Stanford Law Review

Volume 78 June 2026

ESSAY

The National Security Administrative State

Laura K. Donohue*

Abstract. The number of federal departments and agencies focused on countering threats to the United States, protecting soldiers and civilians, strengthening the country's physical and digital infrastructure, and defending the political and constitutional structure from (primarily foreign) attack dwarfs the number in existence when Congress introduced the Administrative Procedure Act (APA). That statute sought to prevent the country from slipping into authoritarianism while ensuring that the United States retained the flexibility necessary for its own defense. It included exceptions related to military authority and foreign affairs alongside substantive and procedural requirements. Despite the carveouts, the APA has played an inextricable role in regulating the "National Security Administrative State" (NSAS), comprised of executive branch entities directed by Congress and the President to promulgate legally binding instruments to secure national security at home and abroad. Many of its provisions have a profound impact on the rights to life, liberty, and property; statutory and constitutional interpretation; and citizens' First Amendment right of access to government information. Yet the structure of the NSAS and the APA's role in limiting government overreach have flown under the radar, with treatises and scholarship all but ignoring it.

This Essay breaks new ground, for the first time defining and providing an overview of the NSAS. While many instruments remain classified, an increasing number are subject to the APA. Courts have narrowed the foreign affairs exception and, in relation to the military exemption, become more sympathetic to servicemember claims. The APA's integration, moreover, is likely to grow. The Supreme Court's reasoning in *Loper Bright Enterprises v. Raimondo* is consistent with the APA's standards of review and comes at a time when courts have become less willing to grant deference in areas touching on national security. In light of the profound impact of the national security infrastructure on individual rights, the time is ripe to take account of the NSAS as an administrative entity.

* J.D., Ph.D., Scott K. Ginsburg Professor of Law and National Security, Georgetown Law. Special thanks to Lisa Heinzerling and Eloise Pasachoff and to the Georgetown Law Faculty Workshop for helpful comments on the Essay. Sara Burriesci, Julian Martinez, and Ge Heon You provided valuable research assistance.

Table of Contents

Introduction

In 1946, when Congress passed the Administrative Procedure Act (APA), the Department of Defense (DOD) did not exist.[1] There was no Central Intelligence Agency (CIA), much less an intelligence community made up of eighteen different entities.[2] It would be thirty years until the legislature introduced the International Emergency Economic Powers Act (IEEPA).[3] The Antiterrorism and Effective Death Penalty Act (AEDPA) would not emerge until 1996,[4] with statutes like the Countering America's Adversaries Through Sanctions Act (CAATSA) coming even decades later.[5] More than half a century would elapse before the creation of the Defense Federal Acquisition Regulation Supplement,[6] much less provisions authorizing extraordinary detention, interrogation, and targeted killing.[7]

A complex body of law now marks what I term the "National Security Administrative State" (NSAS), which is composed of executive branch entities directed by Congress and the President to promulgate legally binding

1. *See* Administrative Procedure Act, Pub. L. No. 79-404, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *see also* National Security Act of 1947, Pub. L. No. 80-253, § 201, 61 Stat. 495, 499 (creating the National Military Establishment); National Security Act Amendments of 1949, Pub. L. No. 81-216, § 12(a), 63 Stat. 578, 591 (renaming the National Military Establishment to the Department of Defense).

2. National Security Act of 1947, § 102, 61 Stat. at 497 (codified as amended at 50 U.S.C. § 3023) (creating the CIA); *see, e.g.*, NAT'L SEC. COUNCIL, NATIONAL SECURITY COUNCIL INTELLIGENCE DIRECTIVE NO. 9, COMMUNICATIONS INTELLIGENCE 5 (1952), https://perma.cc/ERN8-9ZPD (creating the National Security Agency); DEP'T OF DEF., DIRECTIVE TS 5105.23, NATIONAL RECONNAISSANCE OFFICE (1962) (creating the National Reconnaissance Office); DEP'T OF DEF., DIRECTIVE NO. 5105.21, DEFENSE INTELLIGENCE AGENCY (1961) (creating the Defense Intelligence Agency); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 921, 117 Stat. 1392, 1568-70 (2003) (codified as amended in scattered sections of the U.S. Code) (creating the National Geospatial Intelligence Agency).

3. *See* International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1625, 1625-29 (1977) (codified as amended at 50 U.S.C. §§ 1701-1706).

4. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

5. *See* Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017) (codified as amended in scattered sections of the U.S. Code).

6. Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, § 4, 93 Stat. 648, 649-50 (codified as amended at 41 U.S.C. § 405) (directing the Office of Management and Budget to issue policies to develop a uniform procurement system); Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42102, 42102 (Sept. 19, 1983) (to be codified at 48 C.F.R. ch. 1) (implementing the policies developed).

7. *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600 (codified as amended in scattered sections of 10 U.S.C.); Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739-44 (codified in scattered sections of the U.S. Code); Memorandum from David J. Barron, Acting Assistant Att'y Gen., to the Att'y Gen. 1 (Feb. 19, 2010), https://perma.cc/W3NP-CAAZ.

instruments to secure national security at home and abroad.[8] Many of its provisions have a profound impact on the rights to life, liberty, and property; statutory and constitutional interpretation; and citizens' First Amendment right of access to government information.[9] Yet the structure of the NSAS and the APA's role in limiting overreach and ensuring transparency and accountability have flown under the radar, with scholarship all but ignoring the topics.[10]

This lack of attention matters. The APA plays a critical role in holding the executive to account and ensuring that the regulatory state is responsive to those impacted by its decisions. Its stipulations give agency rules creating legal rights or obligations the force of law. The statute requires that instruments be publicly available.[11] Agencies must provide notice of proposed rulemaking, conveying

8. I use the term "national security" in relation to the interests it is intended to serve: the preservation of peace, provision of common defense, and protection of U.S. constitutional structures. *See* Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1577-87 (2011) (discussing the evolution of "national security"). This approach provides a broader foundation than that adopted by Elena Chachko, who considers administrative national security in individual terms: bureaucratic decisions targeting threats to protect national security, frequently via complex interagency processes. *See* Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1075 (2020).

9. *See, e.g.*, U.S. DEP'T OF JUST., PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES §§ 1-3 (2013), https://perma.cc/892N-NEFE (establishing procedures for undertaking direct action against "terrorist targets," including surveillance, capture, and lethal force); Exec. Order No. 13224, 3 C.F.R. 786, 787 (2002) (authorizing the Secretary of State to designate and block the assets of suspected terrorists).

10. *See, e.g.*, STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL E. HERZ, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 511-38, 634 (9th ed. 2022) (omitting any discussion of national security from "Exceptions to Notice-and-Comment Requirements"); WILLIAM FUNK, SIDNEY SHAPIRO & RUSSELL WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE: A CONTEMPORARY APPROACH 822-30 (7th ed. 2025) (omitting any discussion of the military or foreign affairs exceptions, with only 8 out of 928 pages addressing the handling of classified materials under the Freedom of Information Act); BERNARD SCHWARTZ, ROBERTO L. CORRADA & J. ROBERT BROWN, ADMINISTRATIVE LAW: A CASEBOOK, at xi-xxvii (2022) (omitting any discussion of entities within the NSAS or how courts have applied the APA to its associated instruments); RICHARD J. PIERCE, JR. & KRISTIN E. HICKMAN, ADMINISTRATIVE LAW TREATISE § 5.10 (7th ed. 2025) (making only cursory reference to the foreign affairs exception). Only one article and one student note refer to the "National Security Administrative State." *See* Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 890 (2014); Jacob Aaron Pagano, Note, *Contrary to National Security: The Rise of the Entity List in U.S. Policy Towards China and Its Role in the National Security Administrative State*, 61 COLUM. J. TRANSNAT'L L. 453, 477 (2023); *see also* Robert Knowles, *Delegating National Security*, 98 WASH. U. L. REV. 1117, 1135 (2021) (discussing "national security administrative determinations"); Chachko, *supra* note 8, at 1066 (addressing "administrative national security" in relation to individualized regulations).

11. 5 U.S.C. § 552 (a)(1)(C)-(E).

the subject matter, adjacent issues, and governing legal authority.[12] They must take on board all submissions prior to final determinations.[13] Article III courts, in turn, "shall . . . hold unlawful and set aside any agency action" deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[14] Nor may agencies act "contrary to a constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations."[15] In addition, they must act consistent with procedural requirements and in a manner warranted by the factual record.[16]

Although the APA was designed to apply broadly, it makes four accommodations for national security.[17] First, the definition of "agency," central to the statute's design, excludes "courts martial and military commissions" as well as "military authority exercised in the field in time of war or in occupied territory."[18] Second, the APA waives rulemaking requirements "to the extent that there is involved . . . a military or foreign affairs function of the United States."[19] Third, it excuses "the conduct of military or foreign affairs functions" from adjudication requirements.[20] Fourth, the APA's waiver of sovereign immunity for non-monetary suits embeds the definition of "agency" along with its exemptions, so parties may not seek injunctive relief against certain military entities.[21] At a sub-statutory level, while guidance documents would normally incorporate "any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the Department that is intended to have general applicability and future effect on

12. *Id.* § 553(b).

13. *Id.* § 553(c).

14. *Id.* § 706(2)(A); *see also* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (stating that an agency rule is arbitrary and capricious where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

15. 5 U.S.C. § 706(2)(B)-(C).

16. *Id.* § 706(2)(D), (F).

17. Broader exceptions also may apply. *See, e.g.*, *id.* § 553(b)(A) (excepting "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice"); *id.* § 553(b)(B) (setting aside "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

18. *Id.* §§ 551(1)(F)-(G), 701(b)(1)(F)-(G).

19. *Id.* § 553(a)(1). For scholarship examining the foreign affairs and military authority exceptions, see Stephen Migala, *The Lost History of the APA's Foreign Affairs Exception*, 31 GEO. MASON L. REV. 119 (2023); and Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673 (2010).

20. 5 U.S.C. § 554(a)(4).

21. *See id.* §§ 701(b)(1)(F)-(G), 702.

the behavior of regulated parties,"[22] the DOD has adopted a blanket exemption for "[g]uidance pertaining to military or foreign affairs functions, or to a national security or homeland security function of the United States."[23]

Other impediments to applying APA provisions to the NSAS abound. Many national security-related matters are closely attributable to the President, whose actions the Supreme Court in *Franklin v. Massachusetts* placed beyond the APA's purview.[24] Lower courts limit *Franklin* "to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties."[25] So while the judiciary may review the President's actions for constitutionality—as it did in *Youngstown Sheet & Tube Co. v. Sawyer*[26]—those actions "are not reviewable for abuse of discretion under the APA."[27] Judicial reticence to interfere in matters in which the executive asserts superior knowledge and experience and which, if undermined, could have serious consequences, may further dampen the courts' appetite to scrutinize the NSAS.[28] These considerations undercut the requirement that courts set aside agency actions which are "arbitrary [and] capricious," "contrary to constitutional right," or "in excess of statutory jurisdiction, authority, or limitations."[29]

Sometimes, these barriers have curtailed APA challenges.[30] But it would be a mistake to assume that the statute lacks applicability to the NSAS. To the contrary, *hundreds* of cases implicate the APA. These claims target everything

22. 32 C.F.R. § 339.1(c) (2025).

23. *Id.* § 339.1(d)(12).

24. *See* 505 U.S. 788, 800-01 (1992); *see also* Dalton v. Specter, 511 U.S. 462, 467-68, 470-71 (1994) (reiterating that final decisions taken by the President fall outside the APA); Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991) (finding "that Congress did not intend to subject the President to the APA").

25. *See* Pub. Citizen v. U.S. Trade Representative, 5 F.3d 549, 552 (D.C. Cir. 1993).

26. 343 U.S. 579, 582 (1952).

27. *Franklin*, 505 U.S. at 801.

28. *See* Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."); *see also* Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

29. *See* 5 U.S.C. § 706(2)(A)-(C).

30. *See, e.g.*, City of New York v. Permanent Mission of India to the United Nations, 618 F.3d 172, 201 (2d Cir. 2010) (holding that "[t]he State Department's regulation of the reciprocal treatment to be afforded foreign missions" falls under the foreign affairs exception).

from intelligence,[31] munitions,[32] detention and interrogation,[33] and federalization of the National Guard,[34] to asset blocking and forfeiture,[35] tariffs,[36] border security,[37] and security clearances.[38] In numerous cases, courts have held agencies in violation of the statute, prompting regulatory change.[39]

Congress, moreover, has integrated the APA's approach into statutes governing parts of the NSAS. AEDPA provides for the Secretary of State to designate Foreign Terrorist Organizations and the Secretary of the Treasury to block associated accounts.[40] In language echoing the APA, where designees challenge their listing, Article III courts "shall hold unlawful and set aside a designation" deemed "arbitrary, capricious, an abuse of discretion," "contrary to constitutional right, power, privilege, or immunity," "in excess of statutory jurisdiction, authority, or limitation," "lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court" or not made "in accord with the procedures required by law."[41] Other national security-related statutory provisions act as a stand-in for APA procedures.[42]

This Essay breaks new ground, providing a framework for how to understand the NSAS and its interaction with the APA. It begins by offering a definition of the NSAS and overview of its regulatory provisions. Although some instruments are classified, an increasing number of rules and procedures

31. *See, e.g.*, Palantir USG, Inc. v. United States, 904 F.3d 980, 985, 989 (Fed. Cir. 2018).

32. *See, e.g.*, Prutehi Litekyan: Save Ritidian v. U.S. Dep't of the Airforce, 128 F.4th 1089, 1099-100, 1107-08 (9th Cir. 2025).

33. *See, e.g.*, Vance v. Rumsfeld, 701 F.3d 193, 195, 197 (7th Cir. 2012).

34. *See, e.g.*, Newsom v. Trump, No. 25-cv-04870, 2025 WL 2501619, at *1 (N.D. Cal. Sept. 2, 2025).

35. *See, e.g.*, Vassiliades v. Rubio, No. 24-1952, 2025 WL 1905654, at *1 (D.D.C. July 10, 2025).

36. *See, e.g.*, *In re* Section 301 Cases, 570 F. Supp. 3d 1306, 1315, 1323-24 (Ct. Int'l Trade 2022).

37. *See, e.g.*, California v. Trump, 963 F.3d 926, 933, 941 (9th Cir. 2020).

38. *See, e.g.*, Oryszak v. Sullivan, 565 F. Supp. 2d 14, 16, 18 (D.D.C. 2008), *aff'd*, 576 F.3d 522 (D.C. Cir. 2009).

39. *See, e.g.*, Latif v. Holder, 28 F. Supp. 3d 1134, 1139, 1163 (D. Or. 2014) (holding that the redress process for the No Fly List violated the APA); Notice Regarding New Redress Procedures at 1, Mohamed v. Holder, 266 F. Supp. 3d 868 (E.D. Va. 2017) (No. 11-CV-0050) (informing the Court that the government, post-*Latif v. Holder*, had implemented changes to the redress process in an effort to bring it in line with the APA).

40. *See* 8 U.S.C. § 1189(a)(1), (a)(2)(C).

41. *Compare id.* § 1189(c)(3), *with* 5 U.S.C. § 706(2)(A)-(E).

42. *See, e.g.*, 50 U.S.C. § 1881a(d)(2), (e)(2), (f)(1)(C), (j) (requiring the government to submit targeting, minimization, and querying procedures to the Foreign Intelligence Surveillance Court to determine their statutory and constitutional sufficiency); *id.* § 1871(a)(4) (requiring the Attorney General to provide Congressional committees with significant legal interpretations); *id.* § 1871(c)(1) (requiring notice to the committees of any judicial decision, order, or opinion containing a significant legal interpretation).

are subject to judicial scrutiny. Over time, courts have narrowed the APA's foreign affairs exception.[43] For the military exemption, generally sustained in relation to defense installations and procurement, courts are more circumspect in regard to servicemember claims.[44] The waiver of sovereign immunity has similarly gained purchase.[45] Although it might appear that the Supreme Court's recent "change in interpretive methodology" heralded by its rejection of the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo* would accelerate application of the APA to the NSAS,[46] its immediate impact should not be overstated: Few cases in the NSAS have historically implicated *Chevron*. The reasoning of *Loper Bright*, however, is consistent with the APA's standards of review[47] and comes at a time when courts have become less willing to grant deference in areas touching on national security.[48] Rulings already show judicial willingness to apply APA standards.[49] These developments may well undermine recent efforts by the Trump Administration to widen what falls within the foreign affairs exception.[50]

I. Overview of the NSAS

In the years since the passage of the APA, the NSAS has evolved into an elaborate regulatory structure.[51] It is comprised of departments and agencies entrusted with protecting the health and welfare of soldiers and civilians, the

43. *See infra* Part III.A.

44. *See infra* Part III.B.

45. *See infra* Part III.C.

46. *See* 144 S. Ct. 2244, 2263, 2273 (2024) (overturning the *Chevron* doctrine); *see also* SEC v. Jarkesy, 144 S. Ct. 2117, 2131 (2024) (determining that post-*Loper Bright*, Securities and Exchange Commission actions are subject to the Seventh Amendment); McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp., 145 S. Ct. 2006, 2013 (2025) (holding that post-*Loper Bright*, district courts are not bound to agency determinations under the Hobbs Act).

47. *See Loper Bright*, 144 S. Ct. at 2263 ("When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."); *id.* at 2273 ("Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. . . . But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.").

48. *See generally* Laura K. Donohue, *Surveillance, State Secrets, and the Future of Constitutional Rights*, *in* 2022 THE SUPREME COURT REVIEW 351 (David A. Strauss, Geoffrey R. Stone, Justin Driver & William Baude eds., 2022) (discussing courts' increasing willingness to challenge the government's overbroad state secrets assertions).

49. *See infra* Part III.

50. *See infra* Part IV.

51. *See infra* Figure 1.

physical and digital infrastructure, and the political and constitutional structure of the United States from (primarily foreign) attack. It encompasses traditional military and foreign affairs institutions, as well as entities given jurisdiction over discrete elements of national security. Some are obvious contenders. The DOD, the Department of State, the Department of Energy (DOE), the Department of Homeland Security (DHS), the Department of the Treasury, the CIA, and the Office of the Director of National Intelligence come to mind.

Others are not as obvious or embedded in the infrastructure. The Food and Drug Administration's (FDA) Office of Regulatory and Emerging Sciences, for instance, secures public health against chemical, biological, radiological, and nuclear terrorism.[52] The Animal and Plant Health Inspection Service enhances protections against terrorist "introduction of plant and animal disease organisms" and develops technologies to counter "intentional outbreaks of plant and animal disease arising from acts of terrorism."[53] The Department of Transportation houses the Office of Intelligence Security and Emergency Response, which contains both an Intelligence Division and a National Security Policy and Preparedness Division.[54]

While it would be difficult to map out the entire NSAS—not least because of constant bureaucratic expansion, contraction, and reorganization—even a basic overview provides insight into its breadth and complexity.[55] Components of the Executive Office of the President, executive departments, and independent agencies all contribute to the national security infrastructure.[56]

52. *See Extramural MCM Regulatory Science Research*, U.S. FDA (Mar. 29, 2024), https://perma.cc/DH9M-NLYX (stating that the Office of Regulatory and Emerging Science helps to develop medical countermeasures "to respond to chemical, biological, radiological, and nuclear threats").

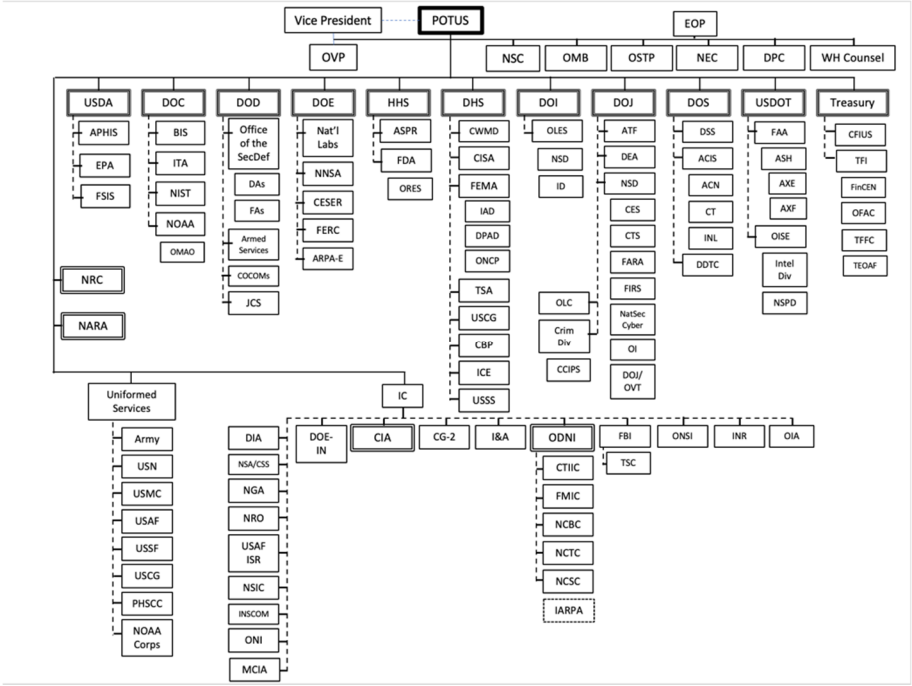
53. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, § 331(a), 116 Stat. 594, 678 (codified at 7 U.S.C. § 8320(a)).

54. *See Intelligence, Security and Emergency Response*, U.S. DEP'T TRANSP., https://perma.cc/K4YT-JKWU (last updated Feb. 23, 2024); *Intelligence Division*, U.S. DEP'T TRANSP., https://perma.cc/BQZ8-VF8P (last updated Feb. 23, 2024); *National Security Policy and Preparedness Division*, U.S. DEP'T TRANSP., https://perma.cc/B5CZ-CWMQ (last updated Feb. 23, 2024).

55. *See generally* Laura K. Donohue, *The National Security Administrative State*, 78 STAN. L. REV. 1149 app. 1 (2026) [hereinafter Appendix].

56. *See id.* pts. I-VI.

Figure 1
Select Entities Within the National Security Infrastructure[57]



The associated regulatory structure is enormously complex. Entities issue instruments that apply department- or agency-wide and in some instances cross-department or cross-agency. The DOD, for example, issues Directives (DODDs), Instructions (DODIs), and Manuals (DODMs), each keyed to the prior instrument, as well as Administrative Instruments and Directive-type Memoranda (DTM).[58] Each performs a slightly different function, with DODDs creating policy, assigning responsibilities, and delegating authority; DODIs implementing policies laid out in chartering directives and assigning responsibilities in functional areas; and DODMs implementing directives and instructions and identifying uniform procedures for managing and operating systems.[59] DTMs are for time-sensitive matters impacting the department, with a one year (and twenty-page) limit.[60] These directives provide the grounding for rules issued by all DOD Components, which include, inter alia, the Military

57. For detailed discussion of each entity, see *id.* Relevant acronyms are defined therein.

58. *See* DEP'T OF DEF., DOD INSTRUCTION 5025.01: DOD ISSUANCES PROGRAM 4, 13, 17, 37-39 (rev. ed. 2023), https://perma.cc/H2DW-RUXA.

59. *Id.* at 17.

60. *Id.* at 5, 17, 39.

Departments, the Office of the Chair of the Joint Chiefs of Staff, Combatant Commands, the Office of the Inspector General, and Defense Agencies.[61]

Agencies at a sub-department level and outside the departmental structure also maintain their own regulations and issue rules which, at times, can be binding department-wide as well as on entities located in other departments. Nine of the eighteen members of the Intelligence Community, for instance, are housed in the DOD: five from the uniformed services (the Army, Navy, Marine Corps, Air Force, and Space Force), and four Defense Agencies (the Defense Intelligence Agency, National Security Agency (NSA)/Central Security Service, National Reconnaissance Office, and National Geospatial Intelligence Agency).[62] Each issues its own instruments, which are keyed to the broader DOD regulatory infrastructure but serve unique internal functions.[63] Some intelligence elements are program managers, with the result that certain of their instruments bind not just subordinate components, but the rest of the department and, in some cases, the entire Intelligence Community. The Defense Intelligence Agency, for instance, has the lead for human intelligence within the DOD, while NSA directives governing signals intelligence apply across the federal government.[64] While agency-specific instruments may be classified, all executive orders and presidential proclamations with general applicability and legal effect must be published in the *Federal Register*,[65] as must other "documents or classes of documents that the President [determines] . . . have general applicability and legal effect," or which Congress requires to be published.[66] The NSAS is subject to myriad such devices, such as Executive Order 12,333, which establishes the framework for intelligence activities.[67] Related executive orders

61. *See* DEP'T OF DEF., *supra* note 58, at 37.

62. *See Members of the IC*, OFF. DIR. NAT'L INTEL., https://perma.cc/9NV9-GX3P (archived Feb. 21, 2026).

63. *See* Appendix, *supra* note 55, at pts. IV-V.

64. *See* DEP'T OF DEF., DIRECTIVE NO. 5200.37, at 3, 5-6 (2025), https://perma.cc/B5RN-B7S5; Exec. Order No. 12333, 3 C.F.R. 200, 208 (1982).

65. Federal Register Act, Pub. L. No. 74-220, § 5(a), 49 Stat. 500, 501 (1935) (codified as amended at 44 U.S.C. § 1505(a)(1)). Unlike most executive orders, Presidential Emergency Action Documents—draft executive orders prepared in anticipation of certain national events—are classified. *See* LAURA K. DONOHUE & DAVID SADOFF, INTELLIGENCE LAW (forthcoming 2026) (manuscript at 24) (on file with author). Memoranda of Notifications, which alter or reflect covert action findings, also tend to be classified. *See id.* at 29.

66. 44 U.S.C. § 1505(a)(2)-(3) (2023).

67. Exec. Order No. 12333, 3 C.F.R. 200, 200-01 (1982), *as amended by* Exec. Order No. 13284, 3 C.F.R. 161 (2004); Exec. Order No. 13355, 3 C.F.R. 218 (2005); Exec. Order No. 13470, 3 C.F.R. 218 (2009). For precursors to Executive Order 12,333, see Exec. Order No. 11905, 3 C.F.R. 90, 91 (1977); and Exec. Order No. 12036, 3 C.F.R. 112, 112 (1979), *as amended by* Exec. Order No. 12139, 3 C.F.R. 397 (1980).

create agencies,[68] establish inquiries,[69] control information,[70] declassify materials,[71] and govern how information is collected.[72] On the sanctions side, executive orders target terrorism,[73] illicit drug trafficking,[74] human rights abuses,[75] and election interference.[76] Various other substantive areas are also implicated.[77]

Department- and agency-level regulations implement presidential issuances. Executive Order 13,526, for instance, lays out the requirements for classifying National Security Information (NSI).[78] It applies to agencies, defined as any executive agency, military department, or executive branch entity coming into possession of classified information. In June 2010, citing the APA notice exception for rules relating to agency procedures, the National Archives' Information Security Oversight Office (ISOO) issued a final rule, anticipating judicial review.[79] It required that original classification authorities "be able to support the decision in writing, including identifying or describing the damage, should the classification decision become the subject of a challenge or access demand pursuant to the Order or law."[80]

Other NSI-related instruments track the APA's full requirements. Following issuance of Executive Order 13,556,[81] the ISOO published a proposed rule on Controlled Unclassified Information in the *Federal Register*, opening a 60-day public comment period during which the agency received written responses, along with "numerous phone calls, email questions, and requests for

68. *See* Exec. Order No. 13328, 3 C.F.R. 139, 139 (2004).

69. Exec. Order No. 13354, 3 C.F.R. 214, 214 (2005).

70. *See* Exec. Order No. 13529, 3 C.F.R. 298, 298 (2010), *as amended by* Exec. Order No. 13526, 75 Fed. Reg. 1013 (Jan. 8, 2010); Exec. Order No. 12968, 3 C.F.R. 391, 391 (1996); Exec. Order No. 13549, 3 C.F.R. 234, 234 (2011); Exec. Order No. 13556, 3 C.F.R. 267, 267 (2011).

71. *See* Exec. Order No. 14040, 3 C.F.R. 632, 632 (2022); Exec. Order No. 12951, 3 C.F.R. 323, 323-24 (1996).

72. *See, e.g.*, Exec. Order No. 14086, 3 C.F.R. 447, 447 (2023); Exec. Order No. 13491, 3 C.F.R. 199, 199 (2010).

73. *See* Exec. Order No. 13224, 3 C.F.R. 786, 786-87 (2002); Exec. Order No. 13894, 3 C.F.R. 382, 382 (2020).

74. *See* Exec. Order No. 14059, 3 C.F.R. 715, 715 (2022).

75. *See* Exec. Order No. 13810, 3 C.F.R 379, 379-80 (2018).

76. *See* Exec. Order No. 14024, 3 C.F.R. 542, 542-43 (2022).

77. *See, e.g.*, Exec. Order No. 14161, 90 Fed. Reg. 8451, 8451-52 (Jan. 30, 2025) (enhancing immigration vetting and screening across agencies); Proclamation No. 10949, 90 Fed. Reg. 24497, 24499-501 (June 10, 2025) (restricting and limiting the entry of nationals from twelve countries).

78. Exec. Order No. 13526, 3 C.F.R. 298, 298 (2010).

79. *See* 5 U.S.C. § 553(b)(A); Classified National Security Information, 75 Fed. Reg. 37254, 37254 (June 28, 2010) (to be codified at 32 C.F.R pts. 2001 and 2003).

80. 32 C.F.R. § 2001.10 (2024).

81. *See* Exec. Order No. 13556, 3 C.F.R. 267 (2011).

information or clarification."[82] The ISOO treated the proposed changes to the handling of sensitive materials within the broader regulatory structure.[83] Instruments outside NSI similarly reflect the extent to which national security regulations are embedded in the administrative state, with proposed and final rules published in the *Federal Register*.[84]

Despite the proliferation of NSAS agencies and regulatory instruments, much of the structure has flown under the radar of administrative law. In addition to a dearth of articles on the topic, casebooks all but ignore it.[85] This lack of attention is exceptional, not least because the APA was in part born of dueling national security concerns.

II. History of the APA's National Security Exceptions

Growing executive power in the wake of the New Deal generated alarm about the future of American democracy.[86] Simultaneously, the threat posed by authoritarian regimes overseas yielded support for increased military power and greater flexibility at home and abroad.[87] Thus, even as it endorsed notice, public hearings, and judicial review, an early APA bill excluded from its remit "any matter concerning or relating to the conduct of military or naval operations," and certain national security agencies and decisions, such as those related to trial by courts martial.[88]

---

82. *See* Controlled Unclassified Information, 81 Fed. Reg. 63324, 63324 (Sept. 14, 2016) (to be codified at 32 C.F.R. pt. 2002).

83. *See id.* (citing obligatory review under executive orders that "direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity)").

84. *See, e.g.*, 50 U.S.C. § 4565 (2023); Provisions Pertaining to Certain Investments in Persons in the United States by Foreign Persons, 85 Fed. Reg. 3112, 3125 (Jan. 17, 2020) (to be codified at 31 C.F.R. § 800.101); Penalty Provisions, Provision of Information, Negotiation of Mitigation Agreements, and Other Procedures Pertaining to Certain Investments in the United States by Foreign Persons and Certain Transactions by Foreign Persons Involving Real Estate in the United States, 89 Fed. Reg. 93179, 93185 (Nov. 26, 2024) (to be codified at 31 C.F.R. § 802.901).

85. *See supra* note 10.

86. *See* 84 CONG. REC. 9392-93 (1939) (report of Sen. King); 86 CONG. REC. 4534 (1940) (statement of Sen. Michener); *Administrative Law: Hearings on H.R. 4236, H.R. 6198, and H.R. 6324 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 76th Cong. 23 (1939) [hereinafter *1939 Hearings*] (statement of Colonel O.R. McGuire, Counsel, General Accounting Office).

87. *See generally* WILLIAM YANDELL ELLIOTT, THE NEED FOR CONSTITUTIONAL REFORM: A PROGRAM FOR NATIONAL SECURITY (1935) (arguing for a new constitutional structure and greater aggression to counter Germany, Italy, and Japan); PENDLETON HERRING, THE IMPACT OF WAR: OUR AMERICAN DEMOCRACY UNDER ARMS (1941) (emphasizing the need to build military power).

88. S. 915, 76th Cong. § 6(b) (1939).

Despite the carveout, Secretary of War Harry Woodring balked at *any* administrative restrictions.[89] Many Army and War Department regulations operated at the time.[90] Woodring argued that forcing amendments to go through the proposed processes would have a deleterious effect.[91] The language would "authorize and encourage" each person "in the military service to challenge the official decisions, orders, and actions of his commander."[92] The Army and War Departments would be sucked into "a hopeless tangle of red tape, obstructing and delaying the discharge of military functions, without substantially serving any useful purpose whatever."[93] He urged that Congress instead adopt a blanket exemption for "all matters concerning or related to the operations of the War Department and the Army."[94]

The bill's framers undertook revisions, removing the qualifier "in time of war or civil insurrection" thereby creating a broad exemption for "the conduct of military or naval operations."[95] The equivalent House measure followed course, for which it, too, earned criticism for still not going far enough: Other activities undertaken by the military had a significant impact on "national defense, such as river and harbor improvements, and purchase of munitions and supplies."[96] Critics continued to raise concerns about the national security implications with the result that by the time it wended its way through Congress, the bill had acquired an exemption for "any matter concerning or relating to the military or naval establishments, including . . . any other agency or authority hereafter created to expedite military and naval defense."[97] President Franklin D. Roosevelt nevertheless sided with the Department of War and vetoed the bill, partly because it failed to protect civilian "agencies engaged in National Defense functions," such as the Departments of Commerce and of the Treasury.[98] Their regulations, which in the interests of national security ought to "be made with utmost promptness, would be subjected to delay."[99] The

89. *See 1939 Hearings*, *supra* note 86, at 102-03 (statement of Hon. Harry H. Woodring, Secretary, Department of War).

90. *Id.* at 102.

91. *Id.* at 102-03.

92. *Id.* at 103.

93. *Id.*

94. *Id.* Stephen B. Gibbons, the Acting Secretary of the Treasury, similarly argued that the Coast Guard should be exempt because its activities relating to internal affairs mirrored those "of a military organization." *Id.* at 108 (statement of Hon. Stephen B. Gibbons).

95. *See* 84 CONG. REC. 9392 (1939); *see also* Migala, *supra* note 19, at 152 n.211 (citing *Report of Administrative Law Committee and Draft of Proposed Bill*, 25 A.B.A.J. 113, 118 (1939)).

96. H.R. REP. NO. 76-1149, pt. 2, at 5 (1940).

97. H.R. 6324, 76th Cong. § 7(b) (1940).

98. THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: WAR—AND AID TO DEMOCRACIES 620-21 (Samuel L. D. Rosenman ed., 1941).

99. *Id.* at 621.

United States' entry into World War II in 1941 interrupted the debates but not the underlying tension.[100]

A. Carveouts in the 1946 Administrative Procedure Act

The final version of the 1946 APA struck a balance, providing for certain exclusions while enabling broader application. It limited the definition of "agency" to exempt certain military functions, inserted a secrecy clause to protect classified materials, and created an exception for rulemaking and adjudication in relation to military, naval, and foreign affairs.

1. Exceptions to the definition of "agency"

The APA's definition of "agency," which set the scope of application for the entire statute, excluded: (a) "courts martial and military commissions," (b) "military or naval authority exercised in the field in time of war or in occupied territory," and (c) "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947," as well as certain other matters conferred by statute.[101] The first exclusion made sense, not least because the U.S. Code already contained detailed procedures for the conduct of courts martial and military commissions.[102] The second and third offered explicit recognition of exigencies accompanying warfare.

All three exclusions reflected the precarious position in which the country found itself. The House Report accompanying the final bill downplayed any concerns, stating, "[T]he exclusion of war functions is self-explanatory. They are rarely required to be exercised upon statutory hearing, with which much of the remainder of the bill is concerned, and they are rapidly liquidating. But they are subject to the public information requirements of [S]ection 3."[103] The Senate Report went into slightly more detail, adding, "The exclusion of war functions and agencies, whether exercised by civil or military personnel, affords all necessary freedom of action for the exercise of such functions in the period of reconversion."[104] While World War II still cast its shadow, such matters were

100. *See* Comment, *The Federal Administrative Procedure Act: Codification or Reform?*, 56 YALE L.J. 670, 672 (1947) (noting the war's interruption); *infra* Part II.A (discussing the national security carveouts).

101. Administrative Procedure Act, Pub. L. No. 79-404, ch. 324, § 2(a), 60 Stat. 237, 237 (1946) (codified as amended at 5 U.S.C. § 551(1)).

102. *See* 50 U.S.C. §§ 1475-1496 (1946) (establishing the procedures for court martial and military commissions); 10 U.S.C. § 1493 (1946) (providing authority for courts martial to compel witness testimony*); id.* § 1509 (giving the President the authority to "prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals").

103. H.R. REP. NO. 79-1980, at 19 (1946).

104. S. REP. NO. 79-752, at 10 (1945).

"rapidly liquidating."[105] Like the House, the Senate defined "present hostilities" as "those connected with the war brought on at Pearl Harbor in December 1941."[106] Again like the House, the Senate noted that "even war functions are not exempted from the public information requirement of [S]ection 3."[107]

2. Secrecy clause

The Senate considered Section 3 of the APA "in many ways among the most important, far-reaching, and useful provisions."[108] That Section required each agency to publish descriptions of the agency's organization, delegations of final authority, agency procedures, "substantive rules . . . adopted as authorized by law," and "statements of general policy or interpretations formulated and adopted by the agency" in the *Federal Register*.[109] Absent "good cause" to hold such matters confidential, opinions and orders and public records had to be made available for public inspection.[110]

Despite the comprehensive nature of the information to be made public, Section 3 carved out an exception for "any function of the United States requiring secrecy in the public interest."[111] This clause implicitly acknowledged the classification systems operating at the time.[112] Executive Order 8,381, introduced in 1940, had defined "vital military and naval installations or equipment" as anything marked "secret," "confidential," or "restricted" by the Secretary of War or Secretary of the Navy, regardless of whether it was located on air, land, or sea, subject to certain criteria.[113] It included facilities, weapons, and vehicles, and "[a]ll official military or naval books, pamphlets, documents, reports, . . . drawings, photographs, contracts, or specifications" so marked.[114]

Two years after President Roosevelt issued the Order, the Office of War Information launched Regulation 4, expanding the type of data which could be classified to include any information that could endanger national security or impair the prosecution of the war, or which should be limited for administrative

105. *See id.*

106. *Id.*; H.R. REP. NO. 79-1980, at 19.

107. S. REP. NO. 79-752, at 10.

108. *Id.* at 12.

109. Administrative Procedure Act, Pub. L. No. 79-404, § 3(a), 60 Stat. 237, 238 (1946) (codified as amended at 5 U.S.C. § 552).

110. *Id.* § 3(b)-(c).

111. *Id.* § 3.

112. During World War II, the Army and Navy had maintained their own internal controls on the flow of information. *See, e.g.*, U.S. WAR DEP'T, ARMY REGULATIONS NO. 380-5: SAFEGUARDING MILITARY INFORMATION ¶¶ 6-10 (1939) (establishing secret, confidential, and restricted categories); UNITED STATES NAVY REGULATIONS art. 75.5 (1920) (same).

113. Exec. Order No. 8381, 3 C.F.R. 117, 117-18 (1940).

114. *Id.*

privacy.[115] It was not just the Secretary of War or the Navy who could classify information as "secret," "confidential," or "restricted": Regulation 4 applied to heads of executive departments, independent establishments, and other government agencies, including corporations.[116] Within a few months the Office of War Information had amended the definitions of "secret" and "confidential," expanding the former to include any information that might "cause serious injury to the Nation or any governmental activity thereof."[117]

The exemption in the APA referencing matters "requiring secrecy" provided a statutory recognition of the systems operated by the Executive Office of the President (the home of the Office of War Information) and the military services. Nevertheless, the Senate sought to draw the exception narrowly. The Senate Committee on the Judiciary explained that while necessary, the clause was "not to be construed to defeat the purpose of the remaining provisions."[118] The Committee continued, "It would include confidential operations in any agency, such as some of the aspects of the investigating or prosecuting functions of the Secret Service or Federal Bureau of Investigation, but no other functions or operations in those or other agencies."[119] The House Report made a similar observation, adding only a definition of "public interest" as "manifest need in order to achieve the due execution of authorized functions."[120] Like the exception to internal agency management, the provision would only be operative where "the excepted subject matter is *clearly and directly* involved."[121] The provision, moreover, could not supersede "other legal requirements of publicity or free public accessibility."[122]

3. Military, naval, and foreign affairs exceptions

Section 4 of the APA, which laid out the rulemaking requirements related to notice, public participation, and "the right to petition for the issuance, amendment, or repeal of a rule," began with another carveout: The provisions applied "[e]xcept to the extent that there is involved . . . any military, naval, or

115. *See* U.S. OFF. OF WAR INFO., FED. COMMC'NS COMM., REGULATION NO. 4 (1942); *see also* ARTHUR MACY COX, THE MYTHS OF NATIONAL SECURITY: THE PERIL OF SECRET GOVERNMENT 37 (1975) (noting that Regulation 4 created "[a] classification system [that] for the first time in our history went beyond military and defense information" to include information relating to the national defense).

116. OFF. OF WAR INFO., *supra* note 115.

117. Memorandum from Elmer Davis, Dir., Off. of War Info., to the Heads of All Departments and Agencies (Nov. 13, 1942).

118. S. REP. NO. 79-752, at 12 (1945).

119. *Id.*

120. H.R. REP. NO. 79-1980, at 21 (1946).

121. *Id.* (emphasis added).

122. *Id.*

foreign affairs function of the United States."[123] The Senate sought to cabin its application, writing,

> The 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.*[124]

The House Report contained nearly identical language.[125]

A similar exception marked Section 5, which required that adjudication be accompanied by notice as to the time, place, and nature of the hearing, the authority under which it would be held, and the matters of fact and law asserted.[126] It established procedural protections, separation of functions, and issuance of declaratory orders.[127] It excepted from adjudication "the conduct of military, naval, or foreign affairs functions."[128] The reason echoed that of Section 4, with the Senate observing in addition that, "in any event, rarely if ever do statutes require such functions to be exercised upon hearing."[129]

4. Right to Article III review

The APA created various rights in relation to administrative processes.[130] To ensure that agencies do not bypass these statutory requirements, any aggrieved person could challenge agency rulemaking and hearings in an Article III tribunal, subject to certain exceptions.[131] The statute required that the reviewing court not just compel actions "unlawfully withheld or unreasonably delayed," but also to rule unlawful and set aside any agency action determined to be:

123. Administrative Procedure Act, Pub. L. No. 79-404, ch. 324, § 4, 60 Stat. 237, 238-39 (1946) (codified as amended at 5 U.S.C. § 553).

124. S. REP. NO. 79-752, at 13 (emphasis added).

125. *See* H.R. REP. NO. 79-1980, at 23.

126. Administrative Procedure Act § 5(a) (codified as amended at 5 U.S.C. § 554).

127. *Id.* § 5(b)-(d).

128. *Id.* § 5.

129. S. REP. NO. 79-752, at 16; *see also* H.R. REP. NO. 79-1980, at 27 (making a similar observation).

130. *See, e.g.*, Administrative Procedure Act § 6(a) (codified as amended at 5 U.S.C. § 555) (establishing the right to be accompanied, represented, and advised by counsel at any hearing in which an individual was compelled to appear); *id.* § 9(a) (codified as amended at 5 U.S.C. § 558) (restricting sanctions to those within the agency's jurisdiction and authorized by law).

131. *Id.* § 10(a) (codified as amended at 5 U.S.C. § 702); *see also id.* § 10 (excepting matters otherwise statutorily excluded from judicial review or agency actions by law committed to agency discretion). For discussion of the limits of discretion, see S. DOC. NO. 248, 79th Cong., 2d Sess. 311 (1946).

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) contrary to constitutional right, power, privilege, or immunity;
>
> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (4) without observance of procedure required by law;
>
> (5) unsupported by substantial evidence . . . ; or
>
> (6) unwarranted by the facts . . . .[132]

This section addressed a gap in the law, where in some cases no redress or mechanism of judicial review had been built into the applicable statute.[133] Without recourse to ordinary courts, the adjudicatory nature of certain administrative proceedings would go unchecked. The inclusion of Article III assured aggrieved individuals that they would have a remedy for a legal wrong. It also built a balance of power among the branches into the statutory provision. This section thus acted both as a rights-based and a structural protection.[134]

The statute addressed other gaps as well. By specifying processes rather than specific agencies, it applied to any entity engaging in administrative rulemaking and adjudication. Only certain war and foreign affairs functions were excluded—not entire departments.[135] The Senate Judiciary Committee explained, "Manifestly, it would be folly to assume to distinguish between 'good' agencies and others, and no such distinction is made in the bill."[136] The House Report similarly noted that while "[f]unctional classifications and exemptions" had been made, "in no part of the bill is any agency exempted by name."[137] To the contrary, "[t]he bill is meant to be operative 'across the board' in accordance with its terms, or not at all."[138] Thus, "[w]here one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms"—as illustrated by the exceptions to the definition of "agency" itself in Section 2.[139] The bill was to serve as a floor, that is, "an outline of

132. Administrative Procedure Act § 10(e) (codified as amended at 5 U.S.C. § 706).

133. *See* H.R. REP. NO. 79-1980, at 26.

134. *See, e.g.*, S. REP. NO. 79-752, at 7-8 (explaining that the bill "sets forth a simplified statement of judicial review designed to afford a remedy for every legal wrong," that it distinguishes between "the 'legislative' and 'judicial' functions of administrative agencies," and that "the provisions for judicial review provide parties with a method of enforcing their rights in a proper case").

135. *See, e.g.*, Administrative Procedure Act § 2(a) (codified as amended at 5 U.S.C. § 551(1)) (excluding "military or naval authority exercised in the field in time of war or in occupied territory," but not all activities undertaken by the U.S. Army or Navy).

136. S. REP. NO. 79-752, at 5.

137. H.R. REP. NO. 79-1980, at 16 (1946).

138. *Id.*

139. *Id.*

minimum essential rights and procedures."[140] Agencies were welcome to fill in the details—as long as they were published and available for comment and challenge.[141]

The Attorney General's manual interpreting the APA embraced the functional approach,[142] downplaying the exceptions and emphasizing that they were to be narrowly construed as applied to Section 3.[143] Cribbing from the Senate Judiciary Committee, the manual added, by way of an example of functions "requiring secrecy in the public interest," law enforcement procedures whose utility would be undermined by publication.[144] It continued,

> To the extent that the function does not require such secrecy, the publication requirements apply. Thus, the War Department obviously is not required to publish confidential matters of military organization and operation, but it would be required to publish the organization and procedure applicable to the ordinary civil functions of the Corps of Engineers.[145]

The Attorney General did not consider the rulemaking exceptions for military and foreign affairs to be limited to particular departments: They covered functions "exercised by any agency."[146] However, the matters to which they applied were to be limited. "Foreign affairs functions" was "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 [the provisions] . . . would clearly *provoke definitely undesirable international consequences.*"[147] The language drew from the Senate and House Judiciary Committee Reports.[148] The manual similarly read the military exceptions narrowly, writing, "[T]he exercise of adjudicatory functions by the War and Navy Departments or by any other agency is exempt to the extent that the conduct of military or naval affairs is involved."[149]

140. *Id.*

141. *See id.*

142. *See* U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 11, 17 (1947) (mentioning the definition of "agency" without comment).

143. *Id.*

144. *Id.*; S. REP. NO. 79-752, at 12 (1945).

145. U.S. DEP'T OF JUST., *supra* note 142, at 18.

146. *Id.* at 26.

147. *Id.* (emphasis added).

148. *See* S. REP. NO. 79-752, at 13; H.R. REP. NO. 79-1980, at 23 (1946).

149. U.S. DEP'T OF JUST., *supra* note 142, at 45.

B. Subsequent Amendment

In the aftermath of the APA's passage, the national security carveouts went largely unremarked. Scholarly articles made no mention of them.[150] About a decade later, the Committee on Government Operations issued a survey to agencies to gain insight into the statute's workings.[151] The result in regard to the NSAS was somewhat of a mixed bag: While some entities had followed APA requirements, many had availed themselves of the exceptions.[152] Under the Atomic Energy Act of 1954, for instance, the Atomic Energy Commission had the authority to make rules for licensing and distributing nuclear material.[153] While the agency considered these provisions subject to the APA, it did not consider its research, development, weapons, and informational programs "as constituting the exercise of rulemaking authority" and thus entirely sidestepped Section 4 procedures.[154] The fulcrum for adopting APA procedures appears to be the point at which the agency was forced to interact with the public. In regard to restricted data, for instance—which was part of a parallel classification system employed by the DOE for nuclear-related materials[155]—the Atomic Energy Commission was responsible for issuing permits for access to restricted data for private purposes and for authorizing the exchange of restricted data with foreign persons and governments.[156] While the Atomic Energy Commission believed "that public participation in these matters to the extent of commenting on proposed regulations" was "generally desirable," on occasion "regulations relating to safeguarding restricted data" were instead "referred to selected groups of experts, for comment."[157]

150. *See* Urban A. Lavery, *The Practicing Lawyer and the New Federal Administrative Procedure Act*, 6 F.R.D. 51, 63 (1946) (mentioning "certain exceptions"). *See generally The Federal Administrative Procedure Act: Codification or Reform?*, *supra* note 100 (ignoring the national security exceptions).

151. HOUSE COMM. ON GOV. OPERATIONS, 85TH CONG., SURVEY AND STUDY OF ADMINISTRATIVE ORGANIZATION, PROCEDURE AND PRACTICE IN THE FEDERAL AGENCIES: AGENCY RESPONSE TO QUESTIONNAIRE iii (1957).

152. *Contrast id.* at 1220 (noting that "[t]o the extent practicable," the Federal Civil Defense Agency's "procedures for rulemaking and adjudication have been made uniform with those of other agencies of the [g]overnment"), *with id.* at 278 (suggesting that all DOD regulations are incident to the military function).

153. Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919, 930 (codified as amended at 42 U.S.C. § 2073).

154. *See* HOUSE COMM. ON GOV. OPERATIONS, *supra* note 151, at 1079-80.

155. *See* Atomic Energy Act of 1946, Pub. L. No. 79-585, ch. 724, § 10, 60 Stat. 755, 766 (repealed 1954) (introducing the Restricted Data classification for nuclear information); Atomic Energy Act of 1954, 68 Stat. at 941-42 (codified as amended at 42 U.S.C. §§ 2162, 2164) (expanding and refining this category and adding Formerly Restricted Data, thereby enabling broader cooperation with civilian and non-U.S. entities).

156. HOUSE COMM. ON GOV. OPERATIONS, *supra* note 151, at 1085.

157. *Id.* at 1082.

In some ways, the Atomic Energy Commission was notable in that it applied the APA at all. According to the DOD, "[i]n a fundamental sense all regulations and directives of the Department are incident to its essentially military function of national defense."[158] The DOD did publish its procurement regulations,[159] and interested parties could purchase supplemental instruments (for example, directives and instructions) issued by the military departments.[160] But as far as the Department was concerned, there was "no statute, applicable to the formulation of the procurement policies and procedures of the Department of Defense and the military departments, that require[d] notice, hearing, and record of hearing."[161] Rulemaking related to personal injury or property damage, discharge review boards, the correction of military records, and myriad other areas similarly lay beyond the pale.[162]

Extensive use by the DOD and others of the military and foreign affairs exceptions in regard to rulemaking and adjudication was not the only way in which the NSAS began bypassing the APA. The secrecy provisions also proved problematic, as the Attorney General had left it up to each agency to determine which documents should be withheld.[163] In addition, efforts to hold agencies to account through Article III adjudication at times fell on the shores of claims to sovereign immunity.[164] In an effort to get a handle on these concerns, Congress made further changes to the statute.

1. Disclosure-related amendments

The first shot across the bow came in 1966, with recodification of the APA into Title 5.[165] The adjustment came with a nod to the special interests of the NSAS, excepting the Atomic Energy Commission, NSA, and CIA from systematic review of agency operations, and the CIA from certain congressional reporting obligations.[166] The House, however, also proposed that the secrecy

158. *Id.* at 278.

159. *Id.* at 277; 32 C.F.R. ch. 1, subch. A (1954).

160. HOUSE COMM. ON GOV. OPERATIONS, *supra* note 151, at 277.

161. *Id.*

162. *Id.* at 323-24 (claiming rulemaking exceptions for personal injury and property damage claims); *id.* at 331 (claiming notice exceptions for discharge review boards); *id.* at 346 (asserting notice exceptions for military record correction).

163. *See* H.R. REP. NO. 89-1497, at 30 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2426-27.

164. *See* H.R. REP. NO. 94-1656, at 7-8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6121, 6127.

165. *See* Act of Sept. 6, 1966, Pub. L. No. 89-554, tit. 5, pt. 1, ch. 5, 80 Stat. 378, 381-88 (codified at 5 U.S.C. §§ 551-559).

166. *See id.* §§ 305(a)(5), (6), (8), 2953(b), 80 Stat. at 380, 413 (codified in scattered sections of 5 U.S.C.).

clause be removed from Section 3.[167] Not only had agencies exhibited a tendency to act in their self-interest, but the same could be said of government employees, none of whom believed "that the 'public interest' would be served by disclosure of [their] failures or wrongdoings."[168] The Senate agreed that while "citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy,"[169] new language had to be adopted to ensure that the exception was cabined to that purpose.[170]

The 1966 Freedom of Information Act (FOIA) became Congress's primary vehicle for fixing the problem.[171] It required agencies to publish their rules of procedure, substantive rules of general applicability, and statements of general policy or interpretation, as well as every amendment, revision, or repeal thereof.[172] It demanded that all agency final opinions and orders, statements of policy, and manuals impacting any member of the public, be made available.[173] Instead of a broad exception, FOIA offered nine specific, and judicially reviewable, exemptions.[174] The first carried over the protections afforded to classified materials, excepting matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."[175]

Congress's decision to tie the exemption to the presidential instrument reflected its prior approach and tracked the intervening constriction of the classification regime. Since Roosevelt's introduction of Executive Order 8,381,[176] successive administrations had issued four instruments detailing

167. *See* Administrative Procedure Act, Pub. L. No. 79-404, ch. 324, § 3, 60 Stat. 237, 238 (1946) (codified as amended at 5 U.S.C. § 552); H.R. REP. NO. 89-1497, at 33, *as reprinted in* 1966 U.S.C.C.A.N. at 2421 (proposing the deletion of "Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency" and replacing it with "Every agency shall make available to the public the following information"); Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, 250 (codified as amended at 5 U.S.C. § 552) (making the proposed replacement).

168. H.R. REP. NO. 89-1497, at 30, *as reprinted in* 1966 U.S.C.C.A.N. at 2427.

169. *Id.* at 30-31.

170. S. REP. NO. 89-813, at 8 (1965); *see also* S. REP. NO. 88-1219, at 12 (1964) (referring to the replacement language as "more tightly drawn").

171. Act of July 4, 1966, 80 Stat. at 250-51 (codified as amended at 5 U.S.C. § 552); *see also* CONG. RSCH. SERV., IF12301, CONGRESS AND THE FREEDOM OF INFORMATION ACT 1 (2023) ("FOIA was enacted in response to Congress's perception of improper secrecy in the executive branch.").

172. Act of July 4, 1966, 80 Stat. at 250 (codified as amended at 5 U.S.C. § 552(a)(1)(C)-(E)).

173. *Id.* (codified as amended at 5 U.S.C. § 552(a)(2)(A)-(C)).

174. *Id.* at 251 (codified as amended at 5 U.S.C. § 552(b)).

175. *Id.* (codified as amended at 5 U.S.C. § 552(b)(1)(A)).

176. Exec. Order No. 8381, 3 C.F.R. 117, 117-18 (1941).

classification, each replacing or amending the prior document.[177] The most recent order, issued by President Kennedy, set forth the most restrictive scheme. It established four groups of information: one to be declassified automatically at twelve-year intervals, one to be downgraded every three years until declassified, and two exempt from automatic declassification.[178] The Order contained a section saying that anyone knowingly revealing classified information would be subject to administrative sanctions.[179] So tying materials that could be withheld in the interests of secrecy to the Executive Order comported with Congress's effort to limit the exception.

Following Watergate, Congress overrode President Ford's veto to strengthen FOIA.[180] Agencies became required to publish indices of "any matter issued, adopted, or promulgated" since July 1967, and to respond to requests within certain timeframes.[181] The statute empowered Article III courts to review classification decisions.[182] It also added a new requirement to the classification exemption: Not only would withheld material have to be authorized under executive order criteria, but it would have to "in fact" be "properly classified pursuant to such [e]xecutive order."[183] It inserted qualifiers for the law enforcement exemption, including exempting from disclosure the identity of a confidential source compiled "by an agency conducting a lawful national security intelligence investigation."[184]

Two statutes expanded access to government records while acknowledging national security concerns. The 1974 Privacy Act addressed records maintained on individuals.[185] The legislation used the same definition of "agency" as the APA, thereby excluding "courts martial and military commissions" and "military authority exercised in the field in time of war or in occupied territory" but leaving it generally applicable to NSAS entities, with the exception of any records maintained by the CIA.[186] The 1974 Government in Sunshine Act, in turn, amended the APA to prohibit ex parte communications for certain actions

177. *See* Exec. Order No. 10104, 3 C.F.R. 82, 83 (Supp. 1951); Exec. Order No. 10290, 3 C.F.R. 471 (Supp. 1952); Exec. Order No. 10501, 3 C.F.R. 115 (Supp. 1954); Exec. Order No. 10964, 3 C.F.R. 124, 124-27 (Supp. 1962).

178. Exec. Order No. 10964, 3 C.F.R. at 125.

179. *Id.* at 127.

180. *See* Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1565 (codified as amended 5 U.S.C. § 552).

181. *Id.* at 1561 (codified as amended at 5 U.S.C. § 552(a)(2)-(3)(A)).

182. *Id.* at 1562 (codified as amended at 5 U.S.C. § 552(a)(4)(B)).

183. *Id.* at 1563-64 (codified as amended at 5 U.S.C. § 552(b)(1)(A)).

184. *Id.* (codified as amended at 5 U.S.C. § 552(b)(7)).

185. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified at 5 U.S.C. § 552a).

186. *Id.* at 1897, 1902-03 (codified as amended at 5 U.S.C. § 552a(a)(1), (j)(1)); *see also* Administrative Procedure Act, Pub. L. No. 79-404, ch. 234, § 2, 60 Stat. 237, 237 (1946) (codified as amended at 5 U.S.C. § 551(1)) (providing the full definition of "agency").

and requiring that meetings be open.[187] Again, the Section only applied to what constituted an "agency," leaving it intact as to numerous entities within the NSAS.[188] In the intervening years, more NSAS-related amendments arose.[189]

2. Waiver of sovereign immunity

Although the APA established a right to judicial review, the government at times sought to avoid litigation by asserting sovereign immunity.[190] The courts' convoluted sovereign immunity jurisprudence contributed to dismissals.[191] So in 1976, Congress added a waiver of sovereign immunity to the APA.[192] The new provision allowed actions "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority."[193] The United States could be named as a defendant and a judgment or decree could be entered against it.[194] Since other statutes already established monetary liability, litigants could now seek equitable relief, "such as an injunction, declaratory judgment, or writ of mandamus."[195]

The waiver of sovereign immunity applied to any "agency," exempting military tribunals and courts martial.[196] But Congress again made clear that such provisions did not bypass the NSAS altogether. The House Report noted that "[f]or years almost every regulatory statute enacted by Congress" had measures authorizing the courts to review actions adversely impacting private citizens.[197] "Unfortunately," the Report continued, "these special statutes do not cover many of the functions performed by the older executive departments, such as the Departments of State, Defense, Treasury, Justice, Interior, and

187. Government in Sunshine Act, Pub. L. No. 94-409, §§ 3(a), 4(a)-(c), 5(b), 90 Stat. 1241, 1241, 1246-47 (1976) (codified as amended in scattered sections of 5 U.S.C.).

188. *Id.* at 1241 (codified as amended at 5 U.S.C. § 552b).

189. *See, e.g.*, Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503, § 5, 102 Stat. 2507, 2513 (codified as amended at 5 U.S.C. § 552a) (exempting counterintelligence and security clearance reviews); Civil Service Reform Act of 1978, Pub. L. No. 95-454, tit. 1, § 101, 92 Stat. 1111, 1115 (codified as amended at 5 U.S.C. § 2302(a)(2)(C)(ii)) (excluding the FBI, CIA, NSA, and Defense Intelligence Agency "and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities" from the prohibited personnel practices).

190. *See* H.R. REP. NO. 94-1656, at 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6127-28.

191. *Id.*

192. Pub. L. No. 94-574, 90 Stat. 2721, 2721 (1976) (codified at 5 U.S.C. § 702).

193. *Id.*

194. *Id.*

195. H.R. REP. NO. 94-1656, at 4, *as reprinted in* 1976 U.S.C.C.A.N. at 6124.

196. *See* 5 U.S.C. §§ 701(b)(1), 702.

197. H.R. REP. NO. 94-1656, at 5, *reprinted in* 1976 U.S.C.C.A.N. at 6125.

Agriculture."[198] These agencies were as prone as any to exceed their authority or to use it inappropriately. The amendment would prevent them from being able to assert sovereign immunity to avoid culpability.

III. Application of the APA to the NSAS

Despite the national security exemptions, hundreds of APA challenges have been brought involving the NSAS, reflecting the functional approach adopted by Congress and the extent to which national security regulations have a direct impact on individuals. While it is not possible to discuss every such case, examples illustrate how the NSAS has fared. Outside of a few notable exceptions, such as extradition and detention, courts have read the exemptions increasingly narrowly and employed the APA's judicial standards of review to ensure that agency actions not be arbitrary or capricious, contrary to a constitutional right, outside statutory requirements, unsupported by substantial evidence, or unwarranted by the facts.[199]

A. Rulemaking and Adjudication: The Foreign Affairs Exception

Courts alternate between two tests for whether an agency action falls within the foreign affairs exception for rulemaking and adjudication, both of which derive from language in the congressional reports accompanying the APA: (1) whether the actions or constraints in question "clearly and directly" involve a "foreign affairs function" (the House Report),[200] or (2) whether they would "provoke definitely undesirable international consequences" (the Senate and House Reports).[201] Actions outside these contours are then subject to the APA's judicial review standards.[202] This Subpart examines some of the most common areas considered under this exception: treaties and international trade, export controls, immigration, travel restrictions, and asset blocking and forfeiture. For the most part, the standards for what constitutes a foreign affairs exception have narrowed over time.[203]

1. Treaties and international trade

To the extent that regulations implement international agreements, courts excuse them from APA rulemaking and adjudication.[204] For actions that may

198. *Id.*

199. *See* 5 U.S.C. § 706(2).

200. H.R. REP. NO. 79-1980, at 23, 27 (1946).

201. S. REP. NO. 79-752, at 13 (1945); H.R. REP. NO. 79-1980, at 23.

202. *See supra* Part II.A.4.

203. *See supra* Part II.

204. *See infra* note 224 and accompanying text.

impact such instruments, the courts have narrowed leeway afforded to the executive.[205] The mere assertion that a rule may affect negotiations, for instance, is not sufficient.[206] The government must explain *how* granting an exemption would enable more nuanced intercourse.[207]

Initially, courts—without much analysis—found that restrictions on importation of goods fell within the foreign affairs exception.[208] In *Mast Industries, Inc. v. Regan*, though, the U.S. Court of International Trade underscored Congress's functional approach to reject the plaintiffs' argument that the exception should be limited to diplomatic activities—not least because Congress had considered and discarded this proposal.[209] Nor did the court buy the "provoke definitely undesirable international consequences" test, as the Senate had merely offered the clause as an example.[210] Instead, the court adopted the House approach, which had suggested that the exception applies "only 'to the extent' that the excepted subject matter is clearly and directly involved" in a foreign affairs function.[211] Customs regulations defining goods subject to restraints or quota limits under bilateral agreements met the test, excusing them from the notice-and-comment requirements.[212]

In *American Institute for Imported Steel v. United States*, the Court of International Trade again followed the House approach, stating "the embargo of [European Community] pipe and tube steel implements Congress' direction that the U.S.-EC arrangement be enforced and is, therefore, a foreign affairs function."[213] Overhanging these cases was an agreement between the political branches in an area constitutionally entrusted to them and in regard to which Congress had authorized the president to act, potentially lending reticence to the courts to intervene.

Within a year of *Mast Industries* and *American Institute*, the Court of Appeals for the Federal Circuit, which has appellate jurisdiction over the Court of International Trade,[214] issued a decision in which it bypassed the "clearly and directly" language in favor of the "provoke definitely undesirable international

205. *See infra* notes 225-235 and accompanying text.

206. *See* E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 776 (9th Cir. 2018).

207. *See In re* Section 301 Cases, 570 F. Supp. 3d 1306, 1336-37 (Ct. Int'l Trade 2022), *aff'd sub nom.*, HMTX Indus. LLC v. Off. of the U.S. Trade Representative, 156 F.4th 1236 (Fed. Cir. 2025) (per curiam).

208. *See, e.g.*, Consumers Union of the U.S., Inc. v. Comm. for the Implementation of Textile Agreements, No. 74-968, slip. op. at 15 (D.D.C. Oct. 30, 1975), *rev'd on jurisdictional grounds*, 561 F.2d 872 (D.C. Cir. 1977) (per curiam).

209. 596 F. Supp. 1567, 1580-82 (Ct. Int'l Trade 1984).

210. *See id.* at 1581.

211. *See id.* at 1582.

212. *See id.* at 1582-83.

213. 600 F. Supp. 204, 211 (Ct. Int'l Trade 1984).

214. 28 U.S.C. § 1292(d).

consequences" language.[215] Requiring APA rulemaking, the court reasoned, "would exacerbate the market disruption" that had led the Committee for the Implementation of Textile Agreements to issue quotas in the first place.[216] The body's authority derived "in part from the President's foreign affairs power" and acted as a foreign policy instrument.[217] The court concluded, "Were we to require that [the Committee for the Implementation of Textile Agreements] provide notice thirty days before [quotas] take affect [sic], the President's power to conduct foreign policy would plainly be hampered."[218]

These two approaches—the "clearly and directly" test and the "provoke definitely undesirable international consequences" framework—proceeded to weave their way through the courts.[219] Export controls, a subset of trade, give rise to parallel questions, with courts lurching between the two tests.[220]

In 2022, the D.C. District Court looked to a dictionary from 1945 to define what was meant by the "foreign affairs" exception, in the process rejecting the "provoke definitely undesirable consequences" test partly on the grounds that it is "unmoored from the legislative text" and "lifted from the House Report."[221] Requiring a rule to have such an impact "would render the foreign affairs function exception superfluous" in that such circumstances were already covered by the "good cause" exception.[222] Somewhat mystifyingly, the court then applied the "clearly and directly" test,[223] even though that rule derived from the House Report.

---

215. *See* Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (quoting H.R. REP. NO. 79-1980, at 27 (1946)).

216. *See id.*

217. *See id.*

218. *Id.*

219. *See, e.g.*, Helms v. Sec'y of the Treasury, 721 F. Supp. 1354, 1361 (D.D.C. 1989) (considering the application of anti-apartheid measures to Namibia as "clear[ly] and directly related to the foreign affairs function, and, therefore, . . . exempt from the notice and comment provisions of the APA"); City of New York v. Permanent Mission of India to United Nations, 618 F.3d 172, 201 (2d Cir. 2010) (holding that the State Department's promulgation of tax exemptions "relates directly to, and has clear consequences for, foreign affairs," thus excepting it from the APA's remit); *Am. Ass'n of Exps.*, 751 F.2d at 1249 (applying the "provoke definitely undesirable international consequences" test to claims that the Committee for the Implementation of Textile Agreements violated the notice-and-comment provisions of the APA).

220. *See, e.g.*, Washington v. U.S. Dep't of State, 443 F. Supp. 3d 1245, 1256 (W.D. Wash. 2020) (holding that final rules promulgated by the Departments of State and Commerce relating to 3D-printed firearms did not fall within the scope of the foreign affairs exception primarily because there was no evidence that "public rule-making provisions would provoke definitely undesirable international consequences" (quoting H.R. REP. NO. 79-1980, at 23 (1946))).

221. E.B. v. U.S. Dep't of State, 583 F. Supp. 3d 58, 64 (D.D.C. 2022).

222. *Id.* at 64-65; 5 U.S.C. § 553(b).

223. *E.B.*, 583 F. Supp. 3d at 64, 66.

Where regulations merely comport with treaties and bilateral agreements, courts generally excuse the executive from rulemaking.[224] A claim that negotiations *might* be interrupted is insufficient. During his first term in office, for instance, President Trump directed the U.S. Trade Representative to determine whether to pursue action against China's trade practices.[225] The subsequent report prompted the President to direct the office to "take all appropriate action."[226] As a consequence, the government imposed a series of tariffs on China.[227] In the ensuing challenge, the plaintiffs argued that the Trade Representative had violated the APA by exceeding his authority and promulgating the lists in an arbitrary manner.[228] The court rejected the government's claim to a foreign affairs exemption from the APA's notice-and-comment provisions.[229] The exemption was to be "construed narrowly and granted reluctantly,"[230] with the aim of allowing for "more cautious and sensitive consideration" of ongoing deliberations.[231] Applying the "definitely undesirable international consequences" standard instead, the court reasoned that the United States had not entered into a trade agreement with China until after the lists were promulgated.[232] "Moreover, courts have recognized that the foreign affairs exemption does not apply simply because a rule relates to ongoing negotiations."[233] The government has to address *how* an agency action would have "definitely undesirable international consequences" to meet the foreign affairs exemption.[234] The narrow interpretation adopted in *Mast Industries* persisted: Quoting and citing the case, the court explained, "When invoked, the exemption 'will be construed narrowly and granted reluctantly,'

224. *See* WBEN, Inc. v. United States, 396 F.2d 601, 616 (2d Cir. 1968); Int'l Bhd. of Teamsters v. Peña, 17 F.3d 1478, 1486 (D.C. Cir. 1994).

225. *In re* Section 301 Cases, 570 F. Supp. 3d 1306, 1317 (Ct. Int'l Trade 2022), *aff'd sub nom.*, HMTX Indus. LLC v. Off. of the U.S. Trade Representative, 156 F.4th 1236 (Fed. Cir. 2025) (per curiam).

226. *Id.*; *see also* U.S. TRADE REPRESENTATIVE, 2018 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 1 (2019) (reporting on compliance by China and noting that the U.S. Trade Representative published a *Federal Register* notice requesting interested parties to submit written comments and testimony and scheduling a public hearing).

227. *In re Section 301 Cases*, 570 F. Supp. 3d at 1317-18.

228. *Id.* at 1321.

229. *See id.* at 1335.

230. *See id.* (quoting Mast Indus., Inc. v. Regan, 596 F. Supp. 1567, 1582 (1984)).

231. *See id.* (quoting Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States, 751 F.2d 1239, 1249 (1985)).

232. *Id.* at 1335-36.

233. *Id.*

234. *Id.* at 1337.

and 'only to the extent that the excepted subject matter is clearly and directly involved in a foreign affairs function.'"[235]

2. Immigration

As in the case of international trade and treaty negotiations, in the aftermath of the APA, courts interpreted the foreign affairs exception broadly to find immigration exempt from rulemaking and adjudication.[236] In *Yiakoumis v. Hall*, for example, the Eastern District of Virginia understood "the admission and expulsion of aliens" to constitute "an exercise of a sovereign power in international relations"—one within the province of the executive and legislative branches.[237] "Historically" only those two branches "had occupied this field of government," even as courts had "studiously refrained from incursion into that realm."[238] The district court continued, "Even without the express exclusions in the Act, it is doubtful that the courts would construe the Administrative Procedure Act as empowering them to review the decisions of an executive officer in the performance of foreign affairs functions of government."[239] By 1950, however, the Supreme Court had shifted course. In *Wong Yang Sung v. McGrath*, the Court held that immigration hearings *are* subject to the APA's adjudication requirements.[240] The D.C. District Court in 1973 followed suit, citing to the Senate Report's "clearly provoke definitely undesirable international consequences" language.[241] So narrowly has the exception been drawn that, since 1950, it appears there are just two contexts in which the courts have applied the foreign affairs exception to immigration: the Iranian hostage crisis and 9/11.

a. Iranian Hostage Crisis

On November 4, 1979, Iranian militants in Tehran seized the U.S. Embassy and took more than fifty citizens hostage in response to the deposed Shah's presence in the United States for medical procedures.[242] Six days later, President

235. *Id.* at 1335 (quoting Mast Indus. Inc. v. Regan, 596 F. Supp. 1567, 1582 (1984)).

236. *See, e.g.*, Yiakoumis v. Hall, 83 F. Supp. 469, 472 (E.D. Va. 1949) (stating that the foreign affairs functions of government are entrusted to the political branches instead of the judiciary).

237. *Id.*

238. *Id.*

239. *Id.*

240. 339 U.S. 33, 50-51 (1950), *superseded by statute on other grounds*, Pub. L. No. 81-843, ch. 1052, 64 Stat. 1044, 1048 (1950) (codified at 8 U.S.C. § 155(a)).

241. Hou Ching Chow v. Att'y Gen., 362 F. Supp. 1288, 1290-91 (D.D.C. 1973).

242. *See The Iranian Hostage Crisis*, OFF. HISTORIAN, U.S. DEP'T STATE: OFF. HISTORIAN, https://perma.cc/B4UJ-M7D9 (archived Feb. 21, 2026); Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 808 (1984).

Carter directed the Attorney General to identify Iranian students who had violated their visas and to begin deportation proceedings against them.[243] New Immigration and Naturalization Service (INS) rules followed.[244] Subsequent cases dealing with U.S. policy toward Iranian nationals repeatedly held that the foreign affairs exception to rulemaking and adjudication applied.[245]

In *Yassini v. Crosland*, for instance, an Iranian national brought suit challenging a related immigration directive.[246] The Ninth Circuit concluded that the INS commissioner was exempt from the rulemaking procedures under both the "good cause" and "foreign affairs function" exceptions.[247] The former, the court wrote, "applies when compliance with the notice requirements are 'impracticable, unnecessary or contrary to the public interest.'"[248] Because the public interest was foreign affairs, the inquiries merged.[249] The court was conscious of its (apolitical) position. It explained, "Decisions involving the relationships between the United States and its alien visitors often implicate our relations with foreign powers, and because of their political nature, are generally more within the competence of the Legislative and Executive Branches than the Judiciary."[250] Had the INS "engaged in foreign policy matters, outside the scope of its usual functions, with disregard of the APA and concepts of due process," it might be another case.[251] But here the commissioner had merely implemented the President's foreign policy.[252] It met the "definitely undesirable consequences" test, placing the regulations beyond the reach of the APA.[253]

Although the cases related to Iran could have ended up setting precedent for a broader rulemaking exception, they did not. In *Zhang v. Slattery,* the Second Circuit cabined the exception, picking up on a warning issued by the Ninth Circuit in *Yassini* that the exception should not become "distended" and "applied to INS actions generally."[254] In 1990, the Attorney General had published an

243. Yassini v. Crosland, 618 F.2d 1356, 1359 (9th Cir. 1980) (per curiam).

244. *Id.*

245. *See, e.g.*, Akbari v. Godshall, 524 F. Supp. 635, 644 (D. Colo. 1981) (dismissing the INS's failure to publish Iranian Project Telegrams as within the APA's foreign affairs exception); Nademi v. INS, 679 F.2d 811, 811, 814 (10th Cir. 1982) (holding an INS regulation limiting the grant of voluntary departure exempt from the APA's notice-and-comment provisions).

246. *Yassini*, 618 F.2d at 1359.

247. *Id.* at 1360.

248. *Id.* (quoting 5 U.S.C. § 553(b)(B)).

249. *Id.* at 1360-61.

250. *Id.*

251. *Id.*

252. *See id.* at 1361.

253. *Id.* at 1360 n.4.

254. 55 F.3d 732, 744 (2d Cir. 1995) (quoting *Yassini*, 618 F.2d at 1360 n.4).

interim rule in relation to China's one-child policies.[255] It recognized the "well-founded fear [of being] required to abort a pregnancy or to be sterilized because of their country's family planning policies," stating that in such circumstances, refugees "may be granted asylum on the ground of persecution on account of political opinion."[256] Seven months later, the final rule omitted any reference to reproductive persecution,[257] generating confusion. Another final rule revived the prior language, but with a new presidential administration entering office, it was never published.[258] In *Zhang* (one of numerous cases filed) the court applied the "definitely undesirable international consequences" test and found the exception inapplicable.[259] "There is no record evidence," the court wrote, "for the view that subjecting the January 1990 interim rule to notice and comment would have had any undesirable consequences."[260] While the courts "are not in a good position to gauge the sensitivities of foreign nations, or to consider any but the most obvious foreign policy risks," in the case of China, "the weight of such concerns is not obvious, particularly since the focus on the interim rule . . . had been at the center of a national debate for more than six months prior to issuance of the rule."[261] Unlike the hostage crisis, in which the executive was immersed in delicate negotiations to ensure Americans' safe passage, the one child policy fell within traditional immigration matters.

b. Post-9/11 cases

Following 9/11, using the same "definitely undesirable international consequences" test, a second set of cases upholding the foreign affairs exemption emerged. In *Rajah v. Mukasey*, the Second Circuit addressed a post-9/11 registration program requiring certain non-immigrant alien males over age sixteen to undergo registration and fingerprinting.[262] The court cited "at least three definitely undesirable international consequences that would follow from

255. *See* Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2803, 2804-05 (Jan. 29, 1990) (to be codified at 8 C.F.R. pts. 208, 242) (clarifying the burden of proof for applicants for refugee status, withholding of deportation, or asylum by establishing that aliens "fleeing coerced population control policies of forced abortions or sterilization may be considered to have a clear probability (for withholding of deportation) or well-founded fear (for asylum) of persecution on account of political opinion"); 8 C.F.R. § 208.5.

256. Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. at 2805.

257. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674, 30683 (July 27, 1990) (to be codified at 8 C.F.R. pt. 208).

258. *Zhang*, 55 F.3d at 740-41.

259. *Id.* at 744-45.

260. *Id.* at 745.

261. *Id.*

262. 544 F.3d 427, 432 (2d Cir. 2008).

notice and comment rulemaking" to find the program within the exception.[263] The court added:

> First, sensitive foreign intelligence might be revealed in the course of explaining why some of a particular nation's citizens are regarded as a threat. Second, relations with other countries might be impaired if the government were to conduct and resolve a public debate over why some citizens of particular countries were a potential danger to our security. Third, the process would be slow and cumbersome, diminishing our ability to collect intelligence regarding, and enhance defenses in anticipation of, a potential attack by foreign terrorists.[264]

Outside of the Iranian and post-9/11 contexts, courts have held that the relationship between immigration and foreign affairs is too attenuated for the exception to apply.[265] Thus, in *Capital Area Immigrants' Rights Coalition v. Trump*, immigrants challenged an interim final rule altering U.S. asylum procedures.[266] The D.C. District Court determined that the foreign affairs exception did not excuse the government from engaging in notice-and-comment rulemaking prior to promulgating the rule.[267] Merely because a rule implicated foreign affairs or touched on national sovereignty was insufficient.[268] The "clearly and directly" test applied.[269]

Extradition, in contrast, almost universally finds government actions within the exception.[270] To some extent, this reflects that extradition relies on international agreements for its execution. In contrast, immigration provisions are in some sense entirely domestic: They reflect unilateral actions. While such steps may have an indirect impact on U.S. relations with other countries, they are not necessarily born of bilateral instruments.

3. Travel restrictions

One of the most prominent areas implicating the NSAS relates to travel restrictions. Courts treat APA challenges to Selectee and No Fly Lists as outside

263. *Id.* at 437.

264. *Id.*

265. *See, e.g.*, Jean v. Nelson, 711 F.2d 1455, 1477-78 (11th Cir. 1983); Doe v. Trump, 288 F. Supp. 3d 1045, 1076 (W.D. Wash. 2017); Mayor of Baltimore v. Trump, 416 F. Supp. 3d 452, 509-11 (D. Md. 2019); E. Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094, 1113-15 (N.D. Cal. 2018). *But see* Roe v. Mayorkas, No. 22-CV-10808, 2023 WL 3466327, at *16-17 (D. Mass. May 12, 2023) (acknowledging the dangers of construing the foreign affairs exception too broadly while simultaneously finding the exception satisfied by immigration provisions introduced in the context of the sudden withdrawal of U.S. troops from Afghanistan and the closure of the U.S. embassy).

266. 471 F. Supp. 3d 25, 31-32 (D.D.C. 2020).

267. *Id.* at 32.

268. *Id.* at 55-56.

269. *See id.* at 55.

270. *See, e.g.*, Peroff v. Hylton, 563 F.2d 1099, 1102-03 (4th Cir. 1977) (per curiam).

the foreign affairs exception and thus subject to the APA's judicial review standards.[271] These cases have at times forced regulatory change.

In June 2010, for instance, the ACLU filed a legal challenge on behalf of thirteen U.S. citizens and permanent residents denied travel on the basis of their inclusion on the No Fly List.[272] The district court in Oregon held that the list violated the APA's arbitrary-and-capricious standard of review, as well as the requirement that agencies not act "contrary to constitutional right, power, privilege, or immunity."[273] The plaintiffs had "constitutionally-protected liberty interests in traveling internationally by air," which had been "significantly affected" by their placement on the list.[274] Because of the low evidentiary standard, the risk of error was high, even as targets lacked a meaningful opportunity to challenge their inclusion.[275] Due process won the day.[276]

Following defeat, the government in April 2015 submitted a notice in a parallel case, announcing new redress procedures.[277] The government would send U.S. persons who purchased a ticket, were denied boarding, and applied for redress a letter informing them of their status and their option to submit or receive information.[278] If the recipient did so, the Transportation Security Administration would send a second letter identifying the criteria under which they had been listed, along with a summary of information held "to the extent feasible, consistent with the national security and law enforcement interests at stake."[279] The recipient could then submit additional documents, at which time the TSA would issue a final determination.[280]

The new procedures appear to have brought the redress procedures within the APA's standards: In *Elhady v. Kable*, the Fourth Circuit found them sufficient.[281] The Sixth and Tenth Circuits have similarly determined that the

271. *See infra* notes 272-287 and accompanying text.

272. *See* Latif v. Holder, 28 F. Supp. 3d 1134, 1140 (D. Or. 2014).

273. *Id.* at 1163.

274. *Id.* at 1149.

275. *Id.* at 1153-54.

276. *See id.* at 1154-55, 1161-62.

277. Notice Regarding New Redress Procedures at 1, Mohamed v. Holder, 266 F. Supp. 3d 868 (E.D. Va. 2017) (No. 11-CV-0050).

278. *Id.* at 2.

279. *Id.*

280. *Id.* at 2-3.

281. 993 F.3d 208, 218 n.4, 228 (4th Cir. 2021) (conflating the APA and procedural due process claims).

Selectee List[282] redress procedures comport with Fifth Amendment due process, simultaneously satisfying the APA's judicial standard of review as to the deprivation of a constitutional right.[283]

While the regulatory adjustment that followed successful litigation points to the APA's effectiveness,[284] in some cases the mere fact of litigation has been sufficient for removal.[285] And delisting does not necessarily mean the government gets off the hook: In *FBI v. Fikre*, the Supreme Court unanimously held that the government's claim that the plaintiff would not be placed on the list in the future "based on the currently available information" was insufficient to show that the practice could not reasonably be expected to occur again.[286] The plaintiff could pursue an injunction as well as "a declaratory judgment confirming that the government had violated his rights."[287] Thus, the APA has played a key role in shaping the government's use of travel restrictions.

4. Asset blocking and forfeiture

Numerous devices allow the NSAS to freeze the assets of entities posing a threat to national security.[288] One area which has received almost no attention in the legal literature concerns the listings under the National Defense Authorization Acts (NDAAs) in relation to Communist Chinese Military Companies (CCMCs) and Non-SDN Chinese Military-Industrial Complex Companies (NS-CMIC) which supplanted CCMCs in 2021.[289] The enumeration

282. Unlike individuals on the No Fly List, those on the Selectee List may be allowed to fly, but they are subject to enhanced screening procedures. *See* Elec. Priv. Info. Ctr., Guidance for TSA Contact Center Representatives Handling Watch List Complaints 3, https://perma.cc/MZY9-6T2E (archived Feb. 26, 2026). Both lists are included in the Terrorist Screening Database maintained by the Terrorist Screening Center. *See DHS/TSA/PIA-018 TSA Secure Flight Program*, U.S. DEP'T HOMELAND SEC. (June 16, 2025), https://perma.cc/ZM72-S2FV.

283. *See* Abdi v. Wray, 942 F.3d 1019, 1023, 1031-32 (10th Cir. 2019); Beydoun v. Sessions, 871 F.3d 459, 463, 465-67 (6th Cir. 2017) (suggesting that one of the APA claims should have been treated separately from the constitutional claims, but nonetheless affirming).

284. *See supra* notes 272-280 and accompanying text.

285. *See* Notice of Voluntary Dismissal at 1-3, Chebli v. Kable, No. 21-cv-937 (D.D.C. May 12, 2021) (providing notice of voluntary dismissal following the plaintiff's removal from the No Fly List ten days after he filed the action).

286. 144 S. Ct. 771, 778-79 (2024).

287. *Id.* at 776, 778.

288. *See infra* Parts III.A.4.a-.c.

289. *See* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1237(b)(4), 112 Stat. 1920, 2161 (1998) (codified at 50 U.S.C. § 1701 note (Application of Authorities Under the International Emergency Economic Powers Act to Communist Chinese Military Companies)); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1260H, 134 Stat. 3388, 3965 (codified as amended at 10 U.S.C. § 113 note (Public Reporting of Chinese
footnote continued on next page

parallels another one grounded in the 2021 NDAA, which empowers the DOD to maintain a list of Chinese Military Companies (CMCs) through December 31, 2030.[290] Under IEEPA, in turn, the Departments of State and of the Treasury maintain listings of Specially Designated Terrorists (SDTs), Specially Designated Global Terrorists (SDGTs), and Specially Designated Nationals (SDNs).[291] CAATSA focuses on Russia, North Korea, and Iran,[292] while AEDPA creates a list of Foreign Terrorist Organizations subject to similar measures.[293] Although the APA's foreign affairs exception often applies to rulemaking requirements in regard to foreign entities, the process is nevertheless subject to judicial review, where APA challenges tend to focus on the arbitrary-and-capricious standard as well as (constitutional) due process protections.[294]

a. Chinese military companies

Nearly 30 years ago, the 1999 NDAA gave the President the authority to direct his powers under IEEPA against CCMCs, defined as any person identified in certain Defense Intelligence Agency publications, as well as "any other person that . . . is owned or controlled by the People's Liberation Army; and is engaged in providing commercial services, manufacturing, producing, or exporting."[295] It fell to the Secretary of Defense to identify CCMCs operating "directly or indirectly in the United States."[296]

In November 2020, the legal framing changed. President Donald Trump issued Executive Order 13,959 declaring a state of emergency in regard to the People's Republic of China (PRC) for "increasingly exploiting United States

Military Companies Operating in the United States)); *Chinese Military Companies Sanctions*, U.S. DEP'T TREASURY: OFF. FOREIGN ASSETS CONTROL, https://perma.cc/HUU6-B79C (archived Feb. 26, 2026) (referring to Chinese Military Companies Sanctions as "Non-SDN Chinese Military-Industrial Complex Companies" or "NS-CMIC").

290. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 § 1260H(b)(1).

291. *See generally* AUDREY KURTH CRONIN, CONG. RSCH. SERV., RL32120, THE "FTO LIST" AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS 4-5 (2003), https://perma.cc/XH7P-3MH2 (noting the origins of the SDT and SDGT list and the contours of the SDN list).

292. Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017) (codified as amended at scattered sections of the U.S. Code).

293. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (codified as amended at 8 U.S.C. § 1189).

294. *See infra* Parts III.A.4.

295. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1237(b)(4), 112 Stat. 1920, 2161 (1998) (codified at 50 U.S.C. § 1701 note (Application of Authorities Under the International Emergency Economic Powers Act to Communist Chinese Military Companies)).

296. *Id.* § 1237(b), 112 Stat. at 2160-61.

capital to resource and to enable the development and modernization of its military, intelligence, and other security apparatuses."[297] It alleged that the PRC's policy of "Military-Civil Fusion" compelled Chinese companies to support "military and intelligence activities."[298] The Order prohibited any transaction in publicly traded securities related to CCMCs.[299]

Several companies brought suit, alleging the process violated the APA's judicial review standards, fell outside the DOD's authority, and violated constitutional due process protections.[300] In *Xiaomi Corp. v. Department of Defense*, Judge Rudolph Contreras, "somewhat skeptical that weighty national security interests" were actually implicated, granted the plaintiff's motion for a preliminary injunction.[301] Similarly, in *Luokung Technology Corp. v. Department of Defense*, Judge Contreras observed that while courts extend deference to agencies in matters involving national security, judges nevertheless play a critical role in ensuring that the matter in which agencies reach their final determination is sufficiently justified.[302] The APA required that the "determination be supported by 'substantial evidence,'" that it not be arbitrary and capricious, and that the "reviewing court . . . 'set aside'" any action exceeding the agency's statutory authority or limitations.[303] Luokung's CCMC designation likely violated the APA on the grounds that it was arbitrary and capricious and exceeded the DOD's statutory authority.[304] As with the No Travel and Selectee lists, the mere fact of litigation in some cases has been sufficient to prompt the DOD to drop a company from the list.[305]

In 2021, President Biden replaced the previous CCMC list with a new regime—the NS-CMIC List—overseen by the Office of Foreign Assets Control.[306] Hearkening back to the 1999 NDAA, the 2021 NDAA empowered

297. Exec. Order No. 13959, 3 C.F.R. 475, 475 (2021).

298. *See id.* at 475-76.

299. *Id.*

300. *See* Xiaomi Corp. v. Dep't of Def., No. 21-280, 2021 WL 950144, at *3 (D.D.C. 2021); Luokung Tech. Corp. v. Dep't of Def., 538 F. Supp. 3d 174, 181 (D.D.C. 2021).

301. *Xiaomi Corp.*, 2021 WL 950144, at *12-13.

302. *Luokung Tech. Corp.*, 538 F. Supp. at 182.

303. *Id.* at 183 (quoting 5 U.S.C. § 706(2)).

304. *Id.* at 188, 190-91.

305. *See* Notice of Voluntary Dismissal at 1, Gowin Semiconductor Corp. v. U.S. Dep't of Def., No. 21-cv-01396 (D.D.C. June 25, 2021) ("[I]n light of Defendants' delisting of Plaintiff GOWIN Semiconductor Corp as a Communist Chinese Military Company, Plaintiff hereby gives notice that this action is voluntarily dismissed without prejudice.").

306. *See* Exec. Order No. 14032, 3 C.F.R. 586, 586 (2022); *Chinese Military Companies Sanctions, Non-SDN Chinese Military-Industrial Complex Companies List (NS-CMIC List)*, OFF. FOREIGN ASSETS CONTROL, U.S. DEP'T TREASURY, https://perma.cc/D62Q-Q55N (archived Feb. 26, 2026).

the DOD to maintain a parallel list of CMCs through 2030.[307] Starting in 2026, new restrictions will prevent the DOD from contracting with listed entities (or their affiliates), and by June 2027, the DOD will be prohibited from acquiring end products or services with CMC components.[308] Like the CCMCs, the NS-CMIC List has been subject to APA litigation. In August 2024, Advanced Micro-Fabrication Equipment alleged a violation of three APA judicial review standards: arbitrary and capricious as well as constitutionally and statutorily insufficient.[309] The Pentagon removed the company from the CMC list before the court issued its ruling.[310]

While regulations introduced in regard to Chinese military companies must meet the judicial standards in the APA, courts may in some circumstances not insist on full rulemaking and adjudication.[311]

b. SDNs and SDGTs under IEEPA

IEEPA gives the President the authority to declare a national emergency during peacetime "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[312] The President may block the assets or prevent any transactions of designated individuals or countries.[313] For the first twenty-three years, successive administrations issued fewer than two dozen orders, targeting countries and their nationals.[314] In 1995, the aperture expanded: President Clinton released an order directed at non-state organizations threatening the Middle East Peace process.[315] The SDT List isolated individuals or groups controlled by or acting on behalf of designated organizations.[316] President Clinton went on to place sanctions on narcotics

307. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1260H, 134 Stat. 3965 (codified as amended at 10 U.S.C. § 113 note (Public Reporting of Chinese Military Companies Operating in the United States)).

308. *See* National Defense Authorization Act of Fiscal Year 2024, Pub. L. No. 118-31, § 805, 137 Stat. 136, 315 (2023) (codified at 10 U.S.C. note preceding § 4651).

309. *See* Complaint ¶ 9, Advanced Micro-Fabrication Equip. Inc. v. U.S. Dep't of Def., No. 24-cv-02357 (D.D.C Aug. 14, 2024), ECF No. 1; 5 U.S.C. § 706(2)(A)-(C).

310. *See* Notice of Removal of Designated Chinese Military Companies, 89 Fed. Reg. 102868 (Dec. 18, 2024).

311. *See* Hesai Tech. Co. v. U.S. Dep't of Def., No. 24-1381, 2024 WL 3673574, at *3 (D.D.C. Aug. 5, 2024) (holding that Hesai Technology's listing was exempt from the notice-and-comment requirement).

312. 50 U.S.C. § 1701(a).

313. *Id.* § 1702(a)(1)(B).

314. Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 648 (2008).

315. *Id.*; Exec. Order No. 12947, 3 C.F.R. 319, 319 (1996); CRONIN, *supra* note 291, at 4.

316. *See* Exec. Order No. 13099, 3 C.F.R. 208, 208 (1999).

traffickers, rebel movements, and non-U.S. persons knowingly contributing to the proliferation of weapons of mass destruction.[317] Post-9/11, the volume of orders significantly increased, with nearly three dozen issued in its wake.[318] The standards for inclusion lowered: The risk of contributing to proliferation became sufficient, even as it became an offense to try to avoid the orders.[319] Entities on the SDT List became folded into a more comprehensive SDN List, maintained by the Office of Foreign Asset Control (OFAC).[320]

The SDN List acts as an instrument of U.S. foreign policy.[321] Implementing regulations, accordingly, claim APA notice-and-rulemaking exemption on the grounds that listing "involves foreign affairs functions."[322] Regulations issued by the Treasury nevertheless require OFAC to make information about infractions, fines, and settlements publicly available.[323] They allow challenges to unblock property and to seek reconsideration in cases of mistaken identity or typographical error.[324] A designee can petition for removal based on "arguments or evidence that the person believes establishes" either (1) "that insufficient basis exists for the sanction" or (2) "that the circumstances resulting in the sanction no longer apply."[325] The designee may propose remedial steps, "such as corporate reorganization, resignation of persons from positions in a blocked entity, or similar steps" to "negate the basis for the sanction."[326] OFAC reviews the petition, requests information if necessary, and provides a written decision.[327] The target may challenge the determination or file another petition, echoing the requirements laid out in the APA.

---

317. *See* Exec. Order No. 12978, 3 C.F.R. 415, 415-16 (1996) (declaring a national emergency to combat Colombian drug traffickers); Exec. Order No. 13098, 3 C.F.R. 206, 206 (1999) (implementing sanctions against the National Union for the Total Independence of Angola); Exec. Order No. 13069, 3 C.F.R. 232, 232-33 (1998) (prohibiting transactions with the National Union for the Total Independence of Angola); Exec. Order No. 13094, 3 C.F.R. 200, 200-01 (1999) (targeting the proliferation of weapons of mass destruction).

318. Donohue, *supra* note 314, at 649-50.

319. *Id.* at 648-50.

320. *See* CRONIN, *supra* note 291, at 4; *Specially Designated Nationals List*, OFAC SANCTIONS LIST SERV., https://perma.cc/3CGU-7CHZ (last updated Oct. 30, 2025).

321. *See, e.g.*, Exec. Order No. 14014, 3 C.F.R. 514 (2022) (blocking property with respect to the situation in Burma); Exec. Order No. 13413, 3 C.F.R. 247 (2007) (implementing sanctions against individuals and entities destabilizing the Democratic Republic of the Congo); Exec. Order No. 14024, 3 C.F.R. 542 (2022) (providing for sanctions on persons operating in the technology or defense sectors of the Russian Federation).

322. 31 C.F.R. § 501.804; *id.* § 594.801.

323. *Id.* § 501.805.

324. *Id.* § 501.806.

325. *Id.* § 501.807(a).

326. *Id.*

327. *Id.* § 501.807(b).

Less than a fortnight after 9/11, President Bush issued an executive order under IEEPA declaring a national emergency and creating a second SDGT List, freezing "all property and interests in property" of foreign persons providing material support to terrorism.[328] The Secretary of State designates individuals determined "to have committed, or to pose a significant risk of committing, acts of terrorism" threatening the national security, foreign policy, or economy of the United States.[329] The Treasury then designates individuals or entities owned or controlled by the target, providing material support to them, or in any way associated with the designated entity.[330] For nearly a quarter of a century, the Order has been annually renewed, with occasional amendments.[331]

Entities have brought APA challenges resulting in their removal from the lists. In 2006, for instance, the Treasury froze KindHearts for Charitable Humanitarian Development's assets and provisionally designated it as an SDGT, prompting the organization to bring suit under the APA.[332] In 2009, an Ohio District Court found the Treasury to have violated the charity's Fifth Amendment rights because it relied on unconstitutionally vague criteria, had failed to provide KindHearts with adequate notice and a meaningful opportunity to be heard, and had "acted arbitrarily and capriciously in restricting [the charity]'s access to its own funds to pay counsel for its own defense."[333] The court placed a temporary restraining order on the Treasury to prevent it from listing the charity while the court considered what remedies would be appropriate.[334] In 2012, the government paid the charity's attorney's fees and removed it from the SDGT list, while the organization distributed its funds and dissolved.[335]

While these cases demonstrate the application of the APA to the NSAS in litigation, as with travel restrictions and CMCs, at times the mere fact of litigation prompts delisting.[336]

328. *See* Exec. Order No. 13224, 3 C.F.R. 786, 787 (2002).

329. *Id.*

330. *Id.*

331. *See, e.g.*, Exec. Order No. 13886, 3 C.F.R. 356, 356 (2020); Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 89 Fed. Reg. 77011 (Sept. 20, 2024).

332. KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 676 F. Supp. 2d 649, 650-51, 654-55 (N.D. Ohio 2009).

333. *Id.* at 650.

334. *Id.* at 657.

335. *See KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, CHARITY & SEC. NETWORK (Aug. 24, 2020), https://perma.cc/5CUL-VVZG.

336. *See, e.g.*, Notice of Voluntary Dismissal at 1, Salah v. U.S. Dep't of the Treasury, No. 12-cv-07067 (N.D. Ill. Nov. 16, 2012); Complaint at 6, 15, Salah v. U.S. Dep't of the Treasury, No. 12-cv-07067 (N.D. Ill. Sept. 5, 2012); OFF. OF FOREIGN ASSETS CONTROL, CHANGES TO LIST OF SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST SINCE JANUARY 1, 2012, at 87 (2012), https://perma.cc/U84Q-97G6.

c. CAATSA and AEDPA

In 2017, another statutory anchor, CAATSA, provided for sanctions to be placed on Iran, Russia, and North Korea.[337] Plaintiffs have challenged the procedures adopted as inconsistent with the APA.[338] The Department of State's designation of Foreign Terrorist Organizations under AEDPA and Section 219 of the Immigration and Nationality Act, in turn, has also come under increasing scrutiny.[339] The primary objection to these lists is that they violate the standards of judicial review and the designee's due process protections.[340]

B. Rulemaking and Adjudication: The Military Function

In recognition of the unique demands of the armed services, the APA exempts military functions from rulemaking and adjudication.[341] Rules relating to military justice thus fall outside APA requirements.[342] For the Supreme Court, the "need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion."[343] For adjacent matters, such as regulations governing military commissions, courts allow for promulgation absent notice and comment.[344] In areas involving the military but further afield from core martial functions, courts are more equivocal. For servicemembers, courts ask whether the activity being regulated reflects a

337. *See* Countering America's Adversaries Through Sanctions Act of 2017, Pub. L. No. 115-44, 131 Stat. 886 (codified in scattered sections of the U.S. Code).

338. *See, e.g.*, Deripaska v. Yellen, No. 19-cv-00727, 2021 WL 2417425, at *1, *6, *8 (D.D.C. 2021) (evaluating a plaintiff's claim that his designation in relation to Russia's assertion of governmental authority in the Crimean region without Ukrainian authorization violated the APA because the defendants acted arbitrarily and capriciously when they sanctioned him under Executive Order 13,661 and rejected his delisting petition).

339. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (codified as amended at 8 U.S.C. § 1189) (adding Section 219 to the Immigration and Nationality Act); Bahiraei v. Blinken, 717 F. Supp. 3d 726, 733-34, 736, 742 (N.D. Ill. 2024) (examining elements of Tier I, Tier II, and Tier III Foreign Terrorist Organizations and related exemptions in the context of the APA).

340. *See, e.g.*, United States v. Al-Arian, 308 F. Supp. 2d 1322, 1343-45, 1347 (M.D. Fla. 2004) (considering a due process challenge and finding designation of the Palestinian Islamic Jihad-Shiqaqi Faction to be constitutional on its face); Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 199-200 (D.C. Cir. 2001) (holding that the designation of an organization was not arbitrary or capricious and that organizations designated as Foreign Terrorist Organizations under AEDPA are entitled to due process protections).

341. *See* 5 U.S.C. §§ 553(a)(1), 554(a)(4).

342. *See* United States v. Mingo, 964 F.3d 134, 140 (2d Cir. 2020).

343. *Cf.* Chappell v. Wallace, 462 U.S. 296, 299-300 (1983) (highlighting the special role afforded the military in the context of a *Bivens* claim).

344. *See In re* Abdul-Aziz Ali, 558 F. Supp. 3d 1167, 1183-84 (C.M.C.R. 2021).

military "function."[345] Matters involving military installations are almost always exempt.[346]

Courts tend to afford deference to the DOD in relation to servicemembers in the field. In 1973, for instance, the Southern District of New York rejected a class action lawsuit challenging the lack of notice and opportunity to be heard in presumptive finding of death determinations for soldiers missing in action, despite the fact that "the effect of the statutory scheme appears to create an irrebuttable presumption of death," which "in itself raises a substantial constitutional question since the Supreme Court has traditionally held that irrebuttable presumptions which act to deprive persons of protected interests violate the due process clause of the Fifth Amendment."[347] The demands of war brought administrative determinations within the APA's military function exception.[348] The DOD mandates requiring servicemember vaccination similarly fall within a military function (that is, preparing soldiers for battle), rendering the APA's rulemaking procedures inapplicable.[349]

Civilian agencies may perform military functions. The DOE, for instance, designs, tests, and stockpiles nuclear weapons.[350] In *Independent Guard Ass'n of Nevada v. O'Leary*, the government argued that contractors guarding a DOE facility that produced and tested nuclear devices came within the exception, as the DOE "could not safely and securely accomplish its military function" without them.[351] The Ninth Circuit looked at the nature of the activity being regulated and found it too attenuated to qualify as a military function under the APA.[352] The court cited back to the Senate Report, which underscored that "the exceptions apply only 'to the extent' that the excepted subjects are *directly* involved."[353] Legislative history and case law, the court observed, "direct that exceptions to the APA be narrowly construed, and that the exception . . . be invoked only where the activities being regulated directly involve a military function."[354] Under the alternative reading, "maintenance staff, custodial help, food service workers and even window washers could find their undoubtedly

345. *See infra* notes 347-356 and accompanying text.

346. *See infra* notes 357-360 and accompanying text.

347. McDonald v. McLucas, 371 F. Supp. 837, 839-41 (S.D.N.Y. 1973).

348. *Id.* at 840-41.

349. *See, e.g.*, Doe #1-#14 v. Austin, 572 F. Supp. 3d 1224, 1231 (N.D. Fla. 2021).

350. *See* U.S. OFF. OF THE DEPUTY ASSISTANT SEC'Y OF DEF., NUCLEAR MATTERS HANDBOOK 2020 ch. 5, at 1-9 (rev. ed. 2020), https://perma.cc/BT95-2J5C; Department of Energy Organization Act, Pub. L. No. 95-91, § 102(18), 91 Stat. 565, 567-69 (1977) (codified as amended at 42 U.S.C. § 7112).

351. 57 F.3d 766, 769 (9th Cir. 1995), *amended by* 69 F.3d 1038 (9th Cir. 1995).

352. *Id.* at 770.

353. *Id.* at 769 (citing ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONGRESS, 1944-46, S. DOC. NO. 248, at 199 (2d Sess. 1946)).

354. *Id.* at 770.

necessary support tasks swept within the exception's ambit."[355] For the court, "[n]either the statute, nor common sense, requires such a result."[356]

Courts find challenges involving military installations well within the exemption. In *United States v. Ventura-Melendez*, for example, two fishermen heading in the direction of a Navy firing range ignored U.S. Coast Guard warnings not to enter a temporary security zone.[357] The brothers argued that a lawful regulation did not exist at the time they were arrested because the rule establishing the zone had not been published under the APA's rulemaking requirements.[358] For the court, however, the rule establishing a security zone adjacent to a bombing range constituted a military function.[359] It was "no less directly related to military action than identifying targets or establishing the time for artillery exercises."[360]

Despite the military exception, APA challenges to NSAS procurement contracts are reviewable,[361] albeit with significant deference.[362] It is therefore relatively rare for a court to find an agency's determination in procurement cases to constitute arbitrary-and-capricious behavior,[363] although on some occasions courts have done so.[364]

355. *Id.*

356. *Id.*

357. *See* 321 F.3d 230, 231-32 (1st Cir. 2003).

358. *Id.* at 232.

359. *Id.* at 233.

360. *Id.*

361. *See* Rotair Aerospace Corp. v. United States, 173 Fed. Cl. 187, 196 (2024).

362. *See, e.g.*, Warrior Focused Sols., LLC v. United States, 175 Fed. Cl. 416, 424-25 (2025) (applying a highly deferential standard to APA review of a disappointed bidder challenge); Sys. Stud. & Simulation, Inc. v. United States, 175 Fed. Cl. 309, 318-19 (2025) (applying a highly deferential APA standard of review in a bid protest); Oak Grove Techs., LLC v. United States, 116 F.4th 1364, 1374, 1380 (Fed. Cir. 2024) (reinforcing that APA review in bid protests is deferential); Alisud-Gesac Handling-Servisair 2 Scarl v. United States, 161 Fed. Cl. 655, 662-63, 674, 676 (2022) (extending significant deference to the Navy's determination in an APA case challenging Navy airfield service awards).

363. *See, e.g.*, *Alisud-Gesac*, 161 Fed. Cl. at 677 (holding that the Navy acted rationally in rejecting a technical proposal); Ala. Aircraft Indus., Inc.-Birmingham v. United States, 586 F.3d 1372, 1375-76 (Fed. Cir. 2009) (holding that the Air Force's price-realism analysis was reasonable and not arbitrary under the APA); Info. Tech & Applications Corp. v. United States, 316 F.3d 1312, 1321-22 (Fed. Cir. 2003) (upholding definitions of "clarifications" and "discussions" under APA deference).

364. *See* ARxIUM, Inc. v. United States, 136 Fed. Cl. 188, 197-98, 200 (2018); IAP Worldwide Servs., Inc. v. United States, 159 Fed. Cl. 265, 321 (2022); Level 3 Commc'ns, LLC v. United States, 129 Fed. Cl. 487, 507 (2016).

C. Waiver of Sovereign Immunity: Exceptions to the Definition of "Agency"

In 1976, the APA integrated the statute's general definition of "agency" into its waiver of sovereign immunity, foreclosing Article III courts from subjecting "courts martial and military commissions" or "military authority exercised in the field in time of war or in occupied territory" to judicial review.[365] While some matters fall within these exceptions, courts have been careful to cabin their application.[366] The *reason* for waiving sovereign immunity, after all, was to make sure that the Departments of State, Defense, Treasury, and others could be held to account.[367] Much analysis thus centers on what, precisely, constitutes "in the field" and "occupied territory," as well as *when* decisions are reached.[368]

Where war efforts are not underway, the exception does not apply. In *Jaffee v. United States*, for instance, a servicemember brought suit alleging that he developed cancer from radiation exposure and seeking to compel the government to warn others similarly situated.[369] Although weapons development constituted a military function, the notification failure occurred in the United States, after the Korean War ended, placing it outside the exemption.[370] A similar approach applies to civilian agencies. In *Doe v. Sullivan*, a servicemember challenged an FDA regulation permitting the DOD to use unapproved, investigational drugs without consent in the lead-up to Operation Desert Shield.[371] The D.C. Circuit held the exemption inapplicable.[372] While courts, as a general rule, would not interfere in the "relationship between soldiers and their military superiors," the matter did not turn on "military commands made in combat zones or in preparation for, or in the aftermath of, battle."[373] Then-Judge Ruth Bader Ginsburg explained, "We confront at this time not a dispute over military strategy or discipline, not one between soldiers and their superiors, but one over the scope of the authority Congress has entrusted to the FDA."[374] The Secretary of Health and Human Services, outside the military chain of command, was not exercising the President's Commander-in-Chief authority, acting instead under a civilian statute.[375]

365. 5 U.S.C. § 701(b)(1)(F), (G).

366. *See infra* notes 369-386 and accompanying text.

367. *See* H.R. REP. NO. 94-1656, at 5, *as reprinted in* 1976 U.S.C.C.A.N. 6121, 6125.

368. *See infra* notes 369-397 and accompanying text.

369. 592 F.2d 712, 714 (3d Cir. 1979).

370. *Id.* at 720.

371. 938 F.2d 1370, 1371 (D.C. Cir. 1991).

372. *Id.* at 1380.

373. *See id.*

374. *Id.*

375. *Id.* at 1380-81.

Mindful of how investigational drugs had been used during the 1991 Gulf War and their impact on veterans' health,[376] in 1997 Congress prohibited the administration of unapproved drugs without servicemembers' informed consent.[377] A waiver could only be issued by the President.[378] The following year, though, the DOD began a nonconsensual mass inoculation program for Anthrax without first obtaining a waiver.[379] The program recommenced in June 2002, predating "Congressional authorization for the use of force in Iraq by four months and the recent hostilities by almost eighteen months."[380] Servicemembers and contractors subsequently sued the Secretary of Defense, the Secretary of Health and Human Services, and the Commissioner of the FDA for violating federal law, an executive order, and DOD regulations.[381] In *Doe v. Rumsfeld*, the D.C. District Court registered that the DOD did not administer the inoculations either "in the field" or in "occupied territory."[382] The Secretary of Defense, not commanders in the field, had given the order.[383] The court noted that "the right to bodily integrity and the importance of complying with legal requirements, . . . are among the highest public policy concerns one could articulate."[384] Prior informed consent would not "interfere with the smooth functioning of the military."[385]

These and other cases underscore that neither military nor civilian entities obtain a blanket exemption for national security related matters; to the contrary, courts narrowly construe what constitutes "in the field in time of war."[386] This does not mean, though, that the exemption is never met. Actions taken on the battlefield qualify.[387] Post-9/11, a number of such cases came to the fore.

376. *See* H.R. REP. NO. 105-388, at 110 (1997).

377. *See* 10 U.S.C. § 1107.

378. *See id.* § 1107(f)(1).

379. Doe v. Rumsfeld, 297 F. Supp. 2d 119, 125 (D.D.C. 2003).

380. *Id.* at 129.

381. *Id.* at 122-23.

382. *Id.* at 128-29.

383. *Id.* at 129.

384. *Id.* at 134.

385. *Id.*

386. *See* Harrison v. Austin, 597 F. Supp. 3d 884, 903 (E.D. Va. 2022) (holding that the decision to exclude HIV-positive servicemembers from worldwide deployment was not made "in the field in time of war"); Zaidan v. Trump, 317 F. Supp. 3d 8, 22 (D.D.C. 2018).

387. *Cf.* Rosner v. United States, 231 F. Supp. 2d 1202, 1211-12, 1211 n.13 (S.D. Fla. 2002) (finding that actions taken on the battlefield qualify, though the military exception did not apply in this case).

In *Rasul v. Bush*, for example, family members of Kuwaiti nationals held at Guantánamo Bay sought an injunction, alleging violations of the APA.[388] District Court Judge Colleen Kollar-Kotelly stated, "There is no dispute that Plaintiffs were captured in areas where the United States was (and is) engaged in military hostilities pursuant to the Joint Resolution of Congress," bringing their detention within the APA's exemption for the waiver of sovereign immunity.[389] In *Al Odah v. United States*, Judge A. Raymond Rudolph agreed, writing:

> Each of the detainees, according to their pleadings, was taken into custody by American armed forces "in the field in time of war." . . . [T]hey remain in custody "in the field in time of war." It is of no moment that they are now thousands of miles from Afghanistan. Their detention is for a purpose relating to ongoing military operations and they are being held at a military base outside the sovereign territory of the United States.[390]

Historically, "in the field" extended beyond where battles actually occurred "to organized camps stationed in remote places where civil courts did not exist."[391] Allowing a court to interfere just because prisoners had been "moved to a 'safe' location would interfere with military functions in a manner the APA's exclusion meant to forbid."[392] Other detainee cases endorsed the same reasoning.[393] Like servicemembers and prisoners, contractors located "in the field" may fall within the exception to the waiver of sovereign immunity.[394]

"In the field," however, does not necessarily extend back to the United States. In *Zaidan v. Trump*, for instance, journalists brought suit against the CIA, DOD, DHS, Office of the Director of National Intelligence, and others, alleging that the plaintiffs' placement on a kill list violated the APA's arbitrary-and-capricious standard.[395] In 2013, President Obama had issued a Presidential Policy Guidance addressing the use of lethal force and detention, and providing a framework for "direct action" against U.S. citizens outside areas of active

388. 215 F. Supp. 2d 55, 58 (D.D.C. 2002), *aff'd sub nom.*, Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd and remanded on other grounds sub nom.*, Rasul v. Bush, 542 U.S. 466 (2004).

389. *Id.* at 64 n.11.

390. 321 F.3d at 1149-50 (Randolph, J., concurring).

391. *Id.* at 1150 (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 274 (1960) (Whittaker, J., concurring in part and dissenting in part)).

392. *Id.*

393. *See, e.g.*, *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 480-81 (D.D.C. 2005); Basardh v. Obama, 612 F. Supp. 2d 30, 33 n.9 (D.D.C. 2009); *see also* Vance v. Rumsfeld, 701 F.3d 193, 195-98 (7th Cir. 2012) (holding that contractors allegedly subject to damaging interrogation techniques had been detained in the field and thus fell outside the waiver).

394. *See* Nattah v. Bush, 770 F. Supp. 2d 193, 203 (D.D.C. 2011) (holding that because a translator working for L-3 Services was subject to "decisions made by commanders in the field in preparations for, and during the course of, combat in Iraq," the court lacked jurisdiction under the APA to recruit and deploy the contractor).

395. 317 F. Supp. 3d 8, 15 (D.D.C. 2018).

hostilities, apparently clearing the legal landscape to allow for the targeting of U.S. persons like the journalists in *Zaidan*.[396] Judge Collyer acknowledged that a non-traditional war could be considered a "time of war"; however, the decision of whether to place at least one journalist on a kill list "far from the field of battle" suggested that the APA exception would not apply.[397]

A similarly narrow reading marks judicial construction of "court martial" and "military tribunals." In *Bismullah v. Gates*, D.C. Circuit Chief Judge Douglas Ginsburg, joined by Judges Rogers, Tatel, and Griffith, contended in his concurrence that Combatant Status Review Tribunals counted as neither.[398] Nor did they constitute an "agency"; instead, they represented something sui generis, outside the APA.[399] Together, these cases suggest that outside of active battle and traditional military justice, the APA's waiver of sovereign immunity applies.

IV. Whither the NSAS

In March 2025, the State Department issued a notice in the *Federal Register* designed to cabin the APA's reach.[400] It declared that *all* efforts "conducted by any agency of the federal government, to control the status, entry, and exit of people, and the transfer of goods, services, data, technology, and other items across the borders" constitute a foreign affairs function within the meaning of the APA, thus excluding such actions from rulemaking and adjudication.[401] Backed by Executive Order 14,150, which in January 2025 laid out "the foreign policy of the United States,"[402] the notice plays to the President's responsibilities in the field of international relations, ostensibly shielding a vast range of actions by DHS, State, Treasury, Commerce, and others from accountability under the APA. Simply because the executive branch is asserting a broader understanding of its own foreign affairs exemption, however, does not mean that the courts will necessarily follow suit. If anything, courts' jurisprudence is going in the opposite direction.

In 2024, *Loper Bright Enterprises v. Raimondo* heralded a seismic shift: The Supreme Court held that in the face of textual ambiguity, courts were not required to defer to an agency's legal interpretation.[403] The decision overruled

396. U.S. DEP'T OF JUST., *supra* note 9, at 1.

397. *Zaidan*, 317 F. Supp. 3d at 22-23.

398. 514 F.3d 1291, 1294 (D.C. Cir. 2008) (en banc) (per curiam) (Ginsburg, J., concurring).

399. *See id.*

400. *See* Determination: Foreign Affairs Functions of the United States, 90 Fed. Reg. 12200, 12200 (Mar. 14, 2025).

401. *Id.*

402. Exec. Order No. 14150, 90 Fed. Reg. 8337, 8337 (Jan. 29, 2025).

403. *See* 144 S. Ct. 2244, 2263, 2273 (2024).

Chevron v. Natural Resources Defense Council, which in 1984 determined that where Congress had not spoken directly to the question at issue, courts could only inquire as to whether the approach was "based on a permissible construction of the statute."[404] It was for agencies, not courts, to fill out statutory provisions. Upending forty years of jurisprudence, Chief Justice Roberts underscored that Article III shoulders responsibility for adjudicating cases and controversies.[405] As Chief Justice Marshall had declared in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[406] While respect may be afforded to Article II interpretations, the Court would make the final determination of law.[407] A year later, the Court doubled down in *McLaughlin Chiropractic v. McKesson Corp.*, when it ruled in a putative class action against an advertiser under the Telephone Consumer Protection Act that "[t]he Hobbs Act does not preclude district courts in enforcement proceedings from independently assessing whether an agency's interpretation of the relevant statute is correct."[408]

While these cases appear to signal a higher level of judicial scrutiny, a relatively small number of NSAS cases prior to *Loper Bright* progressed to a *Chevron* analysis.[409] That proportion reflects the nature of the questions which often present in relation to national security. Administrative law distinguishes between organic statutes (authorizing agency action) and general statutes (regulating agency behavior).[410] While the former (until *Loper Bright*) were entitled to *Chevron* deference, the latter, in relation to the APA, were not.[411] Most of the NSAS cases which have come forward engage the latter: As discussed extensively in Part III above, they focus on processes followed in rulemaking and adjudication, the application of judicial standards of review, and whether certain actions fall within the waiver of sovereign immunity, not whether agencies have the power in the first place to engage in the underlying behavior.

404. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

405. *Loper Bright*, 144 S. Ct. at 2257.

406. *Id.* at 2248 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

407. *Id.* at 2274.

408. McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp., 145 S. Ct. 2006, 2011-13 (2025).

409. *See* Zhang v. Slattery, 55 F.3d 732, 749-50 (2d Cir. 1995) (citing *Chevron* in support of the proper standard of review); E. Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094, 1112 (N.D. Cal. 2018), *aff'd sub nom.*, E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640 (9th Cir. 2021) (reading the Ninth Circuit as having concluded that the rule would fail the second step of *Chevron* "because it is not a reasonable interpretation of the statute"); *see also* Raoof v. Sullivan, 315 F. Supp. 3d 34, 43 n.4 (D.D.C. 2018) ("Even if the statutory text was silent or ambiguous on this question, which it is not, *Chevron* deference would require me to uphold the agencies' reasonable interpretation of the statutory scheme.").

410. *See* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1197 (2007).

411. *Id.*

Loper Bright may therefore not represent so much of a sea change in relation to the substantive areas raised in this Essay, as a reinforcement of standards already being applied: Outside of narrow exceptions, as a matter of justiciability, courts subject the action in question to regulatory, statutory, and constitutional scrutiny.

Post-*Loper Bright*, the standards already appear to be strengthening. Consider *Van Loon v. Department of the Treasury*,[412] decided just months after *Loper Bright*. In 2022, OFAC sanctioned Tornado Cash, an open-source software protocol on Ethereum used to facilitate anonymous transactions by masking digital asset origins and transfers.[413] OFAC added the website "tornado.cash" and thirty-seven smart contracts to the SDN list, making it illegal for anyone to use the open source protocol.[414] Three months later, OFAC withdrew the designation and issued a new one with fifty-three Ethereum addresses, identifying Tornado Cash as a Decentralized Autonomous Organization.[415] OFAC issued notices to users that they could request funds trapped in Tornado Cash pools but would be prohibited from interacting with its transaction and pooling functions.[416] In *Van Loon*, six users brought suit, alleging that the Treasury had exceeded its statutory authority.[417] The Fifth Circuit agreed.[418] Quoting *Loper Bright*, the court cited "the unremarkable, yet elemental proposition reflected in judicial practice dating back to *Marbury* that courts decide legal questions by applying their own judgment, even in agency cases."[419] The court took seriously the Supreme Court's admonition that the judiciary must "independently identify and respect [constitutional] delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with" the APA.[420]

Careful scrutiny does not mean, of course, that all cases will come out the same way. In March 2025, the D.C. District Court considered a denial of an SDN

412. 122 F.4th 549 (5th Cir. 2024).

413. *Van Loon*, 122 F.4th at 553; *see also* Press Release, U.S. Dep't of the Treasury, U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash (Aug. 8, 2022), https://perma.cc/4LG5-8TR3 (announcing the sanctions).

414. *Van Loon*, 122 F.4th at 561; *see also* Exec. Order No. 13694, 3 C.F.R. 297 (2016) (imposing sanctions in response to malicious cyber-enabled activities); Exec. Order No. 13722, 3 C.F.R. 446 (2017) (imposing sanctions on certain matters related to North Korea).

415. *Van Loon*, 122 F.4th at 561.

416. *Id.*

417. *Id.* at 553-54.

418. *Id.* at 565-66.

419. *Id.* at 563 (quoting Mayfield v. U.S. Dep't of Lab., 117 F.4th 611, 617 (5th Cir. 2024)).

420. *Id.* (alteration in original) (quoting *Mayfield*, 117 F.4th at 617).

delisting challenge and upheld the agency's action.[421] The APA's influence should not be underestimated. Trump's designation of Drug Cartels under IEEPA and the Immigration and Nationality Act, as well as AEDPA, for instance, appear to be holding the line in subjecting executive national security assertions to greater scrutiny.

The willingness to question the government's national security claims extended all the way to the top: In the 2025 case of *Trump v. J.G.G.*, the Supreme Court in a per curiam ruling confirmed that Venezuelan detainees were "entitled to notice and an opportunity to challenge their removal."[422] The key point of disagreement, highlighted by Justice Sotomayor's dissent, was *which* court should oversee the determination.[423] No Justice raised any of the foreign affairs exemptions. To the contrary, the question was whether just habeas proceedings or *also* APA proceedings should move forward in light of the significant due process concerns.[424]

These cases, like those addressed throughout this Essay, suggest that the APA's purchase on matters impacting national security should not be underestimated. If anything, the statute's reach is growing. The time is ripe for administrative law to take notice of the substantial body of law that now constitutes the NSAS.

421. *See* Goetz v. Palluconi, 775 F. Supp. 3d 189, 200 (D.D.C. 2025) (stating in regard to an SDN listing that "In the realm of international affairs, courts must 'respect' the Government's 'conclusions' as to its ability 'to collect[] evidence' and the 'factual inferences' it 'draw[s]' from that evidence," continuing, "That is especially true when the Government's 'national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain" and holding that the government met the substantial evidence standard); *see also* Diegelmann v. Yellen, No. 24-1090, 2024 WL 4880468, at *6-7 (D.D.C. Nov. 25, 2024), *appeal filed sub nom.*, Diegelmann v. Bessent, No 24-5277 (D.C. Cir. Dec. 10, 2024) (adopting a similar approach).

422. 145 S. Ct. 1003, 1006 (2025) (per curiam).

423. *Id.* at 1011-16 (Sotomayor, J., dissenting).

424. *Id.*