

the usefulness of a section 553 proceeding since other directly relevant information is available to the public. As a consequence, the agency still may learn something from the public's participation. The fact that the agency may finally make its decision in such a case on the basis of that information justifiably held secret does not change this conclusion. Public participation procedures were not intended to inform the public; rather, they were intended to educate the agency. Indeed, under normal section 553 procedures the public will not even know the precise content of the materials submitted in the rule-making process unless those who make such submittals to the agency publicize their contents, or unless some member of the public specifically demands to see those materials, as he has a right to do under the freedom-of-information provision of the Act.²¹⁸

On the other hand, this line of reasoning may be vulnerable on the ground that an exception limited to the situation where *all* of the information relevant to the rule-making decision is necessarily within the exclusive control of the agency is illusory. *In every case* where a rule involving a "military or foreign affairs function" is made, *some* relevant and important information bearing on that decision will be available to the public. More importantly, however, the Department of State has made a good point when it asserts that public procedures are inappropriate for those cases of rule-making where the ultimate decision is likely to be made on the basis of information that is necessarily in the exclusive possession of the government. In such cases, opinions expressed to the agency by members of the public availing themselves of the opportunity furnished by section 553 will usually be of little value since they are based on incomplete information. The agency, therefore, is unlikely to give them great weight.

Public participation in such cases might, however, still be of value in assuring that the decision maker is fully informed since it may induce submission to the agency of some important relevant information that is in the public sector and not previously known by the agency; or it may furnish the agency with opinion, based on information in the public sector, that is of substantial value in making the ultimate decision. In terms of a cost-benefit analysis this may suggest that public procedures are worth the cost even when some of the information directly relevant to the decision is not available to the public because it is privileged. On the other hand, those procedures are not worth the cost when the information that is neces-

218. 5 U.S.C. § 552 (1970).

sarily the most important or relevant factor in making the final rule-making decision is not available to the public. Consequently, it may be desirable to exempt rule-making involving a "military or foreign affairs function" from normal procedural requirements in the latter case but not in the former.

There is another class of situations involving subsection (a)(1) rule-making in which adherence to the usual procedures involving advance notice and an opportunity to participate may be deemed unreasonable. A situation occasionally arises in which the rule-making in question is so insignificant or minor in nature and impact that utilization of these procedures may be a complete and predictable waste. A rule requiring persons receiving passports to sign them in ink or ball point rather than in pencil or crayon surely does not require public participation—nor, of course, do technical or other purely ministerial amendments to an existing rule. Rule-making of this sort should, therefore, not be subject to usual section 553 procedures.

Previous discussion demonstrated that in certain types of cases rule-making involving "military or foreign affairs functions" should not be required to follow the usual procedures mandated by section 553. Specific situations exist in which the policies favoring public participation in rule-making are outweighed by the conflicting need to operate our government efficiently, expeditiously, effectively, and inexpensively. These situations, however, break down into a number of well-defined classes that can be dealt with individually. They do not, therefore, constitute an adequate justification for the exemption of *all* rule-making activity involving the excepted functions; rather, they only suggest that suitable, narrowly drawn exceptions be provided for these particular types of cases. As subsequent discussion will demonstrate, a more narrowly tailored exemption already on the statute books can deal adequately with those cases of section 553(a)(1) rule-making that need special treatment. Consequently, no persuasive reason appears to justify continuation of the present unqualified and across-the-board exemption for *all* rule-making involving "military or foreign affairs functions."

A number of federal agencies making rules of this sort have at least tacitly recognized that an unqualified exemption for all rule-making involving these functions is unnecessary. The Department of State, for example, has noted that section 553 procedures are appropriate for at least some rule-making involving "foreign affairs functions." In the course of congressional hearings on administra-

tive-procedure reform, a spokesman for the Department emphasized that

I want to make perfectly clear that I am not proposing that formal procedures are inappropriate to the exercise of all foreign affairs functions. I do believe that the Department is already fulfilling the underlying purposes of the proposed amendments to the Administrative Procedure Act in those cases where formal procedures are suitable.²¹⁹

(This last point is, of course, debatable.) Consider also in this connection the following additional statement by the Department of State.

With respect to its regulatory activities, the Department has in the past published notice of proposed rulemaking in those areas not vitally impregnated with foreign policy considerations. Examples of this are found in various routine visa procedures. There are, however, other areas where foreign policy considerations may be paramount. In such areas, it is readily apparent that the Department requires a free hand to be able to discharge its mission. Examples of this are the determination of geographical limitations of general applicability on the issuance of passports and munitions control area in toto.²²⁰

Referring to its rules involving "military and foreign affairs functions," the Department of the Treasury similarly asserted that "in many instances public participation in rule-making would be desirable, although not required with respect to the matter specified. The determination in any specific case, however, would have to be made with reference to the controlling facts and circumstances."²²¹ The Department of Defense has also tacitly admitted that an unqualified, across-the-board exemption for *all* rule-making involving "military functions" is unnecessary by voluntarily following section 553 procedures for at least some rule-making that may involve a "military function."²²²

It may be argued that since usual rule-making procedures are inappropriate for a substantially larger portion of subsection (a)(1) rule-making than for most other kinds of rule-making, the whole

219. *S. 518 Hearings*, *supra* note 127, at 322 (Mr. Leonard Meeker).

220. *S. 1663 Hearings*, *supra* note 104, at 387.

221. 1957 HOUSE SURVEY, *supra* note 39, pt. 10 (Department of the Treasury), at 1017.

222. *Id.*, pt. 3 (Department of Defense), at 286: "Many of the rules considered herein are of military or naval significance. Since the procedures in paragraph 4 of the Administrative Procedure Act are followed in all cases, there has been no need to characterize particular rules as involving or not involving military or naval functions."

class—all “military and foreign affairs function” rule-making—should be exempted from section 553 without qualification. The argument is that the burden of individually excluding, on a case-by-case basis, each one of those many particular instances of such rule-making that should be excluded from normal procedures is too great, when compared to the benefits obtained from those relatively few cases in which such rule-making should follow usual procedures. This view ought to be rejected for several reasons.

First, the number of situations in which rule-making involving “military or foreign affairs functions” should follow usual section 553 procedures is probably much larger than the affected agencies would admit. Closer examination reveals that in many of the instances of such rule-making for which agencies claim exemption from section 553, the claims are unjustified in terms of actual need. What is more, past performance suggests that the overly broad exclusionary actions of the agencies with respect to public participation in these kinds of rule-making are unlikely to change very much absent a statutory requirement to the contrary or the credible threat of such a requirement. Second, the policy in favor of public participation is so weighty that it should be rejected only if the burden of administering a system of more narrowly tailored exemptions than those presently found in subsection (a)(1) is unduly large. As will be demonstrated, this is not a problem here. An existing, narrowly tailored exemption can exclude appropriate subsection (a)(1) rule-making from usual procedures without excluding rule-making undeserving of that treatment; and it can do so without imposing an unduly large administrative burden on those charged with deciding whether particular rule-making involving these functions must follow ordinary procedures or is exempt from them for good cause.

One last point should be noted with respect to the undesirability of the existing subsection (a)(1) exemptions. Discussion in earlier portions of this Article has demonstrated the vagueness of the terms “military function” and “foreign affairs function.” The unusually large difficulty encountered in any effort to define satisfactorily their exact scope has meant, in practice, that they are susceptible to *very* wide application by agencies colorably entitled to rely on them. As a consequence, section 553(a)(1) is also undesirable because its excessive vagueness facilitates more widespread evasion of the congressionally willed policy of public participation in rule-making than Congress is likely to have intended. At the very least, this suggests that subsection (a)(1) should be replaced with terms that are less vague and more easily definable in practice. As noted, however, this

is only an additional reason why section 553(a)(1) should not be continued. The chief reason this exemption should be eliminated is that it is unqualified and overbroad and, therefore, not justifiable on its merits.

V. ARE EXISTING EXEMPTIONS ADEQUATE TO SUPPORT
A FLAT REPEAL OF SECTION 553(a)(1)?

Previous discussion has demonstrated that agencies making rules involving "military or foreign affairs functions" must have freedom to ignore usual rule-making procedures in various types of situations. A flat repeal of section 553(a)(1) *without more* is, therefore, justified only if other existing exemptive provisions would satisfactorily accomplish this result. The following discussion will examine legitimate agency needs for avoiding usual procedures in rule-making involving "military or foreign affairs functions," and determine whether existing exemptions, other than subsection (a)(1), can adequately meet these needs.

A. *The Secrecy Exemption of Section 552(b)(1)*

Agencies must be allowed to ignore section 553 in those cases where the rule involving a "military or foreign affairs function" must be kept secret because of the harm to our "national defense or foreign policy" that would occur if it were made public. It seems clear, however, that where a rule is required to be kept secret under section 552(b)(1), the freedom-of-information section's exemptive provision, agencies may properly ignore usual rule-making requirements entirely without adversely affecting the validity of the rule in question. Similarly, when an "Executive order" under section 552(b)(1) mandates that the reasons for a rule, as opposed to the rule itself, be kept secret in the interest of "national defense or foreign policy," agencies would be excused from the section 553(c) requirement that the adopted rules incorporate "a concise general statement of their basis and purpose." The point is that in the formulation and promulgation of valid rules, agencies may ignore usual rule-making procedures *to the extent that* adherence to those procedures would interfere with a lawful secrecy requirement imposed by an executive order issued pursuant to section 552(b)(1).

The present exemption from section 553 for rule-making involving a "military or foreign affairs function" is in no way necessary to accomplish this result. If pursuant to an exemption from the freedom-of-information section an agency must keep certain rules secret,

or has the discretion to keep certain rules secret, advance notice and an opportunity for public comment thereon can be dispensed with despite the requirements of section 553. In such cases the effectiveness of the rules involved would not be impaired because it seems obvious that the publicity requirements of section 553 must be inapplicable to rules that are required to be kept secret or may be kept secret pursuant to a specific exemption from section 552. Section 552(b)(1) itself would, therefore, seem to dictate that if certain rules or the reasons therefor are "specifically" required to be kept secret in the interest of "national defense or foreign policy" by an "Executive order," they are necessarily exempted from all *inconsistent* requirements of section 553. That is, an agency is not required to violate a proper section 552(b)(1) executive order to comply with any provision of section 553. This reading of section 552(b)(1) against section 553 is the only sensible way to reconcile what otherwise might be conflicting demands imposed by the two sections. Furthermore, the *only* situation in which an agency should be able to invoke secrecy as a ground to justify avoidance of any usual rule-making procedures, is when it may lawfully keep the rule, or the reasons therefor, secret under section 552. Otherwise, it would be seeking to use secrecy as a basis upon which to avoid usual rule-making procedures in a situation where section 552 confers upon the public a right to discover the contents of the rule or the reasons for it.

It is clear that the term "secret" in this context means only that the relevant matter needs to be kept confidential in order for the agency to perform properly the function to which that matter pertains. That is, it

is not intended in the sense of the technical security classification "secret" as defined in Section 1(b) of Executive Order 10501, Safeguarding Official Information, but rather in the broad sense of matters which in the interest of [national defense or] foreign policy should not be prematurely disclosed, as for example, while international negotiations are pending or before restraint determinations have been arrived at.²²³

Section 552(b)(1), therefore, insulates from any inconsistent requirement of section 553, all facets of section 553(a)(1) rule-making that must be kept secret in the broader sense because publicity would in some way be injurious to the successful conduct of our "national defense or foreign policy." To read section 552(b)(1) and section 553

²²³ S. 518 Hearings, *supra* note 127, at 373 (Department of Commerce). See 3 C.F.R. 306, 307 (1972).

differently would be out-of-step with the purpose behind the recent addition of the former's language to the APA.

Consequently, even if internal agency planning is regarded as "rule-making" under the APA, virtually all strategic "military and foreign affairs function" planning would be exempt from the requirements of section 553 on this basis. Secrecy with respect to strategic planning will invariably be required by executive order because revealing such plans will usually interfere with the very purpose they seek to achieve—an advantage over our adversaries. As will be seen, this is not the only basis under existing law whereby such strategic planning, assuming it is deemed rule-making, would be exempt from usual rule-making procedures in the event section 553(a)(1) is repealed.

B. *The Sections 553(b)(B) and 553(d)(3) Exemptions*

While section 552(b)(1) may enable agencies to ignore usual procedural requirements when they make section 553(a)(1) rules that must be kept secret, what provisions may be used to exempt the other situations mentioned earlier in this Article? If subsection (a)(1) were repealed, would other exemptions assure that agencies making rules involving "military or foreign affairs functions" could ignore usual procedures when they need to react quickly in emergency situations? Would other exemptions assure that agencies making such rules could ignore usual procedures when adherence to them would cause the very evil that the rule seeks to avoid, defeat the purpose of the rule, or result in other undesirable consequences? Are usual procedures for making such rules currently avoidable under exemptions other than subsection (a)(1) if the most important information relating to the rules' form or desirability is necessarily within the exclusive possession of the national government? Are the usual procedures currently avoidable under other exemptions for rules that are so insignificant or minor that public procedures are predictably a complete waste of effort? As subsequent discussion will demonstrate, the answer to all of the above questions is "yes."

According to section 553(b)(B), the provisions of section 553(b)(c) are inapplicable "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This exemption from two subsections of section 553 deserves careful examination. It may satisfactorily handle all of the problems that would arise if

the current exemption for rule-making involving "military or foreign affairs functions" were repealed. And it may do so in a manner narrowly tailored to fit the specific problem. Section 553(b)(B) is especially narrowly tailored because it is qualified and limited, and requires an administrative assessment of the particular facts and circumstances surrounding each case of rule-making to which it is sought to be applied. The reports of the Senate and House committees responsible for the APA clearly stated:

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.²²⁴

By this, the committees intended to establish a restrictive meaning for the phrase "when the agency for good cause finds," which precedes the enumeration of the grounds upon which this particular exemption is available.

Therefore, the agencies are required under this provision to make specific findings, and thus to meet what has been interpreted to be a strict standard, before they can avail themselves of the exemption. Although some commentators have argued that the courts should not examine the accuracy of the required administrative finding when the validity of an agency's use of this exemption arises in litigation,²²⁵ this finding is clearly judicially reviewable on the same basis as any other finding committed to an agency's judgment.²²⁶ Thus, if the finding is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or is "unsupported by substantial evidence" based on the whole record, it will, in a proper suit, be set aside and the promulgated rule rendered invalid.²²⁷ Of course, in such cases the presumption of validity will be, as it always is, with the administrative agency, and the burden of overturning its finding will rest upon the assailant.

224. LEGISLATIVE HISTORY, *supra* note 13, at 200, 258. See also *id.* at 358 (remarks of Representative Walter).

225. See R. PARKER, *ADMINISTRATIVE LAW* 182-83 (1952); Nathanson, *Some Comments on the Administrative Procedure Act*, 41 *ILL. L. REV.* 368, 384-86 (1946).

226. See *Texaco, Inc. v. FPC*, 412 F.2d 740 (3d Cir. 1969); *Durkin v. Edward S. Wagner Co.*, 115 F. Supp. 118 (E.D.N.Y. 1953), *affd. per curiam sub nom. Mitchell v. Edward S. Wagner Co.*, 217 F.2d 303 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955). See also *National Motor Freight Traffic Assn., Inc. v. United States*, 268 F. Supp. 90 (D.D.C. 1967). In this last case, it is not clear whether section 553(b)(B) or section 553(b)(A) was involved.

227. 5 U.S.C. §§ 706(2)(A), (2)(E) (1970). See also cases cited in note 226 *supra*. But see *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), discussed in text accompanying note 255 *infra*.

There is one interpretation of section 553(b)(B) that should be rejected at the outset. It can be argued that an agency seeking to come within the section 553(b)(B) exemption must find that it is "impracticable, unnecessary, or contrary to the public interest" for the agency to follow the procedures of section 553(b) in each separate rule-making case to which it seeks to apply the exemption, and that it cannot make that finding wholesale for any narrowly tailored class or group of rule-making situations. This interpretation relies upon certain somewhat ambiguous language in the provision, "*when* the agency for good cause finds (and incorporates *the* finding and a brief statement of reasons therefor in *the* rules issued)." It also relies upon the supposed intention of Congress to provide a means by which individual cases could be separately considered on their own merits, and an exemption granted only in those specific cases in which it was justified on one of the grounds stated.

While the above argument has great merit and is a sound general rule by which to construe section 553(b)(B), it overlooks two points. First, it may be "impracticable, unnecessary, or contrary to the public interest" to follow usual section 553 procedures in every instance of a specific type of rule-making under a particular statute, when each such instance is viewed in isolation. In those circumstances it seems a waste to require repetitive and redundant findings and full publication of those findings. As will be explained later, strategic military planning and strategic foreign policy planning are examples of this kind of situation.

Second, there are also situations where compliance with the procedures of section 553(b)-(c) is not "impracticable" or "contrary to the public interest" as applied to any single instance of rule-making on a given subject, but becomes so for a whole class if those requirements must be followed for *all* such similar instances of rule-making. For example, so many different rules of a particular type may have to be issued within a short time period that affording notice and an opportunity to participate in every case would be practically impossible, and would frustrate the proper performance of the agency's functions or cause other substantial deleterious consequences. Rules promulgated for individual military bases by the commander of each base in light of its peculiar conditions and circumstances may provide an example of this kind of situation. Certainly the day-to-day orders of military superiors to inferiors, if they are rules, would serve as an example. Procedures of the type specified in section 553 may not be "impracticable" or "contrary to the public interest" with respect to any one such determination viewed in isolation; but those

procedures may become so when they must be applied to all such determinations.

The exemption contained in section 553(b)(B), therefore, should be read to allow an agency to make the requisite finding for a whole class of rule-making. But this should be permitted only if the agency can make that finding either as to every individual instance of rule-making within the class considered separately, or as to every individual instance of rule-making within the class because it would be "impracticable" or "contrary to the public interest" to impose section 553 procedures in *all* instances. Of course, agencies must be required to draw classes for this purpose as narrowly as possible so that no more is excluded under this exception than is absolutely justifiable in terms of the statutory criteria. Overbreadth of any kind in delineating such a class of rules should not be tolerated. Consideration might also be given to shifting the burden of proof to the agency with respect to such group delineations as opposed to individual case delineations, and thus forcing the agency to justify its definition of the "class" of rule-making it seeks to exclude from usual procedures. Such a limitation, however, may not be necessary and may have some undesirable consequences.

The Administrative Conference of the United States commented on this subject when it proposed the "Elimination of Certain Exemptions [found in section 553(a)(2)] From the APA Rulemaking Requirements." The Conference concluded: A section 553(b)(B) finding that adherence to usual procedures would be "impracticable, unnecessary, or contrary to the public interest . . . can be made, and published in the Federal Register, as to an entire subject matter concerning which rules may be promulgated. Each finding of this type should be no broader than essential . . ." ²²⁸ Similarly, while in the United States Attorney General's Office, Justice Rehnquist stated that "where it is evident to an agency that notice and public procedure will always be inappropriate to a particular class of rule-making, there is no objection to making this finding and basing future actions upon it." He suggested, however, that "a boiler plate recitation or incorporation by reference [of the class finding] must be published as part of each rulemaking action" because this "is more consistent with a literal interpretation of section 553(b)(B) and seems to me to be the better practice." Justice Rehnquist was more guarded in his response to the question, "whether an agency may

228. Recommendation No. 16, *supra* note 8, at 29-30.

determine that notice and public procedure are 'impracticable' with respect to a whole class of cases simply because of the unusually large number of cases involved and despite the fact that as to any one such case [viewed in isolation] such a procedure might not be impracticable." After suggesting that this question cannot be "answered in the abstract," and expressing some uncertainty about its merits, he stated that "the language of section 553(b)(B) is not so clear as to preclude the interpretation . . . [suggested and] it does not appear that there is any authority which would rule out such an interpretation." Finally, Justice Rehnquist suggested that any doubt on this issue could be completely eliminated "by legislative history made in the course of the consideration of [an] amendment" of the type being considered here.²²⁹

The grounds specified in section 553(b)(B) upon which an agency may dispense with the usual rule-making procedures are stated in the alternative, so that any one of the three grounds listed is sufficient to invoke the exemption.²³⁰ The first ground for a qualified exemption is when the notice and participation requirements of section 553 are found to be "impracticable." *Webster's* defines this term as meaning, among other things, "infeasible," "impractical, unwise, imprudent."²³¹ Earlier drafts of the APA would have made the exemption available when the public rule-making procedures were "impracticable because of unavoidable lack of time or other emergency,"²³² but the qualifying language after "impracticable" was subsequently dropped. The Senate and House reports on the APA stated that "impracticable" refers to a situation "in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rulemaking proceedings."²³³

The term "unnecessary," which is the second exemptive ground specified in section 553(b)(B), connotes something that is "not necessary: useless, needless."²³⁴ The legislative history indicates that it must be unnecessary "so far as the public is concerned, as would

229. Undated letter from William Rehnquist, then Assistant Attorney General, Office of Legal Counsel, to Jerre Williams, Chairman, Administrative Conference of the United States.

230. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 30.

231. WEBSTER'S, *supra* note 55, at 1136.

232. LEGISLATIVE HISTORY, *supra* note 13, at 140, 148, 157. See also *id.* at 181, a draft reading "impracticable because of unavoidable lack of time or other emergency affecting public safety or health."

233. *Id.* at 200, 258. Accord, ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 30.

234. WEBSTER'S, *supra* note 55, at 2504.

be the case if a minor or merely technical amendment in which the public is not particularly interested were involved."²³⁵ On this basis, one court seems to have concluded that "unnecessary" applies to situations in which an agency rule is "minor or emergency in character,"²³⁶ or "'a routine determination,' 'insignificant in nature and impact,' and unimportant 'to the industry and to the public.'"²³⁷

Rule-making is also exempted by section 553(b)(B) from advance notice and public participation when adherence to those procedures would be "contrary to the public interest." According to the APA's legislative history, this phrase "supplements the terms 'impracticable' or 'unnecessary'; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule-making warrants an agency to dispense with public procedure."²³⁸ The *Attorney General's Manual* takes the position that "'[p]ublic interest' connotes a situation in which the interest of the public would be defeated by any requirement of advance notice."²³⁹

At some point during their legislative history, all three terms—"impracticable," "unnecessary," and "contrary to the public interest"—were referred to as operating "only where facts and interests are such that notice and proceedings are impossible or manifestly unnecessary,"²⁴⁰ and as exempting "situations of emergency or necessity."²⁴¹ However, the weight of their legislative history, as well as their language, clearly establishes that these terms were not meant to be so narrowly limited. At the same time, it must be remembered that these are qualified grounds for exemption and are not to be construed more broadly than the demands of sound government administration and wise public policy require. It is worth repeating that the section 553(b)(B) exemption is "not an 'escape' clause in the sense that any agency has discretion to disregard its terms or the facts."²⁴² An agency can use this exemption only if it has "good cause" within the meaning of the APA.

A more detailed description of how the section 553(b)(B) exemp-

235. LEGISLATIVE HISTORY, *supra* note 13, at 200, 258. See also ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 31.

236. *Texaco, Inc. v. FPC*, 412 F.2d 740, 743 (3d Cir. 1969).

237. 412 F.2d at 743, citing *National Motor Freight Traffic Assn. v. United States*, 268 F. Supp. 90, 95-96 (D.D.C. 1967).

238. LEGISLATIVE HISTORY, *supra* note 13, at 200, 258.

239. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 31.

240. LEGISLATIVE HISTORY, *supra* note 13, at 358.

241. *Id.* at 200, 258.

242. *Id.* See text accompanying note 224 *supra*.

tion might operate in practice demonstrates that it could satisfactorily handle all the problems resulting from a repeal of section 553(a)(1)—and in so doing, rationally accommodate the need for public participation in rule-making, on the one hand, with the need for efficient, effective, expeditious, and inexpensive government administration on the other. Although the terms “impracticable,” “unnecessary,” and “contrary to the public interest” overlap to some extent, an effort will be made to examine their applications separately. But in light of the very close relationship between these terms, the following analyses of their applications should also be considered as partially overlapping.

Consider, first, the exemption for situations where public procedures are found to be “unnecessary.” This could undoubtedly perform the function intended by the exception for “minor revisions and refinements of rules,” which is found in several bills that sought to rewrite section 553.²⁴³ Indeed, the existing language can probably do so more satisfactorily because it is more narrowly tailored. For example, the “unnecessary” exemption seems to cover situations where a rule is in fact so minor, such as the rule requiring passports to be signed in ink rather than in pencil, that public procedures would be a predictable waste. Under this exemption public procedures may also be dispensed with for rules announcing exact rates under statutes making the calculation of those rates purely ministerial because, for example, the rate set must be a certain specified percentage of another known figure.²⁴⁴ Similarly, usual rule-making procedures are also “unnecessary” for mere technical changes in regulations. If, for example, the statutory citations contained in a regulation must be altered to conform to changes in the numbering of the *United States Code*, or regulations are rewritten or reorganized purely to improve their style, and without altering their substance, it is obviously “unnecessary” to resort to public procedures.

Additionally, if *all* or the *most important information* relating to the form or desirability of a rule is necessarily within the exclusive possession of the national government, a section 553 rule-making proceeding would seem unwarranted. In this circumstance, the pub-

243. See, e.g., S. 1663, 88th Cong., 2d Sess. § 4(b)(2) (1964).

244. See, e.g., 1957 HOUSE SURVEY, *supra* note 39, pt. 1 (Department of Agriculture), at 26-27. The Department may dispense with usual procedures, under the “unnecessary” exemption, for rules announcing the exact penalty rates applicable to marketing of certain commodities in excess of the farm marketing quota. The Department’s action in those cases only involved a mathematical calculation, for the rates are set by law as a certain percentage of parity or support price of the commodity as of a particular date.

lic could not contribute anything meaningful to improve the product of the agency's decision-making process. Thus, by definition, adherence to usual procedures in situations of this sort would be predictably unproductive, and hence "unnecessary." All, or the most important, information relating to the form or desirability of a rule may necessarily be in the exclusive possession of the national government because it is properly kept secret under section 552(b)(1). According to the agencies involved, this is particularly true with respect to a substantial amount of the rule-making involving "military and foreign affairs functions."²⁴⁵ To the extent they are right, such rule-making may be exempted from usual procedure requirements by section 553(b)(B).

Agencies should not be permitted to decide lightly that public procedures are "unnecessary" within the meaning of this qualified exemption. In *Texaco, Inc. v. FPC*²⁴⁶ the Court of Appeals for the Third Circuit considered an FPC regulation promulgated without resort to the public procedures of section 553(b)-(c). The regulation required natural gas companies to pay a compound interest rate, for the first time, on all amounts refunded to their customers because of overcharges resulting from new rates subsequently found to be unjustified. After considering all of the Commission's arguments, the court held that the rule was invalid because of the FPC's failure to follow the procedures of section 553(b)-(c) in its promulgation.

The court in *Texaco* explained that "[t]he rule does not fall within the 'unnecessary' exception relied on by the Commission since it cannot be classified as either minor or emergency in character."²⁴⁷ The judges refused to accept the argument that the section 553 procedures were "unnecessary," since they found that "the compound rate would affect numerous jurisdictional gas companies and potentially involves large sums of money."²⁴⁸ The court also expressly rejected the Commission's contention that the procedures were "unnecessary" because the new rule imposed no obligation on affected parties that could not have been imposed on them by ad hoc adjudicatory orders in each case. "The crucial fact is that the Commission elected to proceed in this case by making a general rule and, when engaged in rule-making, it must comply with the procedural requirements imposed on rule-making by the Administrative Procedure Act, which it failed to do"²⁴⁹

245. See text accompanying notes 212-16 *supra*.

246. 412 F.2d 740 (1969).

247. 412 F.2d at 743.

248. 412 F.2d at 743.

249. 412 F.2d at 745.

By holding as it did, the court in *Texaco* seems to have taken the position that the ability of an agency to achieve the same result as a rule by another means, such as ad hoc adjudication, does not make the requirements of section 553(b)-(c) "unnecessary" when the agency in fact elects to achieve that result through rule-making. This Article is not the place to explore fully the wisdom of that result.²⁵⁰ However, a number of general points are worth making here. The result in *Texaco* can be justified in light of the fact that the APA favors public participation in rule-making in all cases except those where very good reasons preclude it; the fact that the rule was not minor in its effects and had a large financial impact on many companies;²⁵¹ and the fact that the agency did make a conscious choice to proceed by rule-making which would result in an order of general applicability rather than by an ad hoc order in each case.²⁵² On the other hand, one of the undesirable effects of this decision may be to discourage the use of general rules in favor of ad hoc adjudication, a result that is usually contrary to the sound administration of regulatory policies.²⁵³

The "unnecessary" exemption should also not allow agencies to avoid section 553 procedures on the ground that a rule has only a small impact on a very limited segment of the public and is therefore "minor" or "unimportant." It is wise to have well-informed decision-making and citizen participation in rule-making that has a relatively small impact on limited segments of the public, as well as in those actions that have a great impact on large portions of the public. The size of the group harmed is in no way related to the size or nature of the individual interest that may be worthy of the protection accorded by a right of public participation. And the magnitude of the harm inflicted on a class is, as a general proposition, not a reliable guarantee of the efficacy or usefulness of public participation in improving the operation of government or in relieving unusual individual pain. A small inconvenience to some may be large to others whose circumstances are different or peculiar. At any rate,

250. Cf. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (agency order issued to a party in the course of an adjudicatory proceeding valid and enforceable, even though the same requirement announced as a prospective rule in the course of an adjudication would be void because it failed to follow the rule-making requirements of section 553). See generally Comment, *Wyman-Gordon and the Excelsior Rule*, 117 U. PA. L. REV. 621 (1969).

251. 412 F.2d at 743 n.7.

252. 412 F.2d at 744 n.9.

253. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966). See also Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 Wis. L. REV. 95; Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

since several very minor inconveniences or impositions by government can add up to major ones, government should not be allowed to act insensitively toward the former. The "unnecessary" exemption should not, therefore, be a vehicle to avoid public participation *merely* because, as a general proposition, the injury worked on individuals is estimated to be relatively small, or the number of persons involved is few.²⁵⁴ Of course, some of the usual procedures can be avoided on other bases when the number of individuals affected by a proposed rule is very small. For instance, under section 553(b) notice of proposed rule-making need not be published if the persons "subject thereto are named and either personally served or otherwise have actual notice thereof."

As noted, the term "unnecessary" as it now appears in section 553(b)(B) probably means that usual procedures may be ignored only when they are of no value or help in light of the purposes for which public participation is desired. But with the aid of some corroborating legislative history, which could be supplied at the time section 553(a)(1) is altered or repealed, the term "unnecessary" could also provide an express statutory vehicle by which executive privilege may be invoked. This term could be deemed to mean that the usual procedures may be ignored when they are "useless" because they may not constitutionally be forced on the executive branch. As will be noted, there are types of "military or foreign affairs function" rule-making that may be beyond Congress' authority to regulate even on a purely procedural basis because they involve matters vested wholly and exclusively in the President by the Constitution. While the "unnecessary" exemption is not an essential tool for the invoca-

254. Note the following illustration in this connection:

One congressional office got a host of complaints from people, not only in that area, but throughout the country, on an unimportant rule which an agency had made without any public notice or hearing, related to public property. It related to how many pounds of petrified wood you could take off the premises of a national reservation of some type. And this agency had thought—well, it is a terrible thing to lose all these hunks of stone, so they—within their own internal organization, they came up with one pound, or something like that.

This provoked all this correspondence to Congress.

So the congressional people involved went down to the agency . . . [which] said—"Oh, well, we realize we made a mistake, we will raise it to five pounds." So the congressmen went back and said we solved the problem. The agency said yes, very unimportant.

Well, that provoked ten times more mail than came in the first time, because it turned out that five pounds just didn't qualify under the standards by which petrified wood is traded in the market of . . . collectors. . . . It has to be a bigger poundage.

Well, the moral of that particular story was that this supposedly minor rule . . . turned out to be important to a lot of people in this country, and the fact that the agency did not give public notice, and give the public a chance to express its opinion, caused a heck of a lot of trouble for an awful lot of people.

Transcript, ABA Symposium on S. 1336, Washington, D.C., Dec. 1, 1966, at 110-11.

tion of executive immunity, it may be desirable to make it a vehicle for that purpose—even the exclusive vehicle, if that is constitutionally possible. The section 553(b)(B) procedural requirements of a formal finding that notice and public participation would be “impracticable, unnecessary, or contrary to the public interest,” followed by publication of the finding with the reasons therefor, would ensure careful consideration of the necessity and lawfulness of any claim of executive immunity before it is made, and thereby eliminate some legislative-executive conflict while increasing public participation in rule-making. It would also avoid misunderstandings because the fact of the immunity claim and its nature are made completely clear to all.

Of course, an agency’s determination on this issue would be subject to judicial review. There is certainly no nonjusticiable political question involved. The issue is only whether the agency was justified, as a matter of law, in determining that adherence to usual procedures was “unnecessary” because the rule-making in question is a product of exclusive presidential authority. Judicial review of a section 553(b)(B) “unnecessary” finding based on a claim of executive privilege is different from the situation presented in *Chicago & Southern Air Lines v. Waterman Steamship Corp.*²⁵⁵ There, the United States Supreme Court held unreviewable the merits of an administrative determination that certain American air carriers should be accorded air routes to foreign countries. The Court did *not* refuse to define the exclusive competence of the executive branch. Rather, after defining it, the Court refused only to review an administrative determination that was inseparably linked to an exercise of that exclusive competence.

This situation is more like *Powell v. McCormack*,²⁵⁶ which determined whether Congress had exceeded its constitutional authority when it sought to impose certain qualifications, other than those specifically enumerated in the Constitution, on the election of representatives. In reviewing a section 553(b)(B) finding that usual rule-making procedures are “unnecessary” because the “military or foreign affairs function” policy involved is allegedly a product of *exclusive* presidential powers, the Court need do no more than it did in *Powell*. It need only determine whether or not the particular rule-making involved is in fact a product of exclusive executive authority under the Constitution, just as the Court in *Powell* determined whether the additional qualifications imposed on representa-

255. 333 U.S. 103 (1948).

256. 395 U.S. 486 (1969).

tives were in fact a product of exclusive congressional authority. Only the Court is in a position to resolve successfully a dispute of that sort between the other two coequal branches.

The "impracticable" exemption could adequately deal with a number of different situations in which a requirement of advance notice of rule-making and public participation therein would be unreasonable. In emergency cases where a rule is needed immediately to avoid injury or frustration of a program's objectives, the usual procedures of section 553(b)-(c) can be disregarded because they are "impracticable." According to the *Attorney General's Manual*, for example, an agency may learn "that certain rules concerning . . . safety should be issued or amended without delay; with the safety of the . . . public at stake, the . . . [agency] could find that notice and public rule-making procedures would be 'impracticable,' and issue its rules immediately."²⁵⁷

The Department of Agriculture has properly stated that the same rationale is equally applicable when the Department must impose or modify animal or plant quarantines promptly to prevent the spread of diseases or insect pests; or when the Department makes orders under the Packers and Stockyards Act of 1921²⁵⁸ to continue temporary rate schedules previously authorized after notice and an opportunity to be heard, if prompt action is necessary to avoid a reversion to rates and charges that are unrealistic in light of existing economic conditions; or when the Department finds under the Agricultural Adjustment Act of 1933²⁵⁹ that last minute changes in acreage allotments and marketing quota regulations are necessary because farmers must know of such changes prior to planting.²⁶⁰ To force adherence to the procedures of section 553 in any of these situations would be "impracticable" because time is of the essence.

Consider also the situation presented in *Durkin v. Edward S. Wagner Co.*²⁶¹ In an earlier decision involving the same parties, the court had held that particular workers were not covered by certain regulations under the Fair Labor Standards Act.²⁶² This

257. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 30-31. See also 1957 HOUSE SURVEY, *supra* note 39, pt. 11C (Independent Agencies—Interstate Commerce Commission), at 1760.

258. 7 U.S.C. §§ 181-229 (1970).

259. 7 U.S.C. §§ 601-23 (1970).

260. 1957 HOUSE SURVEY, *supra* note 39, pt. 1 (Department of Agriculture), at 26-27. See also *Dighton v. Coffman*, 178 F. Supp. 114 (E.D. Ill. 1959), *affd.*, 279 F.2d 497 (7th Cir. 1960).

261. 115 F. Supp. 118 (E.D.N.Y. 1953), *affd. per curiam sub nom. Mitchell v. Edward S. Wagner Co.*, 217 F.2d 303 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955).

262. 29 U.S.C. §§ 201-19 (1970).

holding was contrary to the interpretation and practice of the Administrator of the Wage and Hour Division—an interpretation known and relied upon by the industry involved. As an immediate response to this decision, and without resort to usual rule-making procedures, the Administrator promulgated a rule that included those workers within the relevant regulations. When the new rule was issued, the Administrator stated that it would be “impracticable, unnecessary, or contrary to the public interest” to follow usual rule-making procedures in the making of this “clarifying” regulation:

[I]mmediately effective clarification of the regulations is essential in order to accomplish the intent of the present regulations to safeguard the wage standards in the industry, to eliminate the unfair competitive situation, and to provide for adequate enforcement of the home work restrictions.²⁶³

On the basis of this evidence, and in the absence of any evidence to the contrary, the court held that the rule was properly treated as within the section 553(b)(B) exception.²⁶⁴

The court's result seems justifiable because any delay in promulgation of the rule would have encouraged employers to abandon their previous adherence to the Administrator's interpretation of the earlier rule until a new rule to the same effect was formally adopted. This would have hurt countless employees who had come to rely on the prior interpretation. It also would have injured those employers who chose, despite their competitors' contrary action, to keep their wages at the levels demanded by the earlier interpretation during the period in which the new rule was being adopted with public procedures.

As noted earlier in this Article, there are many situations where agencies making rules involving “military or foreign affairs functions” must be able to act quickly to fulfill their mission properly.²⁶⁵ In those cases where usual rule-making procedures would unduly hinder this necessary capacity for speed they are, of course, “im-

263. 115 F. Supp. at 122.

264. 115 F. Supp. at 122-23. On appeal, the court said:

Judge Galston has found that the defendant's operations fall within the amended regulations and that the regulations were properly promulgated under the Administrative Procedure Act We see no reason to overturn his well-reasoned conclusions. While there was no advance notice of the amendment, yet that was not necessary, both because of its nature as an “interpretive” rule and because of the Administrator's finding of “good cause” for immediate action, based upon the fact that other employers in general were complying with this interpretation of the Act and defendant had long known of the view held by the Administrator.

217 F.2d at 304.

265. See text accompanying notes 204-06 *supra*.

practicable" within the meaning of section 553(b)(B). Agencies making subsection (a)(1) rules may, as a result, avoid usual procedures in such cases by resort to this limited exemption. Proper reliance on the "impracticable" exemption because of a special need for speedy agency action is likely to be more frequent in cases involving "military or foreign affairs functions" rule-making than in cases involving other types of rule-making. The peculiar nature of "military and foreign affairs" dictates this conclusion. On the basis of a need for speed alone, for example, much strategic military and foreign policy formulation will be exempt from usual procedures under section 553(b)(B).

Either the "impracticable" or "contrary to the public interest" exemption, or both, must be deemed to exempt rule-making from usual procedures when adherence to these procedures would cause the very evil that the rule seeks to avoid or would sabotage the rule's effectiveness. An agency can ignore usual rule-making procedures under section 553(b)(B) whenever advance notice would tend to defeat a rule's purpose, because in such situations those procedures would certainly be "contrary to the public interest."²⁶⁶ In practice, usual rule-making procedures have been deemed "impracticable" or "contrary to the public interest" when, for instance, there is "danger that certain companies might take advantage of the interim period to effect transactions which the rule is designed to prevent or control and thus escape the intended regulation of conduct altogether."²⁶⁷ Normal procedures have also been deemed avoidable on those bases in cases where they would "permit speculators or others to reap unfair profits or to interfere with the [agency's] action taken."²⁶⁸ A proposed revision of section 553 contained a specific exemption for "matters with respect to which notice of proposed rulemaking would seriously impair effectiveness of a rule."²⁶⁹ There seems little doubt, however, that the function sought to be performed by that proposed revision is adequately performed by the existing "contrary to the public interest" terminology.

Other situations that may involve section 553(a)(1) rule-making illustrate how the "contrary to the public interest" exemption would

266. See 1941 Hearings, *supra* note 20, at 812. See also ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 31.

267. B. SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 62 (1958) (Securities and Exchange Commission).

268. 12 C.F.R. § 262.2(e) (1972). See also S. 518 Hearings, *supra* note 127, at 367 (Federal Reserve Board).

269. S. 2771, 90th Cong., 1st Sess. § 553(h)(6) (1967).

properly release an agency from following usual procedures. The Department of Commerce has reported, for example:

In the exercise of priority and allocation functions [under the Defense Production Act of 1950] speed in the issuance of orders and regulations is often essential as prior notice of proposed governmental action would tend to defeat the purpose intended to be accomplished thereby. For example, notice of intention to place certain materials under production control or to limit acquisition thereof might create panic buying in an effort to get the jump on the regulation and on competitors.²⁷⁰

In such cases the Bureau of Defense Services Administration has concluded that the section 553(b)(B) exemption may properly be invoked on the grounds that adherence to usual procedures would be "contrary to the public interest."²⁷¹ In the same vein, adherence to usual procedures may be dispensed with as "impracticable" or "contrary to the public interest" when import controls are imposed on textiles, or embargoes are imposed by the Department of Treasury's Office of Foreign Assets Control. In the first of these cases arguably involving "foreign affairs function" rule-making—the textile program—compliance with the advance notice requirements could stimulate exports to the United States of the very goods that might later be subject to import limitations, thereby causing some of the evil sought to be prevented. And "if it were publicly known that the United States was definitely going to impose a financial embargo on a particular country at a certain time there would, within a matter of several hours, be a virtually complete transfer of all its public and private liquid assets to other countries. Obviously, therefore, public hearings would nullify the proposed embargo entirely."²⁷²

On this basis it is also "impracticable" or "contrary to the public interest" to follow usual rule-making procedure in the making of most, if not all, strategic military policy and strategic foreign policy. Even if the strategic policy involved need not be kept secret after it is implemented, utilization of usual rule-making procedures in its formulation will usually be disastrous because they will reveal the intended scope of such policy in advance of its actual implementation. If the "other side" is aware of the contemplated policy of this

270. 1957 HOUSE SURVEY, *supra* note 39, pt. 2 (Department of Commerce), at 115 (in reference to its functions under the Defense Production Act of 1950, 50 U.S.C. App. §§ 2061-168 (1970)).

271. *Id.*

272. 1969 Survey Response (Department of the Treasury). *See* text accompanying notes 207-08 *supra*.

country before that policy is actually put into effect in concrete public action, the very purposes sought to be accomplished may be defeated, the evils sought to be avoided may be caused, or the "other side" may be enabled to evade the effects of that strategy. Consequently, adherence to normal procedures in these cases is "impracticable" or "contrary to the public interest" within the meaning of section 553 (b)(B).²⁷³

There is also no reason why the "contrary to the public interest" language of section 553(b)(B) cannot serve as a satisfactory means for accommodating the need for public rule-making procedures on the one hand, and the need for inexpensive, expeditious, effective, and efficient government administration on the other. The function performed by exemptive language such as "occasion delay or expense disproportionate to the public interest," which appeared in a bill introduced several years ago in an effort to revise completely the rule-making provision,²⁷⁴ can easily be performed under section 553(b)(B) by balancing the relevant considerations under the standard "contrary to the public interest."

It has been suggested that the "contrary to the public interest" terminology should allow the Department of Labor an exemption for the wage determinations it makes under the Davis-Bacon²⁷⁵ and related acts because of the especially large number of such "rules" that the Department must continually make during a limited period.²⁷⁶ The factual basis for this conclusion is set forth in the following passage:

[T]he Davis-Bacon Act and some 45 related acts for Federal and Federally assisted construction contracts . . . provide that the specifications for all such contracts shall require the contractor to pay to his laborers and mechanics at least the prevailing wage as determined by the Secretary of Labor. The determinations are made by the Secretary at the request of the contracting agency before the bids are let.

. . . .
Application of the formal rule-making requirements of section [553] would require some 500 to 600 notices of proposed rulemaking to be published each week in the Federal Register. Interested per-

273. Of course, as noted earlier, reliance on an executive order under section 552(b)(1) may satisfy the need for an exemption in this situation as well.

274. See S. 2335, 88th Cong., 2d Sess. § 1003(f) (1964). This bill would have completely revised the rule-making section of the APA.

275. 40 U.S.C. §§ 276a to a-5 (1970). See also, e.g., 41 U.S.C. §§ 35-45 (1970).

276. Participants in the deliberations of the Administrative Conference of the United States at the time Recommendation No. 16 was being considered expressly articulated this view on a number of different occasions and relied thereon in adopting the Recommendation.

sons would have an opportunity . . . [to participate in each case]. The processing of the submitted data, views, and arguments could result in obvious delays and additional personnel and other costs.²⁷⁷

In this program, the magnitude of the adverse consequences that would result from an application of standard rule-making procedures to the particular determinations involved were deemed to outweigh any positive good that might result from requiring adherence to normal procedures. An exemption from usual requirements should, therefore, be allowed in this situation under the "contrary to the public interest" language. In many other situations the facts may dictate the same result with respect to the determination of contract specifications, if they are "rules."

Similarly, rules affecting the public that are promulgated on a day-to-day basis for individual military bases by the commander of each base, may also properly be exempted from usual procedures because of their sheer volume. There are hundreds of armed forces bases at home and abroad, and every year the commander of each of these bases makes scores of rules affecting the public that are tailored to the peculiar needs and circumstances of his base or the military property under his control.²⁷⁸ Rules regarding public access to the base and use of its facilities are examples. Given the huge number of such rules in aggregate that may be promulgated by *all* base commanders every year, a Davis-Bacon Act argument might be equally applicable: It may be "contrary to the public interest" to require adherence to normal procedures for rules promulgated by individual base commanders for their particular bases, as distinguished from rules promulgated by the Department of the Army for all Army bases generally. Even though it may not be "contrary to the public interest" to force adherence to normal procedures for each such base rule considered separately, running the aggregate of all such rules through that procedure may be so burdensome, time-consuming, and expensive that it is unjustifiable in light of the potential benefits. A class finding with respect to rules of this particular type may, therefore, be made on the basis of their huge and unmanageable number, just as it may be done in the Davis-Bacon Act situation. But the class must be narrowly drawn to satisfy section 553(b)(B) and the volume of rules involved must in fact be as large as here supposed—a point that requires empirical verification.

The same argument can be made with respect to *all* everyday

277. *S. 518 Hearings*, *supra* note 127, at 239-40.

278. *See* Department of the Army, *Military Reservations*, ch. X (Pamphlet 27-164, Oct. 1965).

command orders issued by one member of the armed forces to another, if they are rules within the APA definition.²⁷⁹ Uncounted millions of such orders are issued every year directing the manner in which ordinary military duties are to be performed. A narrowly tailored finding that rule-making in this category should be exempt under the "contrary to the public interest" language of section 553(b)(B) would, therefore, also be fully justified on a volume basis alone. In most situations, resort to usual procedures for such rule-making would also be "impracticable" or "unnecessary" on other bases. However, as will be seen, most if not all of the orders of this character are exempt from usual procedures anyway under existing exemptions other than section 553(b)(B). They may be exempt, for example, as either "general statements of policy" or as rules relating to "agency management or personnel."²⁸⁰

Similarly, the "contrary to the public interest" standard found in section 553(b)(B) should permit exemptions for other extraordinary situations. Those extraordinary situations will usually (but not always) arise in contexts where the volume of rule-making decisions that must be made is exceptionally large. Where the delay and costs involved are of such a magnitude, due to special facts of the case, that they outweigh the strong public interests favoring adherence to usual rule-making procedures, an exception could be allowed. More than just "any" increase in cost or delay will be necessary to justify such an exception under this standard. The facts will have to demonstrate that an atypically large delay or increase in cost will result from adherence to normal rule-making procedures, and that the extraordinary delay or cost is not outweighed by the benefits of adherence to those usual procedures. Situations of this sort will be relatively few. The ordinary costs and delays occasioned by giving notice and an opportunity for public participation are properly treated by the Act as an acceptable quid pro quo for the important benefits achieved.

Section 553(d)(3) should perform the same function for section 553(d) as section 553(b)(B) performs for section 553(b)-(c). According to section 553(d)(3), an agency can dispense with the section

279. See 5 U.S.C. §§ 551(1), 551(4) (1970). The question is whether all commands by a military superior to a subordinate are "agency" statements "designed to implement, interpret, or prescribe law or policy." An "agency" is defined as "each authority of the Government of the United States whether or not it is within or subject to review by another agency." Since each superior may be deemed an "authority of the Government of the United States" their orders may constitute "rules." *But see* text accompanying notes 4-6 *supra*.

280. See 5 U.S.C. §§ 553(a)(2), 553(b)(A) (1970).

553(d) requirement of publication or service of a substantive rule at least thirty days before its effective date whenever the agency decides to do so "for good cause found and published with the rule." This "good cause" exemption should give agencies at least as much discretion to avoid the application of section 553(d) in appropriate cases as the "impracticable, unnecessary, or contrary to the public interest" exemption gives them to avoid the application of section 553(b)-(c). Indeed, the former may give agencies even more discretion than the latter because the guiding terms "impracticable, unnecessary, or contrary to the public interest" are conspicuously absent from section 553(d)(3).

Nevertheless, to make the requirements of section 553(d) meaningful, the exemption from its terms should be construed to be as broad as, but no broader than, section 553(b)(B). If that is so, the "good cause" required by section 553(d)(3) must also be predicated on a finding that adherence to usual procedures is "impracticable, unnecessary, or contrary to the public interest." The legislative history of the "good cause" exception in section 553(d)(3) supports the conclusion that the two exemptions should be treated as congruent. The House Report on the APA states:

[This] exception—upon good cause found and published—is not an "escape clause" which may be exercised at will but requires legitimate grounds supported in law and fact by the required finding. Many rules . . . may be made operative in less than 30 days because of inescapable or unavoidable limitations of time, because of the demonstrable urgency of the conditions they are designed to correct, and because the parties subject to them may during the usually protracted hearing and decision procedures anticipate the regulation.²⁸¹

Previous discussion should demonstrate that if the section 553(a)(1) exemptions were eliminated, the exclusions found in section 553(b)(B) and section 553(d)(3) could adequately handle any peculiar problems that would arise in rule-making involving military or foreign affairs functions. Where a rational balancing of the relevant interests would indicate the desirability of an exception from the requirements imposed by section 553(b)-(d) for particular rule-making, the above "good cause" exemptions could suffice to achieve the result.

No special exemption is needed from the right-to-petition provision of section 553(e) if the subsection (a)(1) exclusions are re-

281. LEGISLATIVE HISTORY, *supra* note 13, at 260. See *id.* at 201. See also *Buckeye Cablevision, Inc. v. FTC*, 387 F.2d 220, 228 n.34 (D.C. Cir. 1967).

pealed. Interested parties should always have the right to petition for the issuance, amendment, or repeal of a rule. As noted earlier, the only obligations that this right imposes on an agency are the duty to follow its own rules with respect to such petitions, and the section 555(e) duty to respond by giving "[p]rompt notice . . . of the denial in whole or in part of a . . . petition accompanied by a brief statement of the grounds for denial." If the need arises, an agency may treat a group of similar petitions as an entity and issue a single response. Consequently, except for one situation to be noted later, there seems to be no case relating to section 553(a)(1) rule-making in which even a qualified exemption from section 553(e) is required. Currently no exemption from the right-to-petition requirement is deemed necessary for any rule-making already subject to the terms of section 553. In light of the importance of that right, and the minor burden it imposes on agencies, this position seems fully justifiable.

If the right to petition continues unhampered by any exceptions even after the subsection (a)(1) exemptions are removed, an important salutary consequence will follow. In every case where usual public procedures are dispensed with prior to the promulgation of a rule, because the qualified exemptions of section 553(b)(B) are applicable, interested parties will have an effective opportunity to express their views on that rule subsequent to its enactment. They can file a petition for the amendment, repeal, or modification of the rule in question, including a statement of their reasons therefor. The agency will then be obliged to respond, as section 555(e) requires, with "[p]rompt notice . . . of the denial in whole or in part of [the] petition . . . accompanied by a brief statement of the grounds for denial." A statement of grounds is not required, of course, if the agency merely reaffirms a prior denial, or the denial is self-explanatory.

The section 553(b)(B) and section 553(d)(3) exemptions impose a special obligation of disclosure on agencies utilizing those provisions. An agency must incorporate in the rules issued without following usual procedures the necessary statement of "good cause," predicated upon a finding that adherence to section 553(b)-(d) is "impracticable, unnecessary, or contrary to the public interest," and must also include a brief statement of the reasons for that finding. In cases where the exemption utilized is based on a finding with respect to a whole class of cases, only one such full publication applicable to the whole class should be required. Rules in that class subsequently issued without resort to usual procedures would only

need to refer to the prior full publication of findings and reasons and to give its citation. To be of value, the reasons listed in the rules as justification for the failure to follow usual procedures must, of course, be fairly specific. Declarations in the language of the Act will not satisfy this requirement and should be inadequate under the statute. As noted by the Administrative Conference, "[E]ach finding of this type . . . should include a statement of underlying reasons rather than a mere conclusory recital."²⁸² At the same time, the required statement of reasons need not be so detailed that it is unduly onerous.

This disclosure obligation will have two salutary effects. First, such a requirement will force the agency to consider carefully its reasons for each claim to an exemption. Second, by requiring an official statement of the agency's reasons for using the exemption, judicial review of that decision will be facilitated. If the decision is challenged in a judicial proceeding, the court can test its validity against the reasons provided in the prior publication. The requirement that agencies formally and publicly state the reasons for their conduct should, therefore, keep them both thoughtful and honest in their use of the exemption.

In this connection a further point deserves some elaboration and explanation. Publication of the specific reasons for avoiding usual procedures is required by sections 553(b)(B) and 553(d)(3). Communication of the denial and the specific reasons for the denial of a petition is required by sections 553(e) and 555(e). But mere performance of those statutorily imposed obligations may cause serious evils in some cases involving "military or foreign affairs function" rule-making. However, this does not demonstrate that sections 553(b)(B) and 553(d)(3) cannot adequately handle all of the problems that would arise if, without more, section 553(a)(1) were simply eliminated. As noted earlier, an agency need not violate a proper executive order commanding certain specific matters to be kept secret in the interest of "national defense or foreign policy" in order to satisfy any requirements of section 553. Of course, this includes the requirements of sections 553(b)(B) and 553(d)(3) and sections 553(e) and 555(e). No other result seems possible when section 552(b)(1) is read in conjunction with section 553. If the President really believes that the publication of reasons required by section 553(b)(B), for example, would be harmful to our "national defense or foreign policy" in situations involving certain matters, he can

282. Recommendation No. 16, *supra* note 8.

always order that these reasons be kept secret under section 552(b)(1). In these cases compliance with those provisions requiring publication or communication of reasons is excused as a matter of law, without affecting the validity of the rules ultimately issued.

On the other hand, if the President does not issue such an order applicable to the particular matter in question, and the matter is not otherwise exempt from the requirements of section 552, the agency should not be able to invoke the need for secrecy as an excuse for noncompliance with the statement-of-reasons requirements of these provisions. After all, to the extent that the reasons for the agency's failure to follow usual procedures, or its reasons for turning down a petition, appear anywhere in the government's files, they may be inspected by members of the public unless they are somehow exempt from public perusal under section 552. So, if the public has the right to inspect documents relevant to the rules in question under section 552, agencies may not properly claim the need for secrecy as an excuse for not complying with the statement-of-reasons requirements of sections 553(b)(B) and 553(d)(3) and sections 553(e) and 555(e).

The 1969 survey²⁸³ asked all federal agencies the following question:

Why are the several specific exemptions currently contained in § 553(b)-(e) insufficient to deal with any disadvantages that might be encountered by your department or agency if all of § 553(a)(1)-(2) was repealed? Among these specific exemptions just referred to is that contained in § 553(b)(B) providing that public notice of rule-making is not required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

Agencies making rules presently exempted by subsection (a)(1) from section 553 responded in various ways to this question. These responses, and the following discussion of section 553(b)(B), may also be considered applicable to the section 553(d)(3) exemption since, as noted, the requirements of that exemption are probably congruent with those of section 553(b)(B).

Some respondents insisted that the section 553(b)(B) exemption was an insufficient substitute for subsection (a)(1) simply because the latter exemption is necessary as it is, and the former is not as broad as the latter.²⁸⁴ Responses of this sort are of little help in

283. See text accompanying note 38 *supra*.

284. 1969 Survey Response (Atomic Energy Commission, Post Office Department, Department of the Navy). For example, the Post Office stated:

evaluating the impact that the proposed statutory change may have, and they in no way detract from the solution previously suggested. They amount to no more than unexplained assertions.

Another objection to section 553(b)(B) as a substitute for section 553(a)(1) is that making the findings required by the former would constitute too great an administrative burden on the agencies.²⁸⁵ The Department of Defense stated that

[a]dmittedly, the exemption is a broad one in which [the Department] would rely in issuance of any highly significant rule. . . . But the scope and volume of substantive rulemaking in the Department makes impracticable compliance with the unwieldy requirement for a "finding and brief statement of reasons" for the "good cause."²⁸⁶

By way of summary, the Department of Defense has noted that "the primary disadvantages" of any reliance on section 553(b)(B) as a substitute for section 553(a)(1)—which it prefers—"can be described as costly administrative delay and excessive paperwork without apparent compensatory benefit to the public."²⁸⁷

Since the statement of findings and reasons is required only in those cases in which the agency opts out of the usual procedures, and it can be made for a whole class of rule-making in the few instances where that can be justified on the basis of the special facts and circumstances discussed previously, this objection seems unsound. The burden involved here is merely that the agency must set down a finding that public procedures are "impracticable, unnecessary, or contrary to the public interest," and a *brief* statement of the reasons supporting this conclusion.²⁸⁸ To some extent agencies

It is considered that the specific exemptions contained in Sec. 553(b)-(e) are not well adapted to serve as substitutes for the subject area exemptions. It is believed that the exemption stated in Sec. 553(a) reflects a proper and generalized finding that the provisions of Sec. 553(b)-(e) are not appropriate for rulemaking in these subject matter areas and that the reasons underlying this will continue despite repeal of Sec. 553(a).

And the Department of the Navy stated:

It is apparent, then, that the coverage of the exemptions in subsection (b) [of section 553] can be very broad. Beyond this observation, the Judge Advocate General is unable to conclude that the Department would not be disadvantaged by the elimination of the privilege exemptions in subsection (a).

285. 1969 Survey Response (Department of Defense). *See also S. 1663 Hearings, supra* note 104, at 307: "[T]he necessity of determining for each such function whether public participation is unwarranted or contrary to the public interest would itself prove burdensome."

286. 1969 Survey Response.

287. 1969 Survey Response.

288. Thus, the argument of the Department of the Treasury's Office of Foreign Assets Control to the effect that section 553(b)(B) is an inadequate substitute for subsection (a)(1) because its rules "are of an urgent nature with a minimum of time

should be doing that in any case—if they are in fact living up to their more general responsibilities to accord as much participation in rule-making as possible, consistent with their other obligations. The burden, therefore, seems to be both of a kind and quantity that the agencies should be willing and able to bear in light of the attendant benefits.

Another reason has been suggested as to why the current exemptions contained in section 553(b)(B) are inadequate substitutes for the subject exemptions of section 553(a)(1). It is said that the scope of section 553(b)(B) is unclear and uncertain. Reliance upon that exemption, therefore, would not clearly handle *all* the problems created by a repeal of section 553(a)(1); and it would probably result in much litigation over the scope of the subsection (b)(B) exemption, causing undue delay in the execution of agency programs and the like. This “[u]ncertainty about the scope of the exemption” and the fact that “such a finding [as is required by section 553(b)(B)] is subject to challenge in the courts making uncertain the validity of any rule issued under this exemption” were specifically noted by the Department of Defense.²⁸⁹

It is true that the terms “good cause” and “impracticable, unnecessary, or contrary to the public interest” may not be as precise as those which categorically exempt *all* rule-making involving “military or foreign affairs functions.” While the scope of the latter terms may be vague, the former terms may be more difficult to apply to a given situation, since they demand resort to a balancing process that requires special assessment of the facts in each case. Consequently, on a comparative basis the application of section 553(b)(B) may not be as easy or clear as that of section 553(a)(1).

Nevertheless, as previously noted, the language of section 553(b)(B) can adequately deal with all of the problems created by a repeal of section 553(a)(1). That language also need not be as unclear as the opponents of change in this area suggest. If section 553(a)(1) is repealed, Congress could insert in the legislative record a statement that would clarify any ambiguities in the scope of section

available for preparation of the necessary documents for publication” is specious. 1969 Survey Response.

289. 1969 Survey Response. *See also* 1969 Survey Response of the Department of Commerce. The response of the Headquarters, Defense Supply Agency, was that the indefiniteness of the terms of section 553(b)(A) would make it difficult to determine whether a particular regulation fell within these exceptions and would lead to inconsistent application of the act. It is also probable that the courts would take jurisdiction to review any challenged determination of an exemption made under section 553(b)(B). This, of course, could have a serious adverse effect on defense operations.

553(b)(B) along the lines described earlier. Moreover, litigation with respect to the scope and proper applicability of "good cause" and "impracticable, unnecessary, or contrary to the public interest" is not apt to be any more endless or obstructive here than it is elsewhere. And litigation is not in fact likely, in the overwhelming number of cases, to have any significant impact on the agencies' ability to perform their functions properly. *Stare decisis* should have a substantial effect within a brief time. Also, although wise and honest use of the section 553(b)(B) exemption by the relevant agencies will not forestall all litigation, it will forestall some.

In the end, however, it must be admitted that there remains a real difference in clarity between section 553(a)(1) and section 553(b)(B), and that some delays may be caused by litigation over the scope of the latter. But this consequence is a price worth paying for the largely increased breadth of the guarantee of public participation in the particular rule-making involved. After all, no showing has been made that such delays will have any serious ill effects in the few cases where there is some genuine doubt about whether the section 553(b)(B) exemption does in fact apply. If the fear really is that agencies will have to be careful in utilizing this qualified exemption and that their hands will be tied by it to some extent, this fear is justified. Similarly, if the fear is that in close cases, the unclear scope of this exemption will cause agencies to utilize normal rule-making procedures rather than risk possible litigation resulting in invalidation of the rule, that too is warranted.²⁹⁰ Both of these results, however, are acceptable in light of the importance of the policy favoring public participation in rule-making.

C. *The "General Statements of Policy" and "Interpretative Rules" Exemptions*

Two other exemptions from section 553(b)-(d) deserve brief examination at this point. They have been recently analyzed and found to be justifiable.²⁹¹ Their continued availability may be coupled with the availability of sections 553(b)(B) and 553(d)(3) to illustrate further the point that repeal of the section 553(a)(1) exemptions would not be unduly disruptive. According to sections

290. Although not included in this study because it does not make rules involving "military or foreign affairs functions," the Department of Agriculture's Farmers Home Administration feared that repeal of section 553(a)(1)-(2), with consequent reliance solely upon the section 553(b)(B) exemption, might discourage issuance of rules and needed changes in rules. See 1969 Survey Response. This consequence seems highly improbable.

291. See Bonfield, *supra* note 31.

553(b)(A) and 553(d)(2), "general statements of policy" and "interpretative rules" are also exempted as a class from all procedural requirements of section 553(b)-(d). If the exemption for rules involving "military or foreign affairs functions" were repealed, therefore, agencies could also rely on these exemptions for a goodly portion of their rule-making.²⁹²

In addition to being excludable from usual rule-making procedures under the narrowly tailored exemptions of sections 553(b)(B) and 553(d)(3), therefore, much strategic military and foreign policy formulation, if they be "rule-making," may be excluded from the procedures of subsections (b)-(d) as "general statements of policy." Admittedly, the term "general statements of policy" is hard to define. It has been suggested, however, that

"general statements of policy" may be rules directed primarily at the staff of an agency describing how it will conduct agency discretionary functions, while other rules are directed primarily at the public [or some segment thereof] in an effort to impose [legally enforceable] obligations on it. On this basis statements of policy are said not to have the effect of law; they do not alter [the legal rights of members of the public] . . . while other regulations do have that effect.²⁹³

The determination as to what our nation's diplomatic policy shall be toward a certain foreign country would seem to be an example of that sort of "rule-making." So, too, many determinations regarding the everyday operations and deployment of the armed forces may be of this type, if they are "rules."

D. *The "Agency Management or Personnel" Exemption*

It should be stressed that even after section 553(a)(1) is repealed, agencies may still resort to the subsection (a)(2) exemption from every provision of section 553 for rule-making involving "a matter relating to agency management or personnel." As a consequence, the latter provision will be an additional means by which to avoid usual procedures for some rule-making involving "military or foreign affairs functions." A brief excursion into the potential scope of this exemption will demonstrate that the peculiar nature of the functions, operations, and structure of the military establishment results

292. The section 553(b)(A) exemption from section 553(b)-(c) for "rules of agency organization, procedure, or practice" might also be mentioned here to make the same point. There is, however, great doubt whether this exemption is as worthy of continuance as the other existing exemptions discussed in this Article.

293. Bonfield, *supra* note 31, at 115. On statements of policy generally, see *id.* at 113-15.

in a larger proportion of its rules being exempted under the "agency management or personnel" provision than are exempted in the case of most other agencies. Obviously, the reasons for this are the unusually large number of Defense Department personnel, which includes all the personnel of the Army, Navy, and Air Force, and the fact that a very high proportion of the military's efforts is directed at managing, on a day-to-day basis, this unusually large staff.

"Management" means, according to *Webster's*, "the conducting or supervising of something (as a business); esp: the executive function of planning, organizing, coordinating, directing, controlling, and supervising any industrial or business project or activity with responsibility for results."²⁹⁴ "Personnel" means "a body of employees that is a factor in business administration esp. with respect to efficiency, selection, training, service, and health: the division of an organization concerned primarily with the selection, placement, and training of employees and their representatives."²⁹⁵

Presumably, "matter[s] relating to agency management or personnel" are distinguishable from "rules of agency organization, procedure or practice" since the former are exempted from all the provisions of section 553 by subsection (a)(2), while the latter are only exempted from subsections (b)-(c) by subsection (a)(A). "Matter[s] relating to agency management or personnel" are also presumably distinguishable from "matters relating to public property, loans, grants, benefits or contracts." The latter are specially exempted from section 553 in a subsequent portion of the same subsection as that exempting "agency management or personnel."

Obviously, the section 553(a)(2) exemption for "a matter relating to agency management or personnel" must at least be as broad as the analogous exemption for "any matter relating solely to the internal management of an agency" found in section 3 of the original APA, and the current exemption for matters "related solely to the internal personnel rules and practices of any agency" found in the newly revised freedom-of-information provision.²⁹⁶ It would be absurd to demand advance notice of, and a right to participate in, any rule-making expressly exempted from the requirements of public disclosure by a provision of the freedom-of-information section.²⁹⁷ On the other hand,

294. WEBSTER'S, *supra* note 55, at 1372.

295. *Id.* at 1687.

296. 5 U.S.C. § 552(b)(2) (1970).

297. In other words, the Act does not make it clear that all regulations that are exempted from the requirement of being published in the Federal Register [by the § 3 exemption for "any matter relating solely to the internal management of an agency"] are necessarily also exempted from the quasi-notice and hearing

some rule-making subject to public disclosure requirements under section 3 of the original APA, or current section 552, might have been exempted from the advance notice and public participation requirements of the rule-making provision without causing logical or practical difficulties.

Note that the original APA freedom-of-information provision exempted only matters "relating *solely* to the *internal* management of an agency" while exemptions from the rule-making provision are granted "to the extent there is involved a matter relating to agency management or personnel." The language of the rule-making exemption seems to be broader than that employed in the original freedom-of-information provision. "[S]olely . . . *internal* management of an agency" seems to be narrower than simply "agency management or personnel." Nevertheless, the scope of the rule-making and original freedom-of-information exemptions have been considered identical, despite the fact that their disparate wording could make a substantial difference in particular cases.²⁹⁸ The reason for this is that the legislative history of the APA rule-making section indicates that the "exception of matters of management or personnel would operate only so far as not inconsistent with other provisions of the [APA] relating to internal management or personnel."²⁹⁹ On that basis, Attorney General Tom Clark apparently believed that the exemption in section 553(a)(2) was congruent with the analogous exemption for "any matter relating solely to the internal management of an agency," found in the original public information provision of the APA.³⁰⁰

*Seaboard World Airlines, Inc. v. Gronowski*³⁰¹ is relevant here. The Post Office had promulgated a rule directed at its employees which provided that all mail would be "routed abroad by the most expeditious air service, without regard to the type of aircraft used."³⁰² Plaintiff air carrier sought to enjoin the Post Office from operating

requirement of § 4. Yet this is the only possible construction. For if a matter is either (because of its confidential nature) to be kept secret from or (because of its purely internal character) not sufficiently important to the general public, so that not even the regulation itself need be made known, then *a fortiori* the public has no right to be notified of a merely proposed regulation. Thus § 4 does not apply where § 3 does not lie.

R. PARKER, *supra* note 225, at 178. This argument is obviously as true under the new public information act provisions as under those of the original APA.

298. *Id.* at 179 n.40; ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 27.

299. LEGISLATIVE HISTORY, *supra* note 13, at 199, 257.

300. "The exemption [in section 4] for matters relating to 'agency management or personnel' is self-explanatory and has been considered in the discussion of internal management under Section 3." ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 27.

301. 230 F. Supp. 44 (D.D.C. 1964).

302. 230 F. Supp. at 45.

under the new rule on the grounds that no official notice of the proposed rule was published in the *Federal Register*, and plaintiff was not given an opportunity to submit written data, views, or arguments prior to the rule's promulgation. The Post Office Department argued that these procedures were unnecessary in this case because the rule-making involved was exempted from the requirements of section 553 by the subsection (a)(2) exclusion for "agency management or personnel." In finding that the new policy was a rule, and that its promulgation did not fall within this exception, the court stated:

The Government contends that the second exception is applicable in the instant case, that this new rule concerns the duties of the Post Office personnel. It is true that the Administrative Procedure Act does except any matter relating solely to the internal management of an agency. However, the policy involved here, although it is directed to the Post Office personnel, substantially affects outside parties and is therefore NOT subject to the exception.³⁰³

This case seems to suggest that a rule specifying the duties of an agency's staff is not exempted by the exemption for "agency management or personnel" if it "substantially affects outside parties." The *Gronowski* result seems entirely appropriate under the language of section 3 of the original APA to the effect that any matter "relating solely to the internal management of an agency" was exempted. It also seems entirely appropriate as a matter of policy. But it is not necessarily consistent with the actual language used in section 553 (a)(2) which speaks only of "a matter relating to agency management or personnel." If the two provisions were in fact meant to be congruent, however, the result is perfectly understandable. Some agencies, at least, seem to agree with that notion. One stated that "agency management and personnel are matters solely the concern of an agency itself, and do not affect members of the public to any appreciable extent."³⁰⁴

Thus, "military and foreign affairs function" rules that are "solely the concern of the agency proper and, therefore, . . . do not affect the members of the public to any extent" will continue to be excludable under section 553(a)(2), even after section 553(a)(1) is repealed.³⁰⁵ So, for example, "rules as to leaves of absence, vacation, travel, etc." of the armed forces are exempted by the "agency management or

303. 230 F. Supp. at 46 (emphasis original).

304. 1957 HOUSE SURVEY, *supra* note 39, pt. 11C (Independent Agencies—Housing and Home Finance Agency), at 1629.

305. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 18. They would undoubtedly also be exempt under the more limited "unnecessary" exclusion of section 553(b)(B).

personnel" portion of section 553(a)(2).³⁰⁶ So, too, virtually all armed forces rules dealing with such things as record-keeping, financial management and accounting procedures, working hours and working conditions of personnel, safety programs for personnel, the care, maintenance, and inventory of armed forces property, and the like, would also be exempted under this provision.³⁰⁷ Virtually all commands by superiors to subordinates in the armed forces, directing individuals as to the manner in which they are to carry on their usual day-to-day activities, and prescribing the nature of those activities, probably would also be exempt on this basis, if they are "rules." This section 553(a)(2) exemption would, therefore, exclude an unusually high proportion of the rules of the military establishment from usual procedures because of the peculiar nature of its day-to-day functions, operations, and organization.

But the "agency management or personnel" exemption should not permit agencies to avoid usual procedures by merely phrasing regulations in terms of directives to its employees:

[A]most any rule may be put in the form of an instruction directed to subordinates even though its effect and purpose is to regulate private activities; e.g., how customs authorities are to proceed in valuing importations of merchandise In other words, a regulation may seem to be for mere housekeeping or procedural purposes and yet, in effect, govern the substantive rights of parties.³⁰⁸

The key, then, as *Seaboard World Airlines* notes, is whether the rule in question "substantially affects outside parties." If it does, then it should not be excludable under this section 553(a)(2) exemption.

Rules determining the policies of the armed forces with respect to the acquisition and disposal of property, or rules governing the terms and conditions of public access to and use of armed forces property should *not*, therefore, be excludable from section 553 on the basis of *this* exemption.³⁰⁹ A closer case is presented with respect

306. *Id.*

307. *S. 518 Hearings, supra* note 127, at 374 (Department of Commerce).

308. *S. 1663 Hearings, supra* note 104, at 685 (Professor Carl McFarland, University of Virginia Law School).

309. *But see S. 518 Hearings, supra* note 127, at 374 (Department of Commerce), objecting to *S. 518*, based on the assumption that the "agency management" exemption excludes from section 553 "procurement policies" and "utilization and disposition of excess and surplus property." As already noted, rules on these subjects made by the commander of each base in light of the peculiar local conditions applicable to his situation may be exempt under section 553(b)(B) on the ground that the sheer number of such diverse rules involved may make it "contrary to the public interest" to follow usual procedures for all of them. This logic would not, however, apply to rules on this subject that are service- or Department-wide.

to the rules prescribing the terms and qualifications for initial enlistment into the armed forces. Those rules certainly relate to agency "personnel"; but they are primarily directed at the public and its rights rather than at the rights of existing agency staff. The above rules may not, then, relate "solely to the *internal* management of an agency" to use the language of section 3 of the APA, which is supposedly congruent in scope with the section 553(a)(2) exemption. After all, rules of this sort may be deemed to "substantially affect outside parties" within the meaning of the *Seaboard* case.

It is recognized, however, that there may be substantial disagreement over the precise scope of the "agency management and personnel" exception in section 553(a)(2), and that agencies may not readily accept the delineation of that provision's ambit offered above. It should also be reiterated that the definition of the term "agency management or personnel" offered here may not be supportable because the language of that provision is in fact broader than the APA section 3 terminology sought to be superimposed upon it. Repeal of section 553(a)(1) may also increase the possibility of over-reliance upon this portion of section 553(a)(2), or increase agency efforts to expand its scope beyond that described above. If that happens, and the scope of this exemption in fact proves to be broader than this brief and superficial examination suggests, there will be time enough to consider narrowing it.

E. *Conclusion Concerning Existing Alternatives to Section 553(a)(1)*

A number of agencies utilizing the section 553(a)(1) exclusions have admitted, in varying degrees, that potentially undesirable consequences that may result from a repeal of that exemption could be handled by the remaining exemptions contained in section 553. While all of the previously discussed provisions were alluded to, the most prominently mentioned and most significant were the "good cause" exemptions of sections 553(b)(B) and 553(d)(3). Even the Department of the Navy has concluded that "the coverage of the exemptions in subsection (b) [(A) and (B) of section 553] can be very broad," and, therefore, much of its rule-making may be excluded from usual procedures under those exemptions.³¹⁰

The Atomic Energy Commission noted that "[i]n our view the 'good cause' exemption set forth in [section] 553(b) could be con-

³¹⁰ 1969 Survey Response. The Headquarters, Defense Supply Agency, Department of Defense, concluded that if "section 553(a)(1)-(2) of the act were repealed, most of these agencies' regulations could probably be exempt under section 553(b)(A)-(B)." *Id.*

strued to embrace a number of situations now exempted under [section] 553(a)(1)-(2).” But it questioned whether that provision would be construed to cover all situations in need of such exemption. However, the Commission seemed most concerned in its reservation with subsection (a)(2) situations rather than with subsection (a)(1) situations.³¹¹ On the other hand, the Federal Power Commission’s statement was unequivocal:

In those instances in which the Commission departed from the notice, hearing and effective date requirements of [section] 553(b)-(e), it relied specifically on the exceptions set out in 553(b)(A and B) and in [section] 553(d). Insofar as the foreign affairs functions of the Commission are concerned, we believe that these specific exemptions would be entirely sufficient for this aspect of the Commission’s regulatory work.³¹²

Similarly, the Department of Agriculture noted with respect to its Defense Production Act³¹³ responsibilities:

No disadvantages are foreseen [from repeal of section 553(a)(1)] provided authority would be continued to omit notice and opportunity for public comment in any case of rule-making where this procedure is deemed for good cause to be impracticable, unnecessary or contrary to the public interest and other exemptions now in [section] 553 (b)-(d) are retained.³¹⁴

The Office of Foreign Direct Investments (OFDI) in the Commerce Department also stated that in light of other exemptions contained in sections 553(b)-(d) “there would be no disadvantage to OFDI if [section] 553(a)(1) . . . [were] eliminated.”³¹⁵ Similarly, the Domestic and International Business Bureau (DIB) of the same Department commented:

We believe that the several specific exemptions contained in [section] 553(b)-(e) would be sufficient to deal with situations in the DIB area involving rulemaking, provided the interpretation given the exemptions is broad enough to exempt agencies from following public rule-making procedures in situations where this could be internationally detrimental to the U.S. (e.g., Implementation of an unpublished international agreement).³¹⁶

In the same spirit, the Department of Treasury admitted that

311. 1969 Survey Response.

312. *Id.*

313. 50 U.S.C. App. §§ 2061-168 (1970).

314. 1969 Survey Response (Regulatory Division, General Counsel).

315. *Id.*

316. *Id.*

if all of Section (a)(1)-(2) was repealed, in the preparation of regulations which could not be published until announced by the Secretary, and in which speed and its requisite corollary, secrecy, are necessities, and advanced publicity and public participation opportunities, impossibilities, we recognize that we could resort to publication in our rule of a finding that notice and public procedures are contrary to the public interest.³¹⁷

But its Office of Foreign Assets Control noted that while "a liberal recourse to the exception [section 553(b)(B)] would permit the Control to continue to operate, virtually every public document of the Control would have to contain a finding that notice and public procedure is contrary to the public interest."³¹⁸ As noted earlier, the availability of class exemptions, where justified, eliminates this argument for retaining 553(a)(1).

Previous discussion seems to demonstrate that a repeal of section 553(a)(1) accompanied by a construction of sections 553(b)(B) and 553(d)(3) along the lines suggested would be an excellent means by which to reconcile the conflicting societal interests involved in rule-making. The exemptive language of sections 553(b)(B) and 553(d)(3) should not and need not be so broadly construed that it becomes a meaningless limitation on agency discretion, forestalling adequate public participation in rule-making; nor should it be so narrowly construed that it becomes ineffective to deal with the real problems which admittedly might be faced by certain agencies, if section 553(a)(1) were repealed.

As noted earlier, this kind of qualified exemption will remove from the requirements of the rule-making section virtually all of those situations now cited to justify the across-the-board, unqualified exceptions presently contained in section 553(a)(1). Unlike the latter provision, however, the former has the advantage of excluding from the strictures of section 553(b)-(d) only those specific rule-making situations in which competing interests of a high order clearly outweigh the interests in public participation.

Furthermore, repeal of the section 553(a)(1) exemptions will also be advantageous because the competing values involved will be more adequately accommodated in another fashion. Unlike the current unqualified exemption of subsection (a)(1) rule-making from every provision of section 553, the sections 553(b)(B) and 553(d)(3) solution would exempt only particular instances of such rule-making from the specific subsections whose application in those instances would

317. *Id.*

318. *Id.*

be unreasonable. So, even if prior public participation under section 553(b)-(c) should be eliminated in a particular case of rule-making, the agency will still be required in most circumstances, as section 553(e) unqualifiedly demands, to give persons a right to petition for the issuance, amendment, or repeal of a rule. As noted previously, special exemption from that requirement seems to be justified only in the situation where the required statement of reasons under sections 553(e) and 555(e) must itself be kept confidential. That contingency is already taken care of by section 552(b)(1).

One final point with respect to the scope of the statutory reform proposed here deserves note. Rule-making is defined by the APA as the process for formulating "agency statements of *general* or *particular* applicability and future effect designed to implement, interpret or prescribe law or policy . . ." ³¹⁹ The procedures of section 553 are better adapted to dealing with rule-making of general applicability than to dealing with rule-making of particular applicability. Therefore, requiring adherence to the procedures of section 553 in the case of the latter class of subsection (a)(1) rule-making may create larger burdens and smaller benefits than requiring adherence to those procedures for similar rule-making of general applicability.

An argument can be made, however, that there is no problem in this connection because the rule-making provisions of section 553 do not apply to rules of particular applicability. This conclusion as to the applicability of section 553 might be justified on the following basis. Subsection (a)(1)(D) of section 552, the freedom-of-information provision of the APA, only requires publication of "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability . . ." Rules of *particular* applicability need not be published. According to section 552(a)(2)(B), agencies need only make them available for public inspection and copying. Requiring publication under section 553(b) of the terms of a proposed rule of particular applicability or a description of its intended scope, followed by an opportunity for public participation therein, when section 552 specifically provides that an agency need not even publish such a rule when it is finally adopted, would be foolish and inconsistent. Section 553, therefore, must not apply to rules of particular applicability. If so, even after the repeal of subsection (a)(1) much "military and foreign affairs function" rule-making may still be excluded from section 553 on this basis.

319. 5 U.S.C. § 551(4) (1970) (emphasis added).

After all, a substantial portion of the rule-making involving these subjects is of particular applicability. For example, much of this nation's foreign policy and many of the orders issued by military authorities, if they be rule-making, are rule-making of particular applicability because they are specifically addressed to named countries or persons.

Despite the above argument, the provisions of section 553 probably do apply to rule-making of particular applicability, except as it is specifically excluded from section 553 by some express provision thereof. The distinction drawn in section 552 between rules of general applicability that must be published in the *Federal Register*, and rules of particular applicability that need only be made available for inspection and copying, does not necessarily compel the conclusion that the latter class of rules is outside the requirements of section 553. The situation here is different from that where an agency must keep certain rules secret under section 552, or has the discretion to do so under that provision. It is not possible to argue sensibly that the advance public notice requirements of section 553 apply to any rules of that sort. But it is possible that advance published notice of proposed rules of particular applicability, with an opportunity for public comment thereon, might be a requirement for those rules even though when they are adopted, they need not be published but only be made available for public inspection and copying. It should be recalled that the primary purpose of the section 553 rule-making procedures is to assure wiser rules by *educating the decision makers* so that *they* will be fully informed before any new rules are finally promulgated.

Furthermore, neither the express language of section 552 or section 553, nor their legislative history, indicates that the rule-making provisions were meant to be inapplicable to rules of particular applicability. Indeed, the language of section 553 suggests that the rule-making provisions *do* apply to such rules. Section 553(b) states that "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." So, if persons to whom rule-making of particular applicability is addressed are not "personally served" or do not "have actual notice thereof," usual publication requirements apply. Similarly, the deferred effectiveness provision of section 553(d) expressly applies to rules that are required to be published under section 552(a)(1)(D) and *also* to rules as to which "service" is required. The only rules as to which "service" is ever required are rules of

particular applicability. The term "service" in section 553(d) is an obvious reference back to "rules addressed to and served upon named persons," which section 3 of the original APA exempted from publication requirements. Despite the previous argument, therefore, section 553 must be deemed applicable to rules of particular applicability as well as to rules of general applicability. Consequently, if the "military or foreign affairs function" exemption were repealed the effect on such rule-making of particular applicability should be considered. Such a consideration would reveal, however, that no serious or insurmountable difficulties would be encountered with respect to this sort of rule-making after the repeal of section 553(a)(1).

By using one of two exemptions, an agency can avoid the trouble associated with opening too wide the role of public participation in rule-making of particular applicability. As noted, section 553(b) permits agencies to avoid prior publication of notice in the *Federal Register* if "persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." This means that after the repeal of section 553(a)(1), agencies will still not be required to publish advance notice of such rule-making of particular applicability if they give the persons "subject thereto" personal notice and "an opportunity to participate in the rulemaking through submission of written data, views, or arguments." This seems to be the result of a reconciliation of the language "persons subject thereto" in section 553(b) and "interested persons" in section 553(c).

Furthermore, to the extent that it is more "impracticable, unnecessary, or contrary to the public interest" to follow normal procedures for subsection (a)(1) rule-making of particular applicability than for such rule-making of general applicability, the section 553 (b)(B) and section 553(d)(3) exemptions can adequately handle the problem. As a result, one may expect greater resort to these exemptions for subsection (a)(1) rule-making of particular applicability than for such rule-making of general applicability. The various other exemptions now contained in the rule-making provision will also adequately deal with any special problems that arise from the application of section 553 to subsection (a)(1) rule-making of particular applicability, as well as to such rule-making of general applicability.

VI. OTHER PROPOSALS TO MODIFY SECTION 553(a)(1)

During the past decade, a number of bills have been introduced to reform federal administrative procedure. The most important of

these were S. 2335 and S. 1663 of the Eighty-eighth Congress, and S. 518, S. 2770, and S. 2771 of the Ninetieth Congress. With the exception of S. 2771³²⁰ all of these proposals to revise the APA eliminated the unqualified exclusion from section 553 for rule-making involving "military or foreign affairs functions." In its place, they substituted varying kinds of narrower qualified exemptions for such rule-making. So did a more recent ABA proposal.

Of all the proposed substitute exemptions for section 553(a)(1), only one would have granted a special exemption for this sort of rule-making on a basis other than a need for secrecy. S. 2770 would have entirely excluded from section 553 "rulemaking required by an Executive order to be exempt from this section in the interest of national defense or foreign policy."³²¹ This provision obviously would have vested authority in the President to exclude any rule-making affecting "national defense or foreign policy" from the provisions of the rule-making section if he thought that would be desirable. Rule-making would have been exempt even if it did not "*involve*" the "national defense or foreign policy" as such, provided the President found that an exemption was "*in the interest of* national defense or foreign policy."

The possibility of any effective check on the President in his use of such a broad provision is probably remote. Of course, one may assume that unless the rule-making excluded from section 553 by an executive order was the product of authority vested wholly and exclusively in the President, a court might review the determination that the exclusion was "in the interest of national defense or foreign policy."³²² A court would set aside that determination, however, only if a *clear* abuse of discretion appeared. Given the vagueness of the standard, almost any determination by the President would be upheld. After all, might it not be "*in the interest of* national defense or foreign policy" to avoid usual procedures for subsection (a)(1) rules on the ground that such action would make it less likely that the rule-making would encounter political opposition or public

320. S. 2771, 90th Cong., 1st Sess. § 553(h) (1967).

321. S. 2770, 90th Cong., 1st Sess. § 553(h)(1) (1967).

322. *But see* EPA v. Mink, 41 U.S.L.W. 4201, 4205 (U.S., Jan. 22, 1973), decided just as this Article went to press, holding that in all cases the *legislative history* of 5 U.S.C. § 552(b)(1) (1970) "makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review It also negates the proposition that [section 552(b)(1)] authorizes or permits *in camera* inspection of a contested document . . . so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter." A contrary legislative history should, however, induce the opposite conclusion.

outcry, or that such action would make this rule-making less expensive and time consuming?

Thus, the substitute exemption for section 553(a)(1) found in S. 2770 is undesirable for the same reasons that elimination of the current exemption is sought. Practically, the S. 2770 provision vests in the President too much discretion to avoid usual rule-making procedures when they are not, in fact, "impracticable, unnecessary, or contrary to the public interest." Yet, the approach of S. 2770 is certainly superior to current section 553(a)(1) because under this proposal the President must act affirmatively to exempt any such rule-making before usual procedures may be ignored. This obviously is an advantage over the present situation because the burden is at least put on the agencies desiring an exemption for such rule-making to convince the President that they should have it.

The difficulty is, however, that the President is likely to honor almost any request by trusted subordinates for an exemption from section 553 in these particular areas.³²³ Past history clearly indicates excessive concern by our presidents with safeguarding the supposed interests of national defense and foreign policy, even at the expense of other important competing societal values, which may, on occasion, properly be considered more important. Executive orders excusing rule-making from section 553 "in the interest of national defense or foreign policy" are, therefore, not likely to be difficult for agencies to obtain. What is more, under S. 2770 the exempting executive order need not even be specific. Agencies may infer that they are entitled to such an exemption on the basis of an existing, general "Executive order." Even if this were not so, however, the ultimate conclusion would remain unaltered. For all of the reasons noted above, the solution proposed by S. 2770, while an improvement over current section 553(a)(1), is unacceptable. Outright repeal of the exemption for rule-making involving "military or foreign affairs functions," *without more*, seems best.

Nevertheless, a number of other substitutes for section 553(a)(1) have been proposed and deserve careful examination. All of these proposed substitutes were qualified exclusions relating in one way or another to the need for secrecy of some such matters. More specifically, S. 2335 provided that the rule-making section "shall not require notice of or public participation in rulemaking . . . required to be kept secret in the protection of the national security."³²⁴ S. 1663

323. S. 518 Hearings, *supra* note 127, at 334 (Mr. Frank Wozencraft, Assistant Attorney General, Department of Justice).

324. S. 2335, 88th Cong., 2d Sess. § 1003(f) (1964).

provided that rule-making involving "any military, naval, or foreign affairs function of the United States requiring secrecy for the protection of the national defense" was exempted from every requirement of the rule-making provision.³²⁵ Neither of these provisions expressly demanded that an executive order impose the requirement of secrecy. Moreover, neither recognized the need for secrecy for "foreign policy" purposes as opposed to "national defense" purposes. And neither expressly demanded any narrow tailoring of secrecy needs as would have been the case if the exemption only applied to rule-making "specifically" required to be kept secret.

The Senate subcommittee revision of S. 1663 differed from the above exclusions somewhat. It provided that all rule-making involving "any military, naval, or foreign affairs function of the United States required by Executive order to be kept secret for the protection of the national defense or foreign policy" was to be exempted entirely from the requirements of the rule-making provision.³²⁶ The addition of the specific requirement of an "Executive order" and the use of secrecy for the purpose of protecting "foreign policy" as well as "national defense" are notable.

S. 518 was almost identical to the latter provision, for it would have exempted from the rule-making provision all "rulemaking required by an Executive order to be kept secret in the interest of the national defense or foreign policy."³²⁷ The recent American Bar Association proposal differs only by its addition of the word "specifically," so that only rule-making "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy" is exempted from the rule-making provision.³²⁸ This language is precisely the same as that now appearing in the freedom-of-information provision of the APA, section 552(b)(1). As the ABA Committee noted, in making its proposal:

Obviously, sensitive matters of national defense and international relations are by their nature not appropriate subjects for public participation. Not all the functions of the Departments of Defense and State are of this character, however, and to the extent that [s]ection 553(a)(1) may be so construed, it is desirable that the provision be narrowed to the same ambit circumscribed by the Freedom of Information Act. . . . The proposed amendment to [section] 553(a)(1) would make explicit that it is not enough to exempt a matter from rulemaking that it is related to a military or foreign affairs function,

325. S. 1663, 88th Cong., 1st Sess. § 4(1) (1963).

326. Revised S. 1663, 88th Cong., 1st Sess. § 4 (1963).

327. S. 518, 90th Cong., 1st Sess. § 4(h)(1) (1967).

328. See Crowther, *supra* note 9, at 8.

in absence of a specific declaration by Executive order that the interest of national defense or foreign policy require that they be kept secret. Public participation in rulemaking would then generally be the rule rather than an exception in such activities as the formulation of Armed Services Procurement Regulations.³²⁹

It has previously been argued in this Article that section 552(b)(1) already exempts rule-making from section 553 to the extent an "executive order" "specifically" requires that the rules or the reasons therefor must be kept secret in the "interest of national defense or foreign policy." That is, in the formulation and promulgation of valid rules agencies may ignore usual rule-making procedures to the extent that adherence to those procedures would interfere with a valid secrecy requirement imposed under section 552(b)(1). No objection, therefore, can be urged against adding a provision to the rule-making section expressly recognizing this fact. But if such a provision is added, its language certainly should be congruent with the language of section 552(b)(1). This is, of course, the position of the American Bar Association. There are a number of very good reasons to support that view.

If special exemptive language to deal with problems of secrecy were added to section 553 at the time of subsection (a)(1)'s repeal, an anomaly would be created if the wording chosen were substantively broader than that found in section 552(b)(1). Agencies would then be authorized to avoid usual rule-making procedures on the grounds of secrecy in some situations in which the public would be entitled to obtain documents relating to that subject matter under section 552. As noted earlier, there is no reason to permit any greater resort to secrecy as a basis for avoiding usual rule-making requirements under section 553 than there is for avoiding usual freedom-of-information requirements under section 552. A similar difficulty would be encountered if the language of a substitute for section 553(a)(1) were substantively narrower in scope than that of section 552(b)(1) because in that case an agency might be forced to reveal matters under the requirements of section 553 that it had a right to suppress under section 552.

In addition, it is desirable to have determinations of the necessity for exemption from usual rule-making requirements made by an "Executive order."³³⁰ The policy of openness of government pro-

329. *Id.* at 18-20.

330. "The Department of Justice and the Department of State insisted that the requirement of an Executive Order was 'unnecessary,' would add a 'layer' and could be better handled by legislative oversight." Carrow, *Revision of the Administrative*

ceedings is so important that a final determination to depart from it on a purely discretionary basis because of an alleged need for secrecy should be made only at the highest level. An excuse based on the need for secrecy is, after all, so subject to abuse, and such a tempting vehicle by which government officials may seek to hide improprieties, that it should be available only after a determination of its necessity has been made by the most politically responsible official, the President. Of course, it is understood that such an "Executive order" requirement cannot and will not ensure personal consideration of the merits of each such order by the President if he is prepared to rely completely on the advice of his advisors by automatically signing any order on this subject that they put before him. In support of this requirement of an "Executive order" it should also be noted that courts reviewing the propriety of the use of an exemption predicated on a need for secrecy are not likely to probe very deeply, if at all.³³¹ That lack of close judicial scrutiny is less likely to be disastrous if the decision to avoid usual rule-making procedures based on a need for secrecy is made at the highest level, because at that level the agency's decision is most likely to be responsible and justifiable.

An executive order that exempts certain rule-making from the procedures of section 553 should be reasonably specific as to the precise kinds of rule-making covered in the order. Specificity would avoid some unjustified reliance on executive orders by subordinate officials who wish to dispense with normal rule-making procedures. The term "specifically" in section 552(b)(1) is, therefore, very desirable and should be imported into any analogous exemption added to the rule-making provision. Section 552(b)(1) is also worthy of emulation in section 553 because it recognizes the legitimate use of secrecy not only for "national defense" purposes but also for "foreign policy" purposes. Secrecy exemptions for either purpose should be available because they are, in practice, necessary.³³² All of these points militate in favor of the ABA proposal—using language identical to section 552(b)(1) in a special exemption from section 553 for rule-making

Procedure Act: A Comparative Analysis of Current Bills and a New Proposal, 21 *AD. L. REV.* 227, 230 (1969), citing *S. 518 Hearings*, *supra* note 127, at 332, 318.

331. They may not probe at all if the Act's legislative history precludes review. See *EPA v. Mink*, discussed in note 322 *supra*, decided just as this Article went to press. But see *United States v. Reynolds*, 345 U.S. 1, 11 (1953); K. DAVIS, *supra* note 5, §§ 3A.16, 3A.33 (Supp. 1970).

332. See *S. 1663 Hearings*, *supra* note 104, at 354 (Department of Justice); *id.* at 392 (Department of the Treasury); *id.* at 387 (Department of State).

which must be kept secret in the interest of "national defense or foreign policy."

However, the ABA proposal is arguably undesirable because it may authorize the President to treat the need for secrecy of a subject under the rule-making provision in a manner that is inconsistent with his treatment of the same subject under the freedom-of-information provision. This could not happen if the President were reduced to relying solely on section 552(b)(1) for secrecy exemptions from both the freedom-of-information section and the rule-making section. In that case, rule-making could be exempt from section 553 on the basis of a need for secrecy in the interest of "national defense or foreign policy" only if an executive order also makes the matter to which those rules pertain exempt under section 552(b)(1). The argument is that if the President does not think that the matter involved needs to be kept secret, and, therefore, refuses to issue an executive order to that effect under section 552(b)(1), he should not be permitted to exempt the matter from section 553 on the basis of a special need for secrecy.

But this objection to the ABA proposal may not be realistic or sound. Even under section 552(b)(1), the "Executive order" need not be of the all-or-nothing variety, nor should it be. The term "matter" as used in section 552(b)(1) admits of executive authority to define in any number of different ways exactly what must be kept secret. So, the "matter" may include the texts of certain rules themselves, but no other documents relating to the subject to which the rules pertain, if in fact the President ascertains that secrecy is required in the interest of "national defense or foreign policy" for the rules but not for the other documents. Or, the President may order that the reasons for the rules be kept secret but not the rules themselves. This is as it should be, since utmost flexibility in this matter should properly reside in the President, and is available under the ABA proposal and section 552(b)(1).

For the same reason the following objection to the ABA proposal is spurious:

If an Executive order makes a finding that the national interest requires secrecy in the case of a particular type of foreign policy decision-making, there will be an inevitable inhibition on employing other, less formal [and hence more secrecy-maintaining] procedures of consultation with interested parties, than have been employed in the past.³³³

333. S. 518 Hearings, *supra* note 127, at 388 (Department of State).

Not so! The executive order requiring rule-making to be exempt from section 553 because of a need for secrecy need not interfere with those other procedures, if the President so chooses. Neither the ABA proposal nor section 552(b)(1) is an all-or-nothing provision; they vest discretion in the President to adopt intermediate, qualified, or part-way stances in the interest of maintaining the requisite secrecy.

Another more serious objection to the ABA proposal is that it would "thrust too many duties on an already overburdened President,"³³⁴ since it would permit exemption of rule-making from section 553 on the ground of secrecy only if that secrecy is "specifically" required by an "Executive order." According to the Atomic Energy Commission, the "course of submitting each proposed exemption to the President for ad hoc determination would impose on the President an unreasonable continuing burden."³³⁵

But is this burden any different or greater than that already imposed on the President by section 552(b)(1)? Congress made the decision at the time that provision was enacted that in light of the important values involved, imposition of this obligation on the President was justifiable. As pointed out earlier, enactment of the ABA proposal is unnecessary because the President is already charged with making determinations under section 552(b)(1) that would in effect exempt certain rule-making from section 553 because of the need for secrecy in the interest of "national defense or foreign policy." No further burden would, therefore, in fact be imposed on him by the ABA proposal because it would only be declaratory of his present obligations. Consequently, this objection to the ABA proposal does not deserve serious consideration since Congress resolved the basic policy question when it enacted section 552(b)(1).

The Atomic Energy Commission has, however, sought to distinguish section 552(b)(1) from the ABA proposal for section 553—deeming the latter unsuitable for the rule-making provision even though the former may be suitable for the freedom-of-information provision. It said:

While we recognize that the modified exception [for the rulemaking provision] is the same as that in [section 552(b)(1)] the considerations relating to public information and rulemaking are sufficiently dif-

334. *S. 1663 Hearings*, *supra* note 104, at 679 (Professors Marvin Frankel & Walter Gellhorn, Columbia University Law School). *See also id.* at 480 (Department of Commerce).

335. 1969 Survey Response.

ferent as to warrant different treatment with respect to exemptions from their requirements.³³⁶

However, the AEC does not explain why the considerations should be different with respect to exemptions from these two provisions to deal with a unitary problem, the need for *secrecy* in the interest of "national defense or foreign policy."

Another objection to an ABA type proposal is that "the Executive order that would be needed if section [553] procedures were to be omitted might in itself destroy the very secrecy it was intended to enhance." The following illustration is provided:

Consider, for example, the making of rules pertaining to access to a secret missile base or pertaining to methods of subsidizing the military operations of friendly powers. Unless the President were to issue an Executive order, which, of course, would be immediately available for publication, section [553] procedures would have to be followed; publication of the absolving Executive order would, however, perforce disclose some of the very information sought to be withheld "for the protection of the national defense or foreign policy."³³⁷

Two points should be made with respect to this argument. First, if it is a valid objection with respect to an "Executive order" requirement for the rule-making provision, it is equally valid with respect to the "Executive order" requirement for the freedom-of-information provision. Second, it is based on a misconception concerning the precise nature of the executive order required under the ABA proposal for section 553, and under section 552(b)(1). Obviously, the required executive order need not be of a nature or specificity that would divulge in any way the very matters sought to be concealed in the interest of "national defense or foreign policy." With respect to the above illustration, for example, all that would be necessary is an executive order requiring secrecy for rule-making and documents (1) pertaining to access to secret missile bases, or (2) pertaining to the methods of subsidizing the military operations of friendly powers. The usual requirements of sections 553 and 552 would thereby be swept aside for such matters. No more specificity is required to be consistent with the purpose of the ABA proposal and section 552(b)(1).³³⁸

One last objection to the ABA proposal—and more generally to the proposal to delete section 553(a)(1)—is that the ABA proposal and other similar substitutes would merely interject "new definitions

³³⁶. *Id.*

³³⁷. *S. 1663 Hearings, supra* note 104, at 679 (Professors Frankel & Gellhorn).

³³⁸. *See* K. DAVIS, *supra* note 5, §§ 3A.16, 3A.33 (Supp. 1970).

which make everybody wonder—what is the difference between national defense and military affairs, what is the difference between foreign policy and foreign affairs, what does the executive order really cover?”³³⁹

The difficulty with this line of argument is apparent. At present both sets of terms are already in the APA—“military and foreign affairs function” in section 553(a)(1) and “national defense and foreign policy” in section 552(b)(1). Neither set of terms is intrinsically clearer or more developed by history and practice than the other. The differing language of these two sets of terms in the same Act also raises unhappy and unnecessary problems of comparative construction. Adding an ABA-type provision to section 553 in lieu of section 553(a)(1) would, however, improve the situation, not worsen it. Then, at least, there would only be *one* set of terms to deal with in applying the Act—“national defense and foreign policy.” Indeed, mere repeal of section 553(a)(1) would be beneficial for the same reason. As to the objection that under the ABA proposal construction of executive orders would be unduly burdensome, it need only be noted that this burden already rests on the agencies under section 552(b)(1).

It should be reiterated that enactment of an express provision permitting exemptions from section 553 for rule-making “specifically” required by an “Executive order” to be kept “secret in the interest of national defense or foreign policy” is probably unnecessary as a matter of law. Enactment of such a provision is, however, desirable because it will make agencies feel more secure to have the present inferential relationship between sections 552(b)(1) and 553 expressly spelled out. But the result will be the same if the only action taken is that which is clearly justified and most pressing—simple repeal of section 553(a)(1). Agencies are not now required by section 553 to violate a proper executive order under section 552(b)(1). To read the current provisions any other way would be absurd.

VII. MAY CONGRESS EFFECTIVELY IMPLEMENT THE REFORM PROPOSED?

Is there any constitutional impediment to the procedural reform proposed here? To what extent, if at all, is section 553(a)(1) a recognition of an independent and exclusive executive authority in the military and foreign affairs area which may not be regulated by Con-

³³⁹ S. 518 Hearings, *supra* note 127, at 334 (Mr. Wozencraft, Department of Justice).

gress?³⁴⁰ The ultimate inquiry, of course, is the extent to which Congress may regulate the precise procedure by which the executive branch makes rules involving "military or foreign affairs functions." To ascertain the answer to these questions, depiction of comparative congressional and presidential authority in these fields seems necessary. Happily, the theoretical analyses contained in several recent studies are particularly useful here because of the light they shed on this question.³⁴¹

A. *Scope of Congressional Power To Dictate Procedure for These Functions*

In *Youngstown Sheet and Tube Co. v. Sawyer*³⁴² Justice Jackson suggested that there are three zones of constitutional power with respect to legislative and executive authority in the military and foreign affairs area. The first is a zone of constitutional power that is exclusively presidential. In that zone the Executive may act lawfully even against the clearly expressed command of Congress. The second is a zone of exclusive congressional authority in which the legislature

340. Some comments with regard to foreign affairs functions suggest a congressional incapacity based on the Constitution's distribution of such powers among the several governmental branches:

The Department of State in its daily functions is, in most cases, carrying out on behalf of the President the exercise of his constitutional power to conduct the foreign relations of the United States. The Constitution gives the President an unusually large degree of authority in conducting foreign affairs

The Department of State thus functions primarily in a different capacity from that of other departments and agencies. Most executive business entails the execution by the departments and agencies concerned of the laws Congress has passed. Rules are made and individual cases considered with a view to applying the mandates of Congress with respect to regulation of various fields of activity and expenditure of appropriated funds.

The conduct of foreign policy, by contrast, is generally not dictated by statutory standards.

S. 518 *Hearings, supra* note 127, at 387-88 (William Macomber, Assistant Secretary for Congressional Relations, Department of State).

Generally speaking, the conduct of foreign affairs is not a part of the administrative process.

In most cases foreign affairs are conducted by agents of the President carrying out his responsibilities in this field under the Constitution.

Id. at 318 (Leonard Meeker, Legal Adviser, Department of State).

Thus, there are good reasons why the foreign affairs exemption should have been placed in the Administrative Procedure Act at its original enactment 21 years ago. Those reasons remain valid today.

Id. at 321.

341. Pollack, Black & Bickel, *The Congressional and Executive Roles in War-Making: An Analytical Framework*, 116 CONG. REC. 16478 (1970) [hereinafter *The Yale Paper*]; Wallace, *The President's Exclusive Foreign Affairs Powers over Foreign Aid* (pts. 1-2), 1970 DUKE L.J. 293, 453 [hereinafter Wallace, *Foreign Aid*]; C. ZINN, *EXTENT OF THE CONTROL OF THE EXECUTIVE BY THE CONGRESS OF THE UNITED STATES*, HOUSE COMM. ON GOVERNMENT OPERATIONS, 87th Cong., 2d Sess. (Comm. Print 1962). The following brief theoretical discussion in the text relies mainly, though not exclusively, on these secondary studies.

342. 343 U.S. 579, 635-38 (1952) (concurring opinion).

may act lawfully even against the clearly expressed command of the President. In between these poles of exclusive executive and exclusive legislative power is a third "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."³⁴³ Either of these branches of the national government can act without the other in this twilight area. But Justice Jackson did not clearly indicate what would happen if congressional action in the twilight zone conflicted with the presidential will.

There is no doubt that under the Constitution Congress and the President each have their own exclusive powers involving "military and foreign affairs functions." Similarly, there should be no doubt that there is a large twilight zone involving "military and foreign affairs functions" in which the Constitution grants authority concurrently to both the President and the Congress. If nothing else, an enumeration of the various broadly worded constitutional provisions conferring powers on Congress and the President in these areas illustrates this point.

Congress has the express constitutional authority to levy taxes, including import duties, and to spend "for the common defense"; "define and punish Piracies and Felonies committed on the high seas, and offences against the law of Nations"; "declare War, grant Letters of Marque and Reprisal, and Make Rules concerning Captures on Land and Water"; "raise and support Armies"; "provide and maintain a Navy"; "make Rules for the Government and Regulation of the land and naval Forces"; "provide for calling forth the militia" and "provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States."³⁴⁴ The Constitution also states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."³⁴⁵ In addition to vesting in Congress the above powers, and all authority "necessary and proper for carrying [them] into Execution,"³⁴⁶ the Constitution provides that two thirds of the Senate must concur in any treaty between the United States and another nation. The Senate must also concur in ambassadorial and major military appointments.³⁴⁷

On the other hand, article II specifies that "[t]he executive Power

343. 343 U.S. at 637.

344. U.S. CONST. art. I, § 8.

345. U.S. CONST. art. IV, § 3.

346. U.S. CONST. art. I, § 8.

347. U.S. CONST. art. II, § 2.

shall be vested in [the] President of the United States." Additionally, the President is designated as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." He also is expressly given the power "by and with the Advice and Consent of the Senate, to make treaties . . . [and to] appoint Ambassadors"; to "receive Ambassadors and other public Ministers"; and to "take Care that the Laws be faithfully executed."³⁴⁸

The fact that there may be a residuum of power in the military and foreign affairs areas that is vested in the national government "as a necessary concomitant of nationality," rather than by the express language of the Constitution, also supports the view that there is a twilight zone involving "military and foreign affairs functions" in which authority rests concurrently in both the President and Congress. By definition, the Constitution does not expressly allocate that power between Congress and the President. But such residual "powers must vest somewhere, and there is *nothing*—nothing in the Constitution, nothing in history, nothing in the case law, and nothing in common sense—to suggest that the entire residuum vests exclusively in one or the other branch."³⁴⁹

A logical scheme has been posited with respect to clashes of authority in the twilight zone, as well as with respect to clashes of authority in the zones of exclusive power:

- 1) In the zone of exclusive executive power, any legislation attempting to restrict presidential action is void and can be ignored by the President, even if it is "passed" over his veto.
- 2) In the zone of exclusive congressional power, any presidential action is illegal and can be prevented or ended by action of Congress.
- 3) In the twilight zone of concurrent power, either the President or Congress can act in the absence of initiative by the other. If both attempt to act in ways that bring their wills into conflict, the deadlock must be resolved in favor of congressional action through valid legislation, which includes legislation passed over a presidential veto.³⁵⁰

That is, either branch of government is entitled to block efforts by

³⁴⁸ U.S. CONST. art. II, §§ 2-3.

³⁴⁹ The Yale Paper, *supra* note 341, at 16480 (emphasis original), citing the fact that article I, section 8, of the Constitution makes it clear that some residual power vests in Congress rather than the President. *See id.* at 16480 n.11. By that provision, Congress is given power "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (emphasis added). The Yale Paper also states that "the lesson of history is that the President and Congress have shared the residual power." *Id.* at 16480 n.12, citing Bickel, *et al.*, *Indochina: The Constitutional Crisis*, 116 CONG. REC. 15409 (1970).

³⁵⁰ The Yale Paper, *supra* note 341, at 16479.

the other to interfere with its exercise of military or foreign affairs powers vested exclusively therein. However, Congress may properly seek to regulate exercises of presidential authority in the twilight zone. When it does so, *Congress' will should prevail over that of the President*. The reasons for this are as follows.

Under our Constitution there is a distinct bias toward vesting national power in Congress, since "Congress is closer to the electorate and represents a greater diversity of views than the President."³⁵¹ Its power, therefore, is more "basic" than that of the Chief Executive in the sense that it is a more democratic institution. Another reason why congressional will should prevail over that of the President in the twilight zone may be found in the text of the Constitution. The Constitution nowhere expressly provides a means by which the President can impose his will over Congress' objection. It does, however, specifically provide a way for *Congress* to impose its will over the *President's* objection: It makes a bill that is passed over the veto of the President as much law as one that he has signed.³⁵² The President is, therefore, obligated to enforce the enactment unless, of course, Congress did not have the power to enact it in the first place. "But, in the twilight zone, Congress has power by definition."³⁵³

It should also be noted that *Youngstown* directly supports the proposition that in the twilight zone any conflict between Congress and the President must be resolved in favor of the former. *Youngstown* seems to suggest that the power of the President to order seizure of the steel mills under the specific circumstances of that case was in the twilight zone. The reason the President could not lawfully do so there was that Congress had specifically rejected presidential seizure as a means for maintaining operation of vital industries during labor disputes.³⁵⁴ A clear intimation may be gleaned from a majority of the Justices in *Youngstown* that absent this congressional rejection of the seizure device, the President might properly have acted under his own independent authority to engage in such a seizure.³⁵⁵

One may briefly speculate about the nature of those "foreign affairs functions" delegated *exclusively* to the President. Certainly, "[a]mong the principal exclusive powers of the President is the power

351. *Id.*

352. U.S. CONST. art. I, § 7.

353. The Yale Paper, *supra* note 341, at 16479.

354. 343 U.S. at 586. See also The Yale Paper, *supra* note 341, at 16479, 16480 n.8.

355. 343 U.S. at 588-89 (Black, J.), 602 (Frankfurter, J.), 631 (Douglas, J.), 637-39 (Jackson, J.), 656-59 (Burton, J.), 662 (Clark, J.).

to recognize foreign governments and states . . . [which] 'includes the power to determine the policy which is to govern the question of recognition.'"³⁵⁶ Similarly, the power to "commence, maintain and sever diplomatic relations . . . is exclusively the President's."³⁵⁷ The precise "*content and mode*" of this nation's diplomatic relations with foreign countries may also be considered exclusive.³⁵⁸ "[H]e alone negotiates. . . . 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'"³⁵⁹ The President, then, is vested with the whole authority to make strategic foreign policy in our diplomatic relations with other nations, and the whole authority to conduct that policy. It has been suggested that

the traditional core would seem to embrace *all* diplomatic and Commander-in-Chief foreign affairs decisions, except for the following particular classes:

- 1) Certain matters affecting foreign commerce, including such derived matters as immigration and passports;
- 2) Certain matters of administrative detail;
- 3) The withholding of appropriations altogether;
- 4) Declarations of war;
- 5) Senate advice and consent to treaties and appointments.

Thus, the Constitution, as it has developed, has struck a balance. On one side is exclusive executive power with respect to foreign affairs; on the other, congressional participation.³⁶⁰

Under this balance, however, Congress cannot, for example, properly use its power not to appropriate funds "to prevent the President from recognizing a state or government, dispatching an emissary to it, or specifying the rank of such emissary."³⁶¹

356. Wallace, *Foreign Aid*, *supra* note 341, at 315, quoting *United States v. Pink*, 315 U.S. 203, 229 (1942).

357. *Id.* at 316.

358. *Id.* at 317 (emphasis original).

359. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), quoting John Marshall in 10 ANNALS OF CONG. 613 (1800). See also Wallace, *The War-Making Powers: A Constitutional Flaw?*, 57 CORNELL L. REV. 719, 734 (1972) [hereinafter Wallace, *War-Making*].

360. Wallace, *Foreign Aid*, *supra* note 341, at 321 (emphasis original).

361. *Id.* at 326. But see E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 432 n.57 (4th ed. 1957), quoting an 1864 report from the House Committee on Foreign Affairs that concluded with the following resolution:

"Resolved, That Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well in the recognition of new powers as in other matters; and it is the constitutional duty of the President to respect that policy, not less in diplomatic negotiations than in the use of the national forces when authorized by law; and the propriety of any declaration of foreign policy by Congress is sufficiently proved by the vote which pronounces it; and such proposition while pending and undetermined is not a fit topic of diplomatic explanation with any foreign power." . . .

One may also speculate briefly with respect to some of the exclusive "military functions" conferred on the President by his Commander-in-Chief authority. It has been suggested that while "Congress may increase the Army, or reduce the Army, or abolish it altogether . . . as long as we have a military force Congress cannot take away from the President the supreme command."³⁶² This proposition has been elaborated more fully by the Supreme Court in *Ex parte Milligan*,³⁶³ where the Court stated:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.³⁶⁴

On this basis, it has been concluded that as Commander-in-Chief, the President "has sole charge of the day-to-day conduct of military affairs in theatres of battle, and Congress cannot control it."³⁶⁵ Presumably, on the same basis, the President has exclusive control over strategic military planning or preparation for hostilities. It has also been suggested that the President may have exclusive power with respect to the selection of weapons systems.³⁶⁶ Of course, Congress can refuse to appropriate funds. As Senator Borah once noted:

Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President would undoubtedly be bound by it. But the Congress could not, through the powers of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find.³⁶⁷

Any effort to define precisely or to catalogue all of those "military and foreign affairs functions" that are beyond congressional control because they are vested exclusively in the President, and those

The resolution passed the House in a somewhat diluted form, but failed to come to a vote in the Senate.

362. *Swain v. United States*, 28 Ct. Cl. 173, 221 (1893), *affd.*, 165 U.S. 553 (1897).

363. 71 U.S. (4 Wall.) 2 (1866).

364. 71 U.S. (4 Wall.) at 139.

365. Wallace, *Foreign Aid*, *supra* note 341, at 320.

366. Wallace, *War-Making*, *supra* note 359, at 735 & n.85.

367. 69 CONG. REC. 6760 (1928).

that are within congressional control because they are vested concurrently in both Congress and the President, or exclusively in Congress, is not required by this Article. For present purposes it is enough to demonstrate that Congress may properly narrow or eliminate section 553(a)(1), or, stated differently, that Congress may, if it wishes, subject a significant portion of rule-making involving "military or foreign affairs functions" to reasonable procedures of its own choosing—even if the President objects. If there be doubt concerning the authority of Congress to impose mandatory procedures in particular instances of such rule-making, that may be worked out on a case-by-case basis under a statutory provision that is valid on its face.

Any effort to define precisely or to catalogue all of those "military and foreign affairs functions" vested wholly or exclusively in the executive branch also seems futile.³⁶⁸ The language of the Constitution delegating power in these areas to the Congress and to the President is of little help because it is opaque and overly general at best. So, too, no help is furnished by the sparse litigation on this subject. For example, while *United States v. Curtiss-Wright* states that the President is "the sole organ of the federal government in the field of international relations,"³⁶⁹ it does not deal with the questions as to which branch or branches of the national government have the authority to make that policy, and under what circumstances; and which branch or branches have the authority to define how such policy is made, and under what circumstances. One study does suggest, however, a working principle by which those exercises of presidential power in the military and foreign affairs fields that are beyond congressional reach can be differentiated from those exercises of such power that are within Congress' capacity to regulate. "[T]he power appropriate to each branch" should be analyzed in light of "(1) the special competences of each, and (2) the probable internal consequences of external actions."³⁷⁰

The presidency's special competence "is its capacity for fast, efficient, and decisive action." "Power in the executive branch is hierarchical; in Congress it is diffuse. The essence of the legislative process is deliberation and compromise; in the executive process, at least in theory, it is command."³⁷¹ Another special competence of the

368. See Wallace, *War-Making*, *supra* note 359, at 731-33.

369. 299 U.S. at 320.

370. The Yale Paper, *supra* note 341, at 16479. On the comparative competence of the executive and the legislature, see *id.* at 16479; Wallace, *Foreign Aid*, *supra* note 341, at 455-64.

371. The Yale Paper, *supra* note 341, at 16479.

Presidency is the ability to act secretly and to keep matters confidential.³⁷² This, too, is a product of the hierarchical and unitary nature of executive power, since only one person need be privy to any decision on the executive level while on the legislative level 535 people must necessarily be privy to any decision. The consequences of this have been a congenital inability on the part of Congress to keep controversial matters confidential.³⁷³ On the other hand, Congress is "closer to the People and reflects the diversity of their views."³⁷⁴ Because of its size and the fact that it "acts through deliberation, compromise, and consensus" it is also likely to be a more prudent body than the President. Congress' special capacity is, therefore, "a unique legitimacy to commit the resources and will of the nation."³⁷⁵ In light of these special competences of the President and Congress:

(1) When a decision in foreign or military affairs demands speed and decisiveness, [or, it may be added, secrecy,] there is a presumption that it is within the exclusive power of the President. (2) *All other decisions* are within the power of Congress. Some of that congressional power is in the twilight zone and held concurrently with the President. [The remainder is within the exclusive powers of Congress.]³⁷⁶

The presidential veto of the Military Authorization Act of 1965³⁷⁷ is consistent with this view of congressional authority, and relevant

372. See Wallace, *Foreign Aid*, *supra* note 341, at 458 (emphasis added):

In recognizing the superior knowledge and information of the executive, the Supreme Court has said, "[the President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries He has his confidential sources of information Secrecy in respect of information gathered by them may be highly necessary"

The speed, *secrecy*, and flexibility of the executive—qualities often cited as necessary for the effective conduct of certain aspects of foreign affairs—frequently have been noted.

Quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

373. Consider, for example, Senator Gravel's public issuance of the "Pentagon Papers," which the Defense Department attempted to keep confidential. Gravel, *Introduction to THE PENTAGON PAPERS* at ix (Gravel ed. 1971).

374. The Yale Paper, *supra* note 341, at 16479.

375. *Id.* See also *id.* at 16480 n.14:

The competence of Congress to commit the resources and will of the nation is reflected in the allocation of enumerated Constitutional powers. It can commit the human and material resources of the nation by laying taxes, borrowing money, and raising an army. It can commit the will of the nation by declaring war. And, perhaps most significantly, it can change the very character of the nation by establishing standards for naturalization. All these things, furthermore, Congress can do over the President's veto.

376. *Id.* at 16479 (emphasis original). The Yale Paper omits mention of a special need for secrecy as a basis for exclusive executive authority under the Constitution, and also fails to mention the special capacity of the Executive to act in secret and to keep matters confidential.

377. H.R. 8439, 89th Cong., 1st Sess. (1965). See 111 CONG. REC. 21244-45 (1965); H.R. Doc. No. 272, 89th Cong., 1st Sess. (1965).

to the ultimate inquiry being pursued in this section of the present Article. That Act provided that no military installation or facility of any kind "shall be closed, abandoned or substantially reduced in mission until 120 days after reports of the proposed action are made to the Committees on Armed Services of the Senate and House of Representatives."³⁷⁸ Reports of this type could only be filed with the appropriate committees between January 1 and April 30 of each year. "If Congress adjourns sine die before 120 days pass, the report must be resubmitted to the next regular session of the Congress."³⁷⁹ President Johnson vetoed the bill on the ground that it was unconstitutional.

According to the President, this Act was an improper effort by Congress to regulate the procedure by which he could exercise military and foreign affairs powers conferred *exclusively* upon his office by the Constitution. In his veto message, the President relied on the need for speedy action in determining matters within the Act's purview as the basis for his exclusive authority over that subject. Congress could not impose this procedure on the President in the performance of those particular military and foreign affairs functions because:

We cannot commit ourselves, for the prolonged period required by this bill, to delay action necessary to meet the realities of the troubled world in which we live.

By the Constitution, the executive power is vested in the President. The President is the Commander-in-Chief of the Armed Forces. The President cannot sign into law a bill which substantially inhibits him from performing his duty. He cannot sign into law a measure which deprives him of power for 8 months of the year even to propose a reduction of mission or the closing of any military installation, and which prohibits him from closing, abandoning, or substantially reducing in mission any military facility in the country for what could be a year or more and must be 120 days. The times do not permit it. The Constitution prohibits it.

. . . The President must be free, if the need arises, to reduce the mission at any military installation in the country if and when such becomes necessary.³⁸⁰

The President indicated that his veto did "not mean to imply that a reasonable reporting provision, consistent with the legislative powers of the Congress, would warrant a veto."³⁸¹ It is unclear, how-

378. H.R. 8439, 89th Cong., 1st Sess. § 611(a) (1965).

379. *Id.*

380. 111 CONG. REC. 21244 (1965).

381. *Id.* at 21245.

ever, whether the President meant that congressional imposition of such a reporting requirement with respect to the particular type of rule-making involved there would be valid and, therefore, binding on him even if he opposed it. The President probably intended to suggest only that he would approve a bill containing such a simple reporting requirement because it would not unduly interfere with the proper performance of his duties. There is, of course, a very large difference between these two possible constructions of the veto message.

According to one view, Congress may lawfully obligate the President to follow a particular rule-making procedure in the performance of those "military or foreign affairs functions" vested exclusively in the executive branch so long as the procedure prescribed in no way interferes with the merits of the President's substantive decision or his ability to perform that function as expeditiously or confidentially as necessary. If Congress has such authority, it may impose rule-making procedures of its own design on the performance of all "military and foreign affairs functions," and the Executive would be bound to follow these procedures in *all* cases, subject *only* to the qualifications noted above. According to the contrary view, however, the very need for reflexive or secret executive action in certain military and foreign affairs situations demonstrates that the particular rule-making involved is being executed pursuant to an *exclusive* presidential power. Congress may not, as a consequence, interfere with the Chief Executive's exercise of that authority *in any way*. It may not, therefore, prescribe the procedures by which that function is performed, even if those procedures do not interfere with his substantive decision or with his capacity to act as swiftly or confidentially as is necessary.

As a matter of policy, both views described above may be able to garner some support because functionally they end in the same place. Under either theory the President is assured freedom to act as quickly and confidentially as necessary to perform those "military and foreign affairs functions" whose peculiar nature demands such a special capacity. The only difference is that under one of the theories Congress may impose some procedural requirements of its choosing on the President in the performance of these duties—requirements that would not interfere with the executive's substantive decision on its merits or with his capacity for speedy or confidential action. Under the other theory Congress could impose no procedural requirements when the President makes rules involving a "military or foreign affairs function" whose peculiar nature requires an ability

to act reflexively or secretly. The President would obviously contend for the latter theory and Congress for the former.

In support of the former view it has been suggested:

Related to the congressional power to create programs is the power to specify many matters of administrative detail. These run the gamut from the establishment of agencies, offices, and positions, through the control of many personnel matters, to the disposition of property and the specification of operating procedures. Thus, it would appear that Congress' discretion is virtually unlimited in "prescribing the organization, procedure and business practices of an administrative agency . . ."³⁸²

The assumption is that "[t]his kind of administrative detail which may be common to both domestic and foreign programs, is to be distinguished from the 'detail' of conduct and policy which forms part of the core area of foreign affairs [or military functions] that is immune from congressional control."³⁸³ So, for example, it is suggested that even with respect to those "military and foreign affairs functions" vested wholly and exclusively in the Executive, Congress can check and balance the President by "reports which the executive can be required to make."³⁸⁴

This conclusion is qualified, however, by the observation that the extensiveness of these powers over "administrative detail" and administrative procedure "is not well defined."³⁸⁵ Consequently, it is admitted that this power of Congress to force the President to make reports is limited by the doctrine of executive privilege, which originates in the residuum of independent and exclusive presidential powers.³⁸⁶ So, too, note the response to the following question:

While Congress can normally prescribe operating procedures, should it be completely free to do so if the same have a considerable impact on the effect of United States . . . programs abroad [or on the exercise of military functions]? The burden which this might place on the conduct of foreign affairs [or military functions] suggests that Congress should not possess such freedom.³⁸⁷

Nevertheless, on occasion Congress has attempted to impose require-

382. Wallace, *Foreign Aid*, *supra* note 341, at 307, quoting L. MERIAM & L. SCHMECKEBRIER, *REORGANIZATION OF THE NATIONAL GOVERNMENT: WHAT DOES IT INVOLVE?* 125 (1939).

383. L. MERIAM & SCHMECKEBRIER, *supra* note 382, at 125.

384. Wallace, *Foreign Aid*, *supra* note 341, at 492 citing C. ZINN, *supra* note 341, at 19.

385. Wallace, *Foreign Aid*, *supra* note 341, at 307-08.

386. *Id.* at 475-76, 492 n.425.

387. *Id.* at 481.

ments of administrative detail or procedure on the Chief Executive even where the particular "military or foreign affairs function" being executed is arguably vested wholly in the President.³⁸⁸ In doing so, it claimed to be acting under one of the powers expressly delegated to the legislature in this area.

A logical objection may be raised to the broader view of congressional power. To the extent that the Constitution vests authority over certain "military or foreign affairs functions" wholly or *exclusively* in the Executive, Congress may in no way interfere with or regulate their exercise—substantively or procedurally. Even a procedural regulation that does not hinder the Executive's capacity to make any decision on the merits he sees fit, or to react as swiftly or confidentially as he deems necessary in such cases, should be invalid. By enacting such a procedural regulation Congress is, after all, attempting to impose its will on the performance of a particular function delegated by the Constitution *wholly* to the President. Why should Congress have more authority over the procedure than the substance with respect to matters whose substance admittedly lies within the zone of *exclusive* executive power? Certainly, no such distinction is drawn in the language of the Constitution or in any known judicial opinion.

Furthermore, it can always be argued that *any* procedural limitation that is imposed by Congress on rule-making in an area of exclusive executive authority will, by definition, hinder *at least to some extent* the Executive's ability to act as speedily or secretly as he may deem necessary in such cases. On the other hand, a suitable response may be that the precise nature of the particular procedure Congress seeks to impose will in fact determine whether or not the Executive's ability to act as speedily or secretly as necessary is impaired. An analysis of the actual procedure involved is, therefore, a prerequisite to any conclusion on this subject.

B. *Section 552(b)(1), the ABA Proposal, and Section 553(b)(B)*

It may be argued that Congress has already acted upon the belief that it has some authority to prescribe the procedures employed in the exercise of *all* "military and foreign affairs functions," including those demanding a special capacity for speedy or confidential executive action. When the new freedom-of-information provision was added to the APA, Congress did not follow the model of section 553 and unqualifiedly exempt all records involving a "mili-

³⁸⁸ *Id.* at 480-82.

tary or foreign affairs function." Instead, in section 552(b)(1), Congress stated that the freedom-of-information section "does not apply to matters that are . . . specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."

This statutory provision may not, however, be used to demonstrate the existence of any assumed congressional authority to impose on the executive branch rule-making procedures for the performance of those "military and foreign affairs functions" *exclusively* delegated to the President. In the first place, the President concurred in the freedom-of-information provision. This generally applicable provision does not, therefore, demonstrate a congressional belief that it may force section 552(b)(1) on the President's exercise of any exclusive executive authority over a veto based on constitutional grounds. Furthermore, it is doubtful that presidential concurrence in such a general statute at the time of its enactment would later disable the Chief Executive from disavowing it in those particular instances where it is seen to trench upon the Executive's exclusive power. In such a case the President and Congress only agreed to a law that was valid on its face. And the President and Congress cannot, either singly or in concert, agree to bind the President to follow a certain procedure in those particular cases where the Constitution delegates to him sole and exclusive authority to make a decision and to act upon it as the occasion demands.³⁸⁹

Secondly, it may be argued that section 552(b)(1) does not, in fact, impose any procedure on the Executive in cases of exclusive presidential power because the particular procedure imposed is so devoid of substance that it is no limitation at all. It is a totally empty command to order the Executive to follow certain open records requirements for all public documents except those "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," since the only procedure required by that provision is that the President must indicate that he does not want to follow the usual requirements when he does not want to do so—a limitation of doubtful significance or substance.

389. "The President has on occasions vetoed legislation with such [unconstitutional] provisions [in congressional acts infringing on his exclusive powers]; in more recent years he has at times approved the legislation but indicated he will treat the provision in question as unconstitutional. Attorneys General have supported this approach." Wallace, *Foreign Aid*, *supra* note 341, at 321-22 n.191. "[T]he President has increasingly indicated in signing messages that he will ignore certain provisions in legislation or treat them in such a way as to avoid constitutional problems." *Id.* at 493. See also Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Newman and Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953).

However, this view of the effect of section 552(b)(1) may be unduly narrow. If usual public record requirements are to be dispensed with, an "Executive order" must be issued, and the matters exempted must be done so "specifically." No precise definition of "Executive order" is provided in the APA. Common language usage and historical practice would suggest, however, that the term "Executive order" means that the President must personally issue or sign the command for exemption.³⁹⁰ This constitutes a procedural limitation of some substance because it suggests that the *final* decision on this subject cannot be delegated by the President to any other official.³⁹¹

The term "specifically" may also constitute a procedural limitation of some substance because it suggests that the President must indicate with a fair degree of particularity the precise records affecting "national defense or foreign policy" that are to be exempted from usual public records requirements. He cannot vest unduly broad discretion in subordinate officials by issuing an exemptive command phrased in vague or overly general terms—leaving it to his subordinates to determine in their completely unfettered discretion what should and what should not be exempted.³⁹²

There is yet a third reason why section 552(b)(1) does not demonstrate any congressional belief that it may impose rule-making procedures on the executive branch in the performance of those "military and foreign affairs functions" exclusively vested therein. The freedom-of-information provision, and in particular section 552(b)(1) thereof, is generally worded and open ended. It may, therefore, be applied to all sorts of "national defense and foreign policy" matters. The provision is undoubtedly constitutional on its face because Congress has the authority to impose procedural requirements on the Executive in his performance of many "national

390. The *Federal Register*, for example, clearly draws this distinction between executive orders and other regulations.

391. Of course, as noted earlier, it is understood that such an "Executive order" requirement cannot and will not ensure personal consideration of the merits of each order by the President if he is prepared to rely completely on the advice of his advisers by automatically signing any order on this subject that they put before him.

392. *But see* EPA v. Mink, 41 U.S.L.W. 4201, 4204 (U.S., Jan. 22, 1973); Epstein v. Resor, 296 F. Supp. 214 (N.D. Cal. 1969), *aff'd.*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970) (Army order, specifying certain files as "Top Secret" under general guidelines designated by President, sufficient to exempt those files from freedom-of-information provision pursuant to "Executive order" excluding all "Top Secret" information from the Act's requirements). They only prove that the "specifically" requirement will be read in light of the practicalities of any situation to ensure that on the one hand, the President is not forced to make an impossible number of individualized judgments, and, on the other hand, that he does not subvert the purpose of the requirement of an "Executive order" "specifically" exempting certain documents by delegating to subordinates more authority than is reasonably necessary.

defense and foreign policy" matters. But Congress is presumably aware that such a general statute may still be unconstitutional as applied to any particular situation in which the Constitution vests exclusive authority in the President.³⁹³ The theory would be that Congress may in no way control executive conduct, substantively or procedurally, when the Executive is exercising a power vested wholly or exclusively in his office. A consequence of this argument would be that when the President exercises such authority he need not adhere to the requirements of section 552(b)(1). He need not exempt records from the freedom-of-information provision by "Executive order"; nor need he do so "specifically." Indeed, the President or his designate may do so very generally, leaving it to subordinates to decide in any particular case, without guidelines, whether an exemption is necessary or desirable.

On the other hand, even if the requirement that any exemption from the freedom-of-information section for matters involving "national defense or foreign policy" be accomplished "specifically" and by "Executive order" does constitute a "meaningful" procedural limitation on the President, and even if the Congress may not generally impose procedural limitations on the Chief Executive when he executes powers vested wholly in his office, *these particular pro-*

393. It seems clear that under his exclusive constitutional powers, the President may assert executive privilege even as against a congressional demand for information. "The executive has long asserted the power to withhold documents from Congress in the name of executive secrecy, and the Congress has to some extent acknowledged this power." Wallace, *Foreign Aid*, *supra* note 341, at 321-22 n.191, citing Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960* (pts. 1-2), 29 GEO. WASH. L. REV. 623, 827 (1961); Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755, 771 (1959). See also E. CORWIN, *supra* note 361, at 110-16. Consider, too, the following statement by Wallace:

As already noted, executive secrecy may be equally applicable to domestic and foreign affairs, but it has been especially asserted with respect to the latter. Section 624(d)(7) of the Foreign Assistance Act [22 U.S.C. § 2384(d)(7) (1970)] requires the delivery of certain documents and information to certain committees of Congress or the General Accounting Office. Upon failure to do so, disbursements to the Inspector General for Foreign Assistance—an official in the State Department—are to cease, although the President may "personally" waive this. For fiscal year 1960, section 533A(d) of the Mutual Security Act [of 1954, added by the Mutual Security Act of 1959, Pub. L. No. 86-108, § 401(h), 73 Stat. 253], a predecessor, did not contain this waiver authority . . . [The Attorney General said that] the section in question was "plainly invalid" and "unconstitutional" [because it did not contain the waiver provision]. The Attorney General implied that the involvement of foreign affairs reinforced the President's right [to withhold information]. Senator Robertson, in explaining a proposed but unsuccessful amendment to the above statutory provision which would have permitted the President to withhold information in certain circumstances, stated: "If the President, in keeping with the well-established principle under the Constitution of the right of the President to handle foreign policy, decides that the disclosure of some phase of foreign policy would be against the public interest, he can so certify, and the Congress will not be able to get the information."

Wallace, *supra*, at 475-76, quoting H.R. REP. No. 818, 87th Cong., 2d Sess. 165 (1961). See 41 OP. ATTY. GEN. 507 (1960).

cedural requirements of the freedom-of-information provision are almost certainly constitutional as applied to such exclusive presidential powers. The only requirements imposed on the Chief Executive by section 552(b)(1) are that when he seeks to resist the imposition by Congress of any open records requirements on his exclusive powers, the President must do so personally and with some specificity. Since those exclusive powers are vested only in the office of the President, it seems reasonable to require that he personally invoke their immunity from any alleged congressional interference. This is especially so since the confrontation is between two coequal branches of the national government; a presumption of validity attaches to this congressional action as with any other; Congress is closer to the people in a democratic sense than is the President; and the line delineating the zone of exclusive presidential powers is uncertain and highly debatable at best.

On the same basis, when the President claims freedom from congressional interference on the ground that he is exercising power vested exclusively in his office, he may reasonably be required to indicate "specifically" that for which he claims such freedom. This requirement would assure careful consideration by the Chief Executive as to the precise scope of the exclusive powers claimed in a particular situation and, thereby, minimize the confrontation between the two branches. Indeed, given the serious nature of the direct confrontation between two coequal branches, one may argue that personal action by the President "specifically" indicating the matters for which executive privilege is claimed is the *only* appropriate constitutional means for invoking the exclusivity of presidential powers against the legislature. Of course, the particular requirements of an "Executive order" and fair specificity are minimal procedural impositions and will in no way interfere with the President's ability to exercise his exclusive powers expeditiously and confidentially. As a consequence, the particular procedural requirements embodied in section 552(b)(1) may be imposed on the President in the execution of his exclusive powers even if such exclusive powers are otherwise wholly free from congressional interference substantively *or* procedurally.

As noted, the American Bar Association proposal is to substitute for section 553(a)(1) an exemption from the rule-making provision couched in the same language as that found in section 552(b)(1). Rule-making involving "military or foreign affairs functions" would be entirely exempt from section 553 only when it is "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." This proposal is obviously con-

stitutional on its face. It would certainly be constitutional as applied to all "military and foreign affairs function" rule-making that is a product of authority vested jointly in the President and Congress, or solely in Congress. On the basis of previous discussion regarding the constitutionality of section 552(b)(1) as applied to powers vested wholly in the President, the ABA proposal would probably also be constitutional as applied to rule-making derived from such powers.

As a result, the provision proposed by the ABA probably may be made the exclusive means by which executive immunity based on a need for secrecy can be properly asserted against normal rule-making requirements. What of rule-making involving "military or foreign affairs functions" that is a product of authority vested wholly in the President for reasons other than a need for secrecy? May Congress similarly designate section 553(b)(B) (and section 553(d)(3)) as the sole and exclusive means by which executive privilege is to be asserted for all other rule-making constitutionally exempt from section 553 because it is a product of authority vested wholly in the Executive? Or may the Chief Executive completely ignore section 553(b)(B) when he chooses to avoid usual rule-making procedures based on an assertion of such constitutional immunity that is grounded on a need, as an example, for speed alone? As noted earlier, through a reconstitution of the term "unnecessary," section 553(b)(B) could become an effective and desirable formally structured means by which executive immunity from usual rule-making procedures can be asserted in cases where it is not assertable under the proposed ABA provision.

The findings requirements and publication requirements of section 553(b)(B) (and again, section 553(d)(3)) could be constitutional as applied to "military and foreign affairs function" rule-making involving exclusive presidential powers, even though the same may not be said of the usual procedures mandated by section 553(b)-(e). If this is so, it is on the same basis that the requirements of section 552(b)(1) were deemed constitutional even as applied to matters delegated wholly to the executive branch. Within limits, Congress may define the means by which the President must assert the exclusiveness of his power against a contrary claim of congressional authority under a general statute. So long as that definition does not impair the President's ability to act as speedily and secretly as necessary, or interfere on the merits with the invocation of his constitutional immunity, the Executive must employ the congressionally defined means to assert effectively constitutional privilege against a generalized legislative policy.

In support of this view it should be reiterated that Congress is

“closer to the people than the President,” and its action must be presumed constitutional. Furthermore, the requirement of a formal finding of executive immunity followed by publication of that conclusion and its justification along with the rules involved is a minimal imposition on what otherwise may admittedly be the exercise of an exclusive executive power. This minimal imposition is also very helpful: the requirement of such a formal and public invocation of executive privilege against an imposition by a coequal branch of the national government may minimize legislative-executive conflicts and increase public participation in rule-making by inducing careful consideration of the desirability and lawfulness of a claim prior to its assertion. It also may minimize or avoid misunderstandings because the fact of the claim and its specific nature are made clear to all.

Of course, there may be some disagreement with the above conclusion as to the constitutionality of the ABA proposal and section 553(b)(B) when applied to those cases involving exclusive executive authority. Should the above view be in error, every provision of section 553, including the requirements of the proposed ABA provision and section 553(b)(B), would be invalid as applied to “military and foreign affairs function” rule-making that derives from powers vested entirely in the President. The theory would be that all “military and foreign affairs function” rule-making vested wholly in the President, for whatever reason, is likely to be immune from *every sort* of congressional regulation, substantive or procedural, including efforts by Congress to define the exclusive means by which executive immunity may be asserted in such cases.

C. *Conclusion as to Congress' Power*

Previous discussion demonstrates that Congress may impose the procedures contained in section 553(b)-(e) on most rule-making involving “military or foreign affairs functions.” Every requirement of section 553(b)-(e) would certainly be valid as applied to any “military or foreign affairs function” vested exclusively in Congress, or vested concurrently in both Congress and the President. And, of course, the President can agree to abide by the procedures desired by Congress when he exercises particular “military and foreign affairs functions” delegated exclusively to him. The mere existence of a general congressional act of this type, meant to apply to all rule-making, including that involving these particular functions, may be persuasive to the President in this connection.

Congress has not previously hesitated to enact general, open-

ended statutes regulating administrative procedure that are valid on their face merely because they might be invalid as applied in some cases. For example, the freedom-of-information provision of the original APA contained no special exemption of any kind for records involving "military or foreign affairs functions" as such, even though that provision was probably invalid as applied to the exercise of those functions delegated wholly to the President. No constitutional impediment seems, therefore, to stand in the way of a simple congressional repeal of section 553(a)(1), which would result in section 553(b)-(e) becoming applicable to all "military and foreign affairs function" rule-making. Of course, as noted, the usual rule-making procedures contained in section 553(b)-(e) are likely to be invalid as applied to those "military or foreign affairs functions" vested wholly in the President; but the ABA proposed provision and section 553(b)(B) are likely to be found valid as definitions of the exclusive means by which the President must assert his constitutional immunity from usual rule-making procedures when exercising powers vested wholly in his office.

Which of these functions are delegated exclusively to the President and are therefore otherwise beyond congressional control, and which are not, may be resolved on a case-by-case basis. As noted, however, those particular "military and foreign affairs functions" whose successful performance normally requires a special ability for speedy or secret action are more likely than others to be deemed vested exclusively in the Executive and beyond congressional authority—substantively or procedurally. Most "military or foreign affairs functions" are, however, not likely to be of this genre. Most authority in this area is vested concurrently in both the executive and legislative branches, or exclusively in Congress.

A large part of the rule-making undertaken by the executive branch that clearly or colorably may involve "military or foreign affairs functions" should be and may be subjected by Congress to usual rule-making procedures. Presidential authority over passports, for example, is certainly concurrent with that of Congress. *Zemel v. Rusk*³⁹⁴ held that the Passport Act of 1926³⁹⁵ embodied a grant of authority to the Executive to impose area restrictions on the right to travel. Implicit in the case is the notion that Congress could, if it desired, prohibit the imposition of any such area restrictions on the issuance of passports. By analogy, is there any doubt that Congress could require most or all rule-making involving passports to adhere

394. 381 U.S. 1 (1965).

395. 22 U.S.C. § 211a (1970).

to the section 553 procedures? At present, relying on the unqualified exemptions of section 553(a)(1), the State Department totally ignores usual rule-making procedures when it makes policy relating to passports. Similarly, Congress and the President have, in most cases, concurrent authority over the acquisition, use, and disposal of military property.³⁹⁶ The times, circumstances, and conditions under which the public may use such military property, acquire such military property, or sell property to the armed forces, may, therefore, be subjected by Congress to usual rule-making procedures. Yet, the Department of Defense almost always ignores section 553 when it makes such rules on the basis of the unqualified exemption found in section 553(a)(1). The Constitution certainly does not compel these results save in a small number of narrowly circumscribed situations.

VIII. CONCLUSION

In 1970 the American Bar Association adopted a resolution to the effect that the APA should be improved by

[b]roadening the coverage of provisions for notice and opportunity for public participation in rule-making where formal procedures are not required by limiting, in appropriate instances, exemptions now included in the Administrative Procedure Act so far as it may be done without occasioning delay or expense disproportionate to the public interest.³⁹⁷

The resolution was not utopian; it realistically called for the limitation or suspension of current exemptions from section 553 *only* where "it may be done without occasioning delay or expense disproportionate to the public interest."

Another critic of section 553(a)(1) has recently noted that

[i]n this era when the biggest undertaking of the federal government is military, and when the biggest department of government is Defense, there is reason to believe that democratic procedures [of the kind provided for in section 553] should more than ever be insisted upon in all rulemaking or policy making [involving military functions] that does not have to be kept secret—namely, most of it.³⁹⁸

The same is true of rule-making involving "foreign affairs functions." The need for democratic procedures of the kind found in section 553 is also especially great with regard to that sort of rule-making because the effects of this nation's foreign affairs so dominate our

396. In regard to Congress' authority, see U.S. CONST. art. IV, § 3.

397. Comment, *Current ABA Proposals for Amendment of the Administrative Procedure Act*, 23 AD. L. REV. 67, 72-73 (1970).

398. R. LORCH, *DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW* 104 (1969).

whole society today, including the direction in which it moves internally, that we all have a very large stake in rule-making involving that subject. The United States Senate Committee on the Judiciary has thus concluded that

the Military Establishment is so large and its reach so universal, and the rights of private citizens that its actions affect so numerous, that a general exception of its rulemaking from any procedure requirements can no longer be justified. The same observation can be made to a large degree with respect to the exercise of what the present act described as foreign affairs functions—by the Department of State, by the Treasury and by other agencies of the Federal Government having such functions.³⁹⁹

The Senate Committee is undoubtedly correct.

The reasons advanced to justify the current exemption from section 553 for *all* rule-making involving a “military or foreign affairs function” are insufficient. At most, those justifications dictate the need for a more narrowly tailored exemption from usual rule-making proceedings than is currently found in section 553(a)(1). The existing “impracticable, unnecessary, or contrary to the public interest” provision found in section 553(b)(B) and the “good cause” exemption found in section 553(d)(3) provide such an exclusion from the requirements of section 553(b)-(d). They would work an adequate accommodation of the competing interests involved, carefully balancing the need for public participation against the need for effective, efficient, expeditious, and inexpensive government administration. And an exemption from the right to petition conferred by section 553(e) seems no more necessary or justifiable for subsection (a)(1) rule-making than for rule-making already covered by section 553. When a special need for secrecy appears in cases of rule-making involving a “military or foreign affairs function,” it can adequately be handled by section 552(b)(1). If this is not sufficient, the language of section 552(b)(1) can be expressly carried over and incorporated into section 553. That is the ABA proposal. It seems wise because it will reassure the agencies involved that their legitimate needs for secrecy will in no way be interfered with by the repeal of section 553(a)(1).

The solution proposed here to the difficulties arising from the repeal of section 553(a)(1) is bound to put some additional burden on the agencies that will have to implement it. But the burden involved is not likely to be very large—especially in light of the availability of narrowly tailored class exemptions—and that burden would

399. S. REP. NO. 1234, 89th Cong., 2d Sess. 11 (1966) (a report on S. 1336 amending the Administrative Procedure Act).

seem clearly outweighed by the benefits obtained from the repeal of section 553(a)(1) because it will guarantee increased public participation in rule-making of the kinds currently excluded from usual procedures by that provision.

The proposal made in this study would only affect the section 553(a)(1) exemptions for rule-making involving "military or foreign affairs functions." It would not affect, in any way, the existing section 553(a)(2) exemption for rule-making relating to "agency management or personnel." Similarly undisturbed would be the exemption from section 553(b)-(d) of all "interpretative rules" and "general statements of policy" found in section 553(b)(A) and section 553(d)(2). When combined with section 553(b)(B) and the "good cause" exemption found in section 553(d)(3), the above exemptions should provide adequate leeway for agencies to meet their responsibilities properly.

Several desirable consequences would flow from repeal of section 553(a)(1). It would eliminate an unqualified exemption that is susceptible to wide application and misapplication, which may defeat the policy of public participation in rule-making. Repeal would also make more effective the previously proposed elimination of the section 553(a)(2) exemption for rules relating to "public property, loans, grants, benefits, or contracts." Even after the elimination of these exclusions, rules relating to those subjects that also involve "military or foreign affairs functions" will be free from usual rule-making requirements under section 553(a)(1). Repeal of the former exemption accompanied by repeal of subsection (a)(1) would close this gap. It would assure that *all* rules relating to "public property, loans, grants, benefits, or contracts" will clearly, and without question, be subject to the requirements of section 553, and that they will be excused from those requirements *only* where particular justifications under more narrowly tailored exemptions dictate that result.

On a practical level, elimination of section 553(a)(1) would mean that most substantive⁴⁰⁰ rules involving the acquisition and disposal of all sorts of military property would clearly be subject to usual advance notice and public participation requirements. This includes substantive rules describing the terms and conditions of such acquisition or disposal and the particular circumstances under which it shall take place. Most rules determining whether, and under what conditions, the public may utilize the property, facilities, and services of

400. The exemption for "rules of agency organization, procedure, or practice" found in 5 U.S.C. § 553(b)(A) (1970) should not be forgotten. It is dubious, however, whether that exemption deserves to be continued.

the armed forces would also be clearly subject to usual advance notice and public participation requirements. The same may be said of most substantive rules involving the terms and conditions upon which persons may join the armed forces or receive loans, grants, benefits, or contracts from the armed forces. Repeal of this exemption would also mean that usual procedures will have to be followed in the making of substantive regulations governing such things as the conduct of ROTC programs, the issuance of passports and visas, and the administration of the immigration laws and foreign exchange programs. Rules issued to control imports or exports or otherwise involving foreign trade would also clearly be subjected to usual procedural requirements in most cases. The same may be said for most rules implementing the regulation of American seamen and ships abroad and the regulation of American business abroad. Rule-making implementing foreign aid programs would also be clearly subjected to advance notice and public participation requirements in most cases. The above examples are only illustrative.

A discouraging discovery made in the course of preparing this Article is that a number of agencies opposing modification of section 553(a)(1) have apparently not re-examined their position seriously during the past few years. Statements opposing repeal of these exemptions that were prepared as long as five or ten years ago are still used by some agencies as the principal basis for articulating their position. The language of a few such statements has sometimes not even been modified to reflect subsequent changes in the law, or obvious changes in circumstances, when they were issued in light of a new inquiry on this subject. It is hoped that this re-examination of the exemption can at least provoke these agencies into conducting a careful reconsideration of their position on this question. That reconsideration should result in a realization that repeal of the exemption for rule-making involving "military or foreign affairs functions" need not seriously disadvantage them, in light of existing exemptions contained in other portions of section 553. The national interest must not be compromised. Repeal of section 553(a)(1) will not do so. The danger is that the mere involvement of "military and foreign affairs functions" will make the matter so politically sensitive that it will not be able to receive a fair hearing on the merits by the Congress or the agencies that make such rules. It is to be hoped that this will not occur.