The Lost History of the APA's Foreign Affairs Exception

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Abstract. Federal agency rulemaking is governed by the Administrative Procedure Act ("APA"), which mainly requires public notice and comment and a delayed effective date. Sometimes, that can be a fast process of just a few months; other times, it can take years. However, an exception to APA requirements—called the "foreign affairs function"—allows qualifying regulations to be immediately issued with the force and effect of law. But as more agencies have increasingly used this pivotal exception, litigants have increasingly challenged its use.

Between these growing disputes, and with almost no accessible history or context to guide them, courts have been confused as to what qualifies for the exception. Now, intra- and inter-circuit splits have emerged over the meaning of "foreign affairs," subjecting its longstanding use to new uncertainty in vital fields. But history and context for this exception do exist.

Using new archival research and contextualizing never-before-linked case law and commentary, this Article is the first to trace the exception's previously unknown origins to illuminate its source, development, scope, and contemporaneous understandings. This history strongly suggests that various courts' readings of the exception and the splits on how to analyze it are mostly inaccurate, conflicting with its text, and with the rediscovered history and purpose behind the exception.

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Introduction

Most laws today are not statutes passed by Congress, but rather regulations issued by agencies,[1] which have the same force and effect of statutory law.[2] Consequently, the Administrative Procedure Act ("APA"), which sets forth specific requirements to issue such regulations—including undergoing public notice-and-comment rulemaking[3]—is as important as ever. Indeed, an agency's failure to follow the APA's requirements means that an agency's issued rules could later be judicially invalidated.[4] If, however, one of the APA's few exceptions to its rulemaking requirements applies, rules that would otherwise be reversed for not properly conducting public notice and comment can remain in force.[5] But a problem for both the regulated public and federal agencies is that the scope of one of the main exceptions to rulemaking has become the subject of increasing confusion. As a result, what used to be a simple question has now become a splintered one: What qualifies for the APA's "foreign affairs function" exception?[6]

As more courts interpret whether a given rule falls within the scope of the term "foreign affairs function," and is thus excepted from the APA's rulemaking requirements, more courts are taking diverging views.[7] Now, even traditional uses of the exception are in peril.[8] As one court succinctly put it, "the meaning of a foreign affairs function is hardly clear."[9] Compounding the problem, courts note that there is sparse case law on the topic, and "legislative history offer[s] little guidance to the meaning of

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[1] *Compare* CONGRESS.GOV, *Public Laws*, https://www.congress.gov/public-laws/117th-congress (listing 362 public laws that were enacted in 2022); *with* FEDERALREGISTER.GOV (choose "Advanced Document Search"; then choose "Rule" from the Document Category; then select "2022" as the year for "Publication Date") (searching agency-promulgated rules in 2022 and finding 3,168 unique results).

[2] *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 295 & n.18 (1979) ("[P]roperly promulgated, substantive agency regulations have the 'force and effect of law.'"). Under the Administrative Procedure Act ("APA"), regulations are encompassed within the term "rule." 5 U.S.C. § 551(4). And a rule is a prescribed law. *Id.*

[3] 5 U.S.C. § 553(b)–(c) (also known as § 4 of the APA, setting forth the APA's requirements for rulemaking).

[4] *E.g.*, Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 8, 11 (D.C. Cir. 2011).

[5] *See* 5 U.S.C. § 553(a)(1).

[6] Some term this the foreign affairs exemption as opposed to exception. This Article uses "exception" because that is the way the authors, agencies, and Congress mostly referred to it, and because "except" is used in the provision itself.

[7] *See infra* Part I.

[8] *Id.*

[9] Mast Indus., Inc. v. Regan, 596 F. Supp. 1567, 1580 (Ct. Int'l Trade 1984) ("The meaning of a foreign affairs function is hardly clear. Cases construing the 'foreign affairs function' exemption and the legislative history offer little guidance to the meaning of the term.").

the term," with hardly anything else to help construe it.[10] These sentiments decrying a lack of guidance for the term, while understandable, are not exactly accurate.

History and sources to help construe the term do exist; they were just not obvious or readily available, until now. Using newly discovered archival documents, never-before-made connections to other key writings, and even Supreme Court case law, this Article shows that the term has a traceable history—one that has been overlooked and misapplied for decades by scholars and jurists alike. This original research and newly woven context sheds new light on the meaning of the foreign affairs exception and offers new arguments not just for why recent courts have misunderstood it but also for how to return to regular readings of its scope.

Briefly summarized, the term "foreign affairs function" has recently led to increased confusion and litigation because all readily available legislative histories on the APA do not discuss the concepts underpinning the exception or its influences, and none note its true origins. Moreover, the Senate and House reports on the APA offer cursory and questionable explanations for the provision. Typically, the contemporaneous and readily available APA legislative histories say things only evident to the law's own authors, like "the meaning of the term is clear," "obvious," or "self-explanatory."[11] But the true explanation behind the exception became lost only because no one undertook a holistic historical look to understand why it was once thought to be clear. Further compounding the problem is a lack of substantial scholarship or commentary on the source and meaning of the term "foreign affairs function."[12] What little there is usually involves a restatement of the same readily available but questionable legislative history, demonstrating the need for the deeper research displayed here.

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[10] *E.g.*, *id.*; E.B. v. U.S. Dep't of State, 583 F. Supp. 3d 58, 63 (D.D.C. 2022) ("There is sparse case law in—or outside—this Circuit construing this exception.").

[11] *See, e.g.*, *infra* notes 178, 195, 262, 265, 281.

[12] *E.g.*, C. Jeffrey Tibbels, *Delineating the Foreign Affairs Function in the Age of Globalization*, 23 SUFFOLK TRANSNAT'L L. REV. 389, 395 (1999) ("The legislative history relating to the 'foreign affairs function' is sparse . . . ."). *But cf.* Arthur Earl Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 221, 258–69 (1972) (exploring possible meanings of the exception but mainly based on readily available House and Senate reports, dictionaries, post-enactment uses and surveys after 1946, and not exploring deeper causes or contexts for the exception); Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 919–31 (2014) (exploring the history of the APA and the exception, relying largely on wartime context and post-enactment case law to suggest its scope, while also noting there was a "dearth of specific legislative history" and "very little discussion" about the exception in the available legislative history).

Consequently, bereft of guidance and amid increasing lawsuits, an inter- and even intra-circuit court split has emerged over time on the applicability of the foreign affairs exception.[13] The split, comprised of different and competing tests, is well acknowledged by courts but has grown even more pronounced in recent years.[14] In some circuits, the test is whether following the public rulemaking provisions would provoke definitely undesirable international consequences (hereinafter the "undesirable consequences test").[15] In others, the test is more like a tautology, asking whether the excepted subject matter clearly and directly involved a foreign affairs function (hereinafter the "clearly and directly involved test").[16] Either of these main tests, unmoored from the statutory text, tell courts to take untenable turns as either soothsayers or statespersons. It is no wonder then that some circuits side with a particular test, while another chooses to combine them, and still others disregard each entirely.[17] Some courts have even further complicated these tests by disregarding the subject matter of the rule (i.e., its function or field) to focus only on a particular rule's effects.[18]

This lack of consistency and clarity has unsurprisingly led to conflicting decisions across different courts, even over the same subject areas, including visas, imports, exports, and certain immigration issues.[19] The conflict is acutely problematic because these fields are primarily governed by regulations and thus often impact a person's ability to travel to or from or remain in the United States, or it impacts America's $2-trillion-per-year global trade market.[20] Now, divergent tests across these important fields, which originally constrained only irregular invocations

13 *See infra* Part I.

14 *See* cases cited *infra* note 40.

15 *See infra* notes 42, 45–50.

16 *See infra* notes 44, 52–54.

17 *See infra* note 51.

18 In a bit of irony, a functional test (a term also used in software testing) examines or predicts a specific output post hoc. This stands in contrast with the subject matter as an input that the foreign affairs function was modeled after. *See infra* Section III.C; *cf.* Or. Bureau of Lab. & Indus. *ex rel.* Richardson v. U.S. W. Commc'ns, Inc., 288 F.3d 414, 418–19 (9th Cir. 2002) (describing a functional test there as "a judicially-developed analysis that neither appears in, nor is necessarily implied by, the statutory language" and which "effectively replaces the statutory term . . . [,] transform[ing] the controlling inquiry from one into the nature of the [statutory term] to one into the nature of [what the term does]"). The lure for courts to only output test in this way becomes stronger when the rule also appears to have significant domestic effects. *E.g.*, Cap. Area Immigrants' Rts. Coal. v. Trump, 471 F. Supp. 3d 25, 56 (D.D.C. 2020). The input as well as the output should be considered in evaluating the exception.

19 *See infra* notes 55–57.

20 *Trade in Goods with World, Seasonally Adjusted*, U.S. CENSUS BUREAU, https://perma.cc/T4U8-N6J5.

of the foreign affairs exception, have recently started to affect previously settled and traditional invocations of the exception.[21]

In that uncertainty lies the practical stakes and the importance of this issue. What constitutes a foreign affairs function is not merely an academic or technical exercise. It can have serious ramifications for international travel or business, and particularly for America's foreign policy and national security.[22] Especially in those latter fields, agility in the form of immediate action is crucial. But the ordinary rulemaking requirements of the APA are anything but agile. In fact, they require delay in two ways: (1) a no less than 30-day delayed effective date and (2) a particularly long delay in a detailed notice-and-comment process.[23] To undertake notice-and-comment rulemaking, the agency must initially publish a proposed rule complete with all relevant factual reasons behind it, then solicit comments from the public, then address and respond to all significant comments, and do so in a thorough and considered way to avoid the risk of judicial reversal.[24] The whole process can take months, even years.[25] Moreover, other statutes' time-consuming requirements apply when the APA's exceptions do not, adding further delay.[26]

Doubling the dilemma, it is not just delay that may be detrimental. Publicly posting reasons that underlie an immediate regulatory change—either in response to a particular country's actions or to issue necessary global measures—risks revealing specific and often sensitive reasons for the change, classified and not. But notice-and-comment procedures require an agency to publicly explain its rationale in response to a comment on a new or changed rule—unless an exception applies.

Consider then the impact of either a delay or of publishing underlying information in some recent rulemakings. When Russia was massing to invade Ukraine in 2022, agencies invoked the foreign affairs exception to

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21 *See infra* notes 55–57.

22 *See supra* notes 19–20 and accompanying text.

23 5 U.S.C. § 553(d).

24 *E.g.*, Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency 'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983))).

25 *E.g.*, Earth Island Inst. v. Regan, 553 F. Supp. 3d 737, 749 (N.D. Cal. 2021) (noting that an Environmental Protection Agency rule had taken six years).

26 *E.g.*, 5 U.S.C. § 603(a) (Regulatory Flexibility Act requiring a months-long analysis for rules affecting small businesses when notice and comment is required); 5 U.S.C §§ 801–08 (Congressional Review Act stating certain "major rules" must have at least a 60-day effective date delay, save for when an agency finds that notice and comment is unnecessary); *see also* Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (requiring lengthy regulatory planning and review steps for qualifying rules, except for most foreign affairs functions).

immediately amend regulations and prohibit certain exports to Russia that could be used to support their military activities.[27] When the Treasury Department's Office of Foreign Assets Controls ("OFAC") uses the exception to immediately implement country-, person-, or sector-specific sanctions, it often does so based on sensitive and urgent considerations, including when preannouncing the action or waiting for a delayed effective date could allow the country or persons to shift or hoard assets.[28] And abstractly, if sensitive or classified information reveals that a country is set to try to harm another, economically or otherwise, the exception negates the requirement to publicly present such information or preannounce a mitigating regulatory action during notice and comment. Visa rules likewise depend on the exception, because they are an exercise of foreign policy ordinarily intended to be reciprocal, based on another country's actions, and affect foreign, non-U.S. persons outside of the United States before they arrive to visit.[29] Visa rules are also available as foreign policy tools to foster or respond to evolving relations with other governments or their people.[30] But if underlying reasons for shifts in visa rules are made public, or if they become subject to public opinion referenda via public comments, it could impact diplomatic relations with those countries, even incrementally. Other examples by domestic-focused agencies also evince the need for the exception, including by the Centers for Disease Control in response to international travel concerns related to the Covid-19 virus,[31] by the National Oceanic and Atmospheric Administration regarding yearly adjustments for Pacific Ocean fisheries,[32] and by the Drug Enforcement Administration to implement an international convention on drugs.[33]

While the previous examples invoking the foreign affairs exception may seem apparent, the court confusion and split over the proper test or use of the exception actually risks these apparent applications. This risk becomes more acute when a rule's "direct" impact on domestic affairs may

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[27] *E.g.*, Implementation of Sanctions Against Russia Under the Export Administration Regulations ("EAR"), 87 Fed. Reg. 12226, 12236 (Feb. 3, 2022).

[28] *E.g.*, *Sanctions Programs and Country Information*, U.S. DEP'T OF TREASURY, https://perma.cc/6283-JQPC; Chinese Military-Industrial Complex Sanctions Regulations, 87 Fed. Reg. 8735, 8736 (Feb. 16, 2022).

[29] *E.g.*, Raoof v. Sullivan, 315 F. Supp. 3d 34, 43 (D.D.C. 2018) (contrasting visa rules with immigration rules and finding the visa exchange visitor program to be a foreign affairs function).

[30] *E.g.*, Visas: Immigrant Visas; Certain Afghan Applicants, 88 Fed. Reg. 35738 (June 1, 2023) (waiving the fee for certain Afghan applicants).

[31] Public Health Reassessment, 87 Fed. Reg. 15243, 15252–53 (Mar. 17, 2022).

[32] Pacific Halibut Fisheries, 87 Fed. Reg. 12604, 12620 (Mar. 7, 2022).

[33] Schedules of Controlled Substances: Placement of Isotonitazene in Schedule I, 86 Fed. Reg. 60761, 60763 (Nov. 4, 2021).

appear greater than its impact on foreign affairs, when courts cannot foresee "undesirable" international consequences, or when other unknown tests are later used to judge the invocation of an exception. For these reasons and others, more thorough scholarship on the scope of the foreign affairs exception is sorely needed.

This Article uses three parts to help decipher the revitalized question of what qualifies as a foreign affairs function. Part I first presents the puzzle and shortly summarizes courts' confusion and splits. Part II then delves into new original research, context, and historiographic tracing to offer tools to help solve the puzzle. It follows why the foreign affairs exception was originally created in 1937 and how it was derived from prior Supreme Court case law. It then follows the exception's progression through key bills that led to the APA, including (1) the 1939–40 Logan-Walter Bill; (2) the 1941 bill authored by Carl McFarland and the minority views contingent on the Attorney General's ("AG's") Committee on Administrative Procedure ("CAP"); and (3) the 1944–45 McCarran-Sumners bill, which was enacted as the APA in 1946. Each of those bills contained a foreign affairs exception, and each took from and built upon its respective antecedent bill and influence. Supplementing and affirming that trace, this Part also uses newly discovered documents from the National Archives circa 1945 to show what the APA's drafters and congressional enactors intended it to cover. Part III then uses that interwoven timeline and context to offer new support for keeping the exception available for core foreign affairs topics that have relied on it for over half a century. Subsequently, other factor-like questions based on the APA's influences and considerations, including case law, are offered for how to separately analyze whether an atypical topic should qualify as a foreign affairs function. By suggesting two tracks for analyzing the applicability of the exception, one for core and obvious matters and another for irregular subject matters, the existing split could be sewn shut without too many destabilizing effects—and with guidance that can prospectively help agencies, courts, and the public. At the very least, perhaps the history presented here can help turn foreign affairs from something seemingly cloudy to something more cognizable.

I. Current Confused Case Law Regarding the Foreign Affairs Function

For the first few decades after the APA was enacted there was little debate over the applicability of the APA's foreign affairs exception. Certain subject areas were often, and depending on the field, almost always, issued

as final rules under the exception, usually by the State Department.[34] The practice was so accepted that few challenged it in court. To quantify this stability, consider that from 1946 to 1979, only six cases substantively addressed the exception.[35] And only in one of those cases, pertaining to an immigration rule, did a court find the exception inapplicable.[36] Over time, however, that stability started to erode. As of the end of 2023, around forty federal cases have in some way analyzed the exception, but seven of those cases occurred in just the last three years.[37]

The increase in cases came as agencies other than the State Department, particularly in the immigration field, began to see the exception as an opportunity to either (1) forgo notice-and-comment rulemaking or (2) present a post-hoc defense to a suit seeking to invalidate a rule for inadequate notice and comment.[38] And so, as different agencies with no direct foreign affairs mission increasingly started to invoke the exception, courts understandably reacted with skepticism and developed different tests to confine the exception.[39]

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[34] *E.g.*, Defendant's Response to Plaintiffs' Motion for Attorney's Fees Pursuant to the Equal Access to Justice Act, at 9 & n.1, E.B. v. U.S. Dep't of State, No. 19-cv-2856, 2023 WL 6141673, (D.D.C. Sept. 20, 2023), ECF No. 54 (listing a long-standing practice of the State Department invoking the exception for visa rules—220 times since 1946); *see also* E.B. v. U.S. Dep't of State, No. 19-cv-2856, 2023 WL 6141673, at *3–4 (D.D.C. Sept. 20, 2023) (stating that "the law on the contours of the foreign affairs function exception is largely undeveloped," and "given the lack of clarity in the law on the exception's scope, the State Department's routine, long-standing reliance on it in the administration of visas does inform whether the agency's position was reasonable").

[35] (1) Yiakoumis v. Hall, 83 F. Supp. 469, 472 (E.D. Va. 1949) (stating that immigration is a foreign affairs function); (2) Wong Yang Sung v. Clark, 174 F.2d 158 (D.C. Cir. 1949), *rev'd sub nom*. Wong Yang Sung v. McGrath, 339 U.S. 33, 50–51 (1950) (finding immigration hearings were subject to the APA's adjudication section, but not discussing the subject exception); (3) WBEN, Inc. v. United States, 396 F.2d 601, 616 (2d Cir. 1968) (finding the exception applicable to a Federal Communications Commission order based on an agreement with Canada); (4) Hou Ching Chow v. Attorney General, 362 F. Supp. 1288, 1290–91 (D.D.C. 1973) (finding the exception inapplicable to an immigration rule); (5) Consumers Union of the U.S. v. Comm. for the Implementation of Textile Agreements, 561 F.2d 872 (D.D.C. 1975) *rev'd on jurisdictional grounds*, 561 F.2d 872, 873 (D.C. Cir. 1977) (stating that the district court found that the exception applied to Department of Commerce import quotas); and (6) Peroff v. Hylton, 563 F.2d 1099, 1102 (4th Cir. 1977) (finding the exception applied to extradition hearings). In another case, *Narenji v. Civiletti*, 481 F. Supp. 1132, 1137 (D.D.C. 1979), *rev'd*, 617 F.2d 745 (D.C. Cir. 1979), a district court cited the theory in *Wong Yang Sung* to conclude that the foreign affairs exception does not control matters that essentially involve naturalization and deportation, but it was reversed on other grounds on appeal.

[36] *Hou Ching Chow*, 362 F. Supp. at 1290–91.

[37] Author-performed search on Westlaw.

[38] *See infra* notes 41–44.

[39] *Id.*

Now, courts' apprehensive examinations have created a concerning split in the case law on how to interpret the exception.[40] Beginning with the Court of Appeals for the Ninth Circuit in 1980, courts that looked at unusual cases would sometimes ask for more justification to prove that the nexus to foreign affairs was beyond incidental.[41] The court of appeals' deeper inquiry, and concerns that the exception would become "distended if applied to [Immigration and Naturalization Service] actions generally," resulted in the first additional test, which required a showing that adhering to rulemaking requirements would provoke "definitely undesirable international consequences."[42] Afterwards, seeing that additional test emerge from those unusual invocations, litigants felt that they could challenge fields that were previously not disputable or that had long histories as foreign affairs functions.[43] Subsequently, starting in 1984, some courts swung the pendulum back the other way and tried to return to a baseline for usual foreign affairs functions, rejecting the undesirable consequences test when the rule's subject was "clearly and directly involved in a foreign affairs function."[44] And so, the swings continued.

The resulting split is a bit of a mess. The Courts of Appeals for the Ninth and Eleventh Circuits usually apply the undesirable consequences test.[45] So too does the Court of Appeals for the Federal Circuit,[46] but after its Court of International Trade first used the clearly and directly involved test.[47] The Court of Appeals for the Second Circuit first used no test,[48] then the undesirable consequences test,[49] then it subsumed that test to be used only if a form of the clearly and directly involved test failed.[50] Other circuit

40 *E.g.*, Louisiana v. Centers for Disease Control & Prevention, 603 F. Supp. 3d 406, 437 (W.D. La. 2022) (describing the split as between the undesirable consequences test and the clearly and directly involved test); *In re* Section 301 Cases, 570 F. Supp. 3d 1306, 1337 (Ct. Int'l Trade 2022) ("[T]he court recognizes the circuit split [related to the exception]." (citing Mast Indus., Inc. v. Regan, 596 F. Supp. 1567, 1581 & n.20 (Ct. Int'l Trade 1984))).

41 Yassini v. Crosland, 618 F.2d 1356, 1358 (9th Cir. 1980).

42 *Id.* at 1360 n.4.

43 *E.g.*, Gomez v. Biden, No. 20-CV-01419, 2021 WL 3663535, at *16 (D.D.C. Aug. 17, 2021); *see also Mast Indus*., 596 F. Supp. at 1582.

44 *E.g.*, *Mast Indus.*, 596 F. Supp. at 1582 (internal quotation marks omitted).

45 *Yassini*, 618 F.2d at 1360 n.4; Jean v. Nelson, 711 F.2d 1455, 1477 (11th Cir. 1983).

46 Am. Ass'n of Exporters & Importers-Textile & Apparel Grp. v. United States, 751 F.2d 1239, 1249 (Fed. Cir. 1985); *see also* Invenergy Renewables v. United States, 422 F. Supp. 3d 1255, 1289 (Ct. Int'l Trade 2019).

47 *E.g.*, *Mast Indus.*, 596 F. Supp. at 1582.

48 WBEN, Inc. v. United States, 396 F.2d 601, 616 (2d Cir. 1968).

49 Rajah v. Mukasey, 544 F.3d 427, 437 (2d Cir. 2008); Zhang v. Slattery, 55 F.3d 732, 744–45 (2d Cir. 1995).

50 City of New York v. Permanent Mission of India to United Nations, 618 F.3d 172, 202 (2d Cir. 2010).

courts have not had an opportunity to present a particular view. Lower courts are scattered, too. Those within the D.C. Circuit either apply no particular test,[51] or use the clearly and directly involved test.[52] The same variance holds for lower courts in the Fourth Circuit.[53] And the only lower court in the First Circuit—the District Court for the District of Massachusetts—to consider the issue used a variation of the clearly and directly involved test.[54]

Indeed, because of the confusion surrounding the scope of the foreign affairs exception, courts have recently come to reverse rulemakings even in core, traditional foreign affairs fields like visas[55] and exports.[56] And there are varying results on immigration.[57] These mixed messages leave agencies

[51] *E.g.*, United States v. Quinn, 401 F. Supp. 2d 80, 94 & n.12 (D.D.C. 2005); Raoof v. Sullivan, 315 F. Supp. 3d 34, 43–44 (D.D.C. 2018).

[52] *E.g.*, Helms v. Sec'y of Treasury, 721 F. Supp. 1354, 1360–61 (D.D.C. 1989); Cap. Area Immigrants' Rts. Coal. v. Trump, 471 F. Supp. 3d 25, 52 (D.D.C. 2020); E.B. v. U.S. Dep't of State, 583 F. Supp. 3d 58, 64 (D.D.C. 2022). The district court in *E.B.* looked to a 1945 dictionary to define "foreign affairs" and rejected the undesirable consequences test because it is "unmoored from the legislative text" and "lifted from the House Report relating to the APA." But then the same court construed the clearly and directly involved test to be the general law of the circuit, despite that it too originated from the same House Report when the Court of Appeals for the D.C. Circuit created the test in the context of another rulemaking exception. *See E.B.*, 583 F. Supp. 3d at 63 (citing Humana of S.C., Inc. v. Califano, 590 F.2d 1070 (D.C. Cir. 1978)); *see also* sources cited *infra* note 69. The *E.B.* opinion highlights the difficulties district courts face in being bound to circuit precedent, which in the past relied more on purpose or intent as gleaned from limited available legislative history, while some more recent courts hew to either text or original meaning. Clearly, the different approaches have contributed to different results.

[53] *E.g.*, Mayor & City Council of Baltimore v. Trump, 416 F. Supp. 3d 452, 510 (D. Md. 2019). The Court of Appeals for the Fourth Circuit, without applying any particular test, has held that a rulemaking by the Immigration and Naturalization Service, involving the same issue as in *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980), had an "obvious" involvement of foreign affairs and at the same time satisfied the good cause exception with a sufficient statement. Malek-Marzban v. Immigr. & Naturalization Serv., 653 F.2d 113, 116 (4th Cir. 1981).

[54] Roe v. Mayorkas, No. 22-CV-10808, 2023 WL 3466327, at *16 (D. Mass. May 12, 2023) ("The First Circuit has not addressed the question of what test should be applied in evaluating the application of the foreign affairs exception."); *id.* at *17 (noting that "[w]here, as here, actions involve core foreign policy functions, the Court finds they 'fall within the exception' without an analysis of the 'specific undesirable consequences'"; in other words, adhering to the Second Circuit test and also citing to its *Permanent Mission of India* case).

[55] *Mayor & City Council of Baltimore,* 416 F. Supp. 3d at 510–11; *E.B.*, 583 F. Supp. 3d. at 70.

[56] Washington v. U.S. Dep't of State, 443 F. Supp. 3d 1245, 1256 (W.D. Wash. 2020) (concluding that "the foreign affairs exception is inapplicable" to an arms export rule), *vacated and remanded*, 996 F.3d 552, 558 n.3 (9th Cir. 2021) (vacating the holding and strongly suggesting that it would have held the foreign affairs exception applicable if would have reached the issue).

[57] *See, e.g.*, cases cited *supra* notes 45, 55; Zhang v. Slattery, 55 F.3d 732, 744 (2d Cir. 1995) ("On occasion, courts have applied this exception to immigration rules."); Cap. Area Immigrants' Rts. Coal. v. Trump, 471 F. Supp. 3d 25, 55–56 (D.D.C. 2020).

guessing so much that it is now common to see detailed explanations in rules as to why the foreign affairs exception should apply, instead of the simple one-sentence assertion that used to be the norm.[58] While the detailed explanations might seem nice, they essentially turn the foreign affairs function into a separate exception to the APA, the good cause exception, which actually requires that such an explanation is provided with the rule.[59] So it is not surprising that several courts have noted that current jurisprudence risks blending the two.[60] Nor is it surprising that agencies have begun asserting both exceptions for the same underlying reason, hoping that two judicial arguments might double the chances of the rule surviving judicial scrutiny.[61] But the APA sets forth two distinct exceptions, not one muddled one.

So, how to distill this confusion? Well, it helps to realize that the two main tests each evolved because courts were grasping for anything that could help them decipher the exception's text. The little they found came from Senate and House reports on the APA.[62] Indeed, that is how the Court of Appeals for the Ninth Circuit developed its undesirable consequences test.[63] It looked to and quoted language from the Senate Report.[64] The main problem with doing so, however, is that was not what the cited Senate Report called for. Instead, it listed "definitely undesirable international consequences" as but one "example" of foreign affairs "which so affect relations with other governments."[65] That "so affect

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[58] *E.g.*, Visas: Eligibility for Diplomatic Visa Issuance in the United States, 87 Fed. Reg. 53373, 53374 (Aug. 31, 2022). The mixed messages and confusion behind the exception is why even a court that invalidated its use still found that the State Department's invocation of it was substantially justified, including because "the law on the contours of the foreign affairs function exception is largely undeveloped." E.B. v. U.S. Dep't of State, No. 19-cv-2856, 2023 WL 6141673, at *2–3 (D.D.C. Sept. 20, 2023).

[59] 5 U.S.C. § 553(b)(B) (if an agency finds good cause and incorporates the finding and a brief statement therefor in the issued rules, then the notice and comment and delayed effective date requirements may be waived); *see also, e.g.*, Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (describing it as for emergencies).

[60] *E.g., Cap. Area Immigrants' Rts. Coal.*, 471 F. Supp. 3d at 53 (citing to other cases).

[61] *E.g.*, Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children from the Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 38717, 38720 (July 22, 2021).

[62] ADMINISTRATIVE PROCEDURE ACT: REPORT OF THE COMM. ON THE JUDICIARY, S. REP. NO. 79-752, at 13 (Nov. 19, 1945) [hereinafter SENATE APA REPORT]; ADMINISTRATIVE PROCEDURE ACT: REPORT OF THE H. COMM. ON THE JUDICIARY, H.R. REP. NO. 79-1980, at 23 (May 3, 1946) [hereinafter HOUSE APA REPORT].

[63] Yassini v. Crosland, 618 F.2d 1356, 1360 & n.4 (9th Cir. 1980).

[64] *Id.* (citing S. REP. NO. 79-752, at 13 (Nov. 19, 1945)).

[65] SENATE APA REPORT, *supra* note 62, at 13. Interestingly, the Senate Report described the excepted function as "those 'affairs'" that, "for example, public rule making provisions would clearly

relations" language was the core test the report asked for, not the non-exclusive example of undesirable consequences it gave as but one way of meeting that test.[66] But the 1980 panel in *Yassini v. Crosland*[67] and subsequent sporadic courts selectively focused on the "undesirable" language and distinction and carried it forward to today, even to matters that were previously not questioned as foreign affairs functions.[68]

The "clearly and directly involved" test is no better. It too came from language in the House Report that said any of the rulemaking exceptions "apply only to the extent that the excepted subject matter is clearly and directly involved."[69] But that is not the text of the APA. In fact, a late version of the APA in January 1945 had text saying "[e]xcept to the extent that there is *directly* involved any military, naval, or diplomatic function."[70] But when a second committee print was circulated after agency consultations in May 1945, the "directly involved" language was changed to simply "involved" at the same time "diplomatic" was broadened to "foreign affairs."[71] That is how the law still reads today.[72] So query how accurate or helpful the clearly and directly involved tautological test actually is. It not only hews to text that was affirmatively rejected, but it also potentially stands at odds with the AG's contemporaneous construction, which in 1946 held that "the exception must be construed

provoke definitely undesirable international consequences." *Id.* While the House Report omitted "clearly" and said "those 'affairs'" that, "for example, public rule-making provisions would provoke definitely undesirable international consequences." HOUSE APA REPORT, *supra* note 62, at 23. Note that both reports preceded these clauses with "for example."

66 *See* case cited *infra* note 351 (the Court of Appeals for the Second Circuit realizing the same).

67 618 F.2d 1356 (9th Cir. 1980).

68 *See id.* at 1360 & n.4.

69 HOUSE APA REPORT, *supra* note 62, at 23 (internal quotation marks omitted). Note that in contrast to the House Report's "subject matter is clearly and directly involved" language, the Senate Report stated "that the exceptions apply only 'to the extent' that the excepted subjects are directly involved." SENATE APA REPORT, *supra* note 62, at 13. Courts have solely relied on these two reports to create the clearly and directly involved test and have claimed the reports as providing the authoritative legislative history on the APA's rulemaking section. *E.g.*, Nat'l Wildlife Fed'n v. Snow, 561 F.2d 227, 232 & n.19 (D.C. Cir. 1976) (in construing a different exception in § 553(a)(2), pointing out that the House report said "clearly and directly involved" while the Senate report said "directly involved," and finding the regulations at issue met both standards); Humana of S.C., Inc. v. Califano, 590 F.2d 1070, 1082 & n.87 (D.C. Cir. 1978) (noting the two different standards from the reports and applying the "clearly and directly" test to a rulemaking exception in § 553(a)(2)).

70 S. 7, 79th Cong. (as introduced Jan. 6, 1945) (emphasis added).

71 S. 7, 79th Cong. (committee print May 1945).

72 5 U.S.C. § 553(a).

as applicable to most functions of the State Department and to the foreign affairs functions of any other agency."[73]

Moreover, leading APA scholars have pointed out that inserting contradictory language in the APA's Senate and House reports were ways that the opposing political party in Congress tried to constrain the administration, knowing that the administration would never agree to enact restrictive statutory text, but that it could not direct what went into congressional reports.[74] So, certain members of Congress tried to achieve more than Congress itself could enact by inserting constricting language in the reports, in hopes that courts might latch onto their language.[75]

The overarching point is that not only are there now different results for the same subjects, and different tests between circuits and even between same-circuit district courts, but many of the tests that are in place are also highly problematic on their face. Similarly, there are many problems with simply relying on the short and uncontextualized statements in the Senate and House reports, which themselves were spuriously motivated and appear to run counter to both the statutory text and the actual intent.[76] All of this urgently points to a need for more history, context, and tools to interpret the provision in the statutory text, rather than provisions in the reports. The next Part aims to provide just that.

II. The History of the APA's Exception for Foreign Affairs

The term "foreign affairs function" did not originate in a vacuum or suddenly appear without reason in the APA. Far from it. Yet several primary sources that explain many other provisions of the APA do not provide much history or reasoning for this term and exception.[77] Instead, these sources state that the term needed no explanation because it was understood and obvious.[78] So how did a term so well understood when it was written become subject to so much modern misunderstanding? Time.

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[73] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 27 (1947) [hereinafter AG'S MANUAL ON THE APA].

[74] *E.g.*, Shepherd, *infra* note 79, at 1665 ("The parties attempted to manufacture legislative history because the bill was ambiguous. The ambiguity was intentional. . . . Ambiguity was essential to reaching agreement. Without it, no agreement could have occurred."); *id.* at 1670–71 ("Although conservatives indicated their grudging support for the bill . . . the administration would agree to no stricter bill than the negotiated compromise. Republicans preferred the bill, imperfect as it was, to no reform.").

[75] *Id.* at 1665.

[76] *See infra* Section II.F.2.

[77] *E.g.*, sources cited *supra* notes 62, 73.

[78] *See, e.g.*, *infra* text accompanying notes 178, 265.

Put simply, the many legal and practical developments that were quite obvious both during and after the APA's enactment simply faded with new generations. Combined with a decades-long dearth of case law on the topic—an effect of how well accepted the exception was and how little it was challenged in court—that understanding became lost over time. So, the best way to recapture that "obvious" sense of the exception is to explore its history and understand its contemporaneous context. To do so, this Part offers not a complete history of the APA, but instead a focused walk-through of the exception's developments from its earliest impetuses and influences at inception to its use and understanding at enactment.[79]

A. *1929–1936: Reform, the ABA's Special Committee, and the Birth of the Foreign Affairs Exception*

There is a prevalent misconception that the APA's origin story started around 1939.[80] But the true beginnings of the APA go as far back as ten years before that, when many of its concepts and language originated.[81]

In early 1929, the first bill to reform administrative law was introduced by Senator George Norris, who stated that he did not want it to become law, but instead hoped it would "bring about a discussion and a consideration of [administrative law] in a general way."[82] The bill proposed to establish a special court to review agencies' factual findings, which were then largely unreviewable.[83] Although no action was taken on the bill, it reflected increasing concern over the growth of government through administrative agencies and their expanding powers.[84] Those

[79] For those that desire a more complete historical context about the APA generally, several laudable sources are available. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560–61 (1996) (Shepherd's is the superior history of the APA); *see also* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986) (a good first-hand perspective).

[80] *E.g.*, Kenneth C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 512 (1986) ("Our story begins, not with 1946 and the APA, but with 1939 and the ABA Report."); Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 581 (1951) ("The history of the [APA] goes back to the year 1936 . . . .").

[81] *E.g.*, Shepherd, *supra* note 79, at 1566 (recounting efforts in the late 1920s); *cf.* Gellhorn, *supra* note 79, at 219 ("The story begins in May 1933 . . . .").

[82] 70 CONG. REC. 1030–33 (Jan. 3, 1929).

[83] S. 5154, 70th Cong. (as introduced on Jan. 3, 1929) (on file with author); *see also* Wong Yang Sung v. McGrath, 339 U.S. 33, 37–38 (1950) ("[D]ecisions of administrative tribunals were accorded considerable finality, and especially with respect to fact finding. . . . Concern over administrative impartiality and response to growing discontent was reflected in Congress as early as 1929, when Senator Norris introduced a bill to create a separate administrative court.").

[84] *E.g.*, Shepherd, *supra* note 79, at 1566 (recounting efforts in the late 1920s). During the 1930s, the size of government began to expand greatly. *See, e.g.*, REPORT OF THE PRESIDENT'S COMMITTEE ON

concerns only multiplied when President Franklin D. Roosevelt took office in 1933 and began to enact his New Deal, creating thirteen new agencies in just his first 100 days.[85] In response, and a week shy of those 100 days, Senator M.M. Logan of Kentucky hastily introduced the era's second bill on administrative reform, which was a literal copy of Senator Norris's prior bill, only somewhat altered by pencil marks.[86] Again, Congress took no action on the bill, but it served to further echo and amplify the growing calls for legislative reform.

Concerns over the sudden growth of government in early 1933 also had another pivotal effect: it spurred the American Bar Association ("ABA") to become involved in the administrative law reform process. No group would have as large of an influence over the development of the APA as the ABA. The ABA's main vehicle for reform came through its Special Committee on Administrative Law, which it created in May 1933.[87] The ABA's proffered purpose for creating the committee was that administrative law had become crucially important given the number of recently created agencies.[88] But many viewed the committee as focused on targeting the New Deal.[89]

The initial work of the Special Committee focused on continuing the push for a special court to "achiev[e] a greater measure of uniformity in the method and scope of judicial review of administrative determinations."[90] But instead of merely supporting an existing bill, like Senator Logan's, the 1933–34 committee aimed to write its own reform

ADMINISTRATIVE MANAGEMENT, S. DOC. NO. 75-8, at 22 (1937) (showing that from 1932 to 1936, the number of Executive Branch employees grew by 42.5%); 1941 AG'S CAP REPORT, *infra* note 241, at 8–11 & nn. 1, 8 (the seminal pre-APA study of administrative law stating that of the 111 agencies in the contemporary C.F.R.'s, 36 (or 32.4%) were created between 1930 and 1940, and further classifying a subset of 51 to-be federal administrative agencies, 17 of which (33.3%) were created during the same period).

85 *Great Depression Facts*, Franklin D. Roosevelt Presidential Libr., https://perma.cc/UV58-TGAW.

86 S. 1835, 73d Cong. (as introduced on June 5, 1933) (on file with author).

87 56 A.B.A. REP. 312, 318 (1933) (report of the ABA Executive Committee); *id.* at 197, 203 (Louis Caldwell addressing ABA members about the new Special Committee); *see also* Gellhorn, *supra* note 79, at 219.

88 56 A.B.A. REP. at 198 ("The significant developments of the last few months by themselves have elevated the subject of administrative law from the rank of mere importance to one of crucial importance.").

89 *E.g.*, Dan Ernst, *The Special Committee on Administrative Law*, LEGAL HIST. BLOG (Sept. 27, 2008, 12:38 PM), https://perma.cc/VL3Y-R2YY; Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452 (1986).

90 56 A.B.A. REP. 197, 201 (1933); *see also id.* at 407 (first written report of the Special Committee).

bill to create a new federal administrative court under its own proposed terms.[91]

Despite that publicized aim, the Special Committee did not produce a draft bill in 1935, nor did it issue a formal written report; instead, it gave only a verbal report.[92] The committee's chairman, Lewis Caldwell, explained that it changed course partly due to the striking shift in jurisprudence that occurred in early 1935, when Justice Owen Roberts joined the Court's four conservatives to strike down several New Deal programs, usually on a 5–4 margin.[93] Although Justice Roberts returned to uphold New Deal programs in 1937 and beyond,[94] in 1935, the Special Committee, along with the rest of the country, attempted to assess whether a permanent shift in jurisprudence against administrative agencies had begun or whether the holdings were limited to special cases.

Another important development also occurred that year. After giving the verbal report to the ABA in July 1935, Caldwell stepped down from the role of chairman and instead continued for a year as one of its other four members.[95] Succeeding him as chairman, O.R. McGuire would soon steer the committee in a new direction. Initially, McGuire lent support to Senator Logan's continued effort to enact an administrative law bill, the most recent of which was introduced in January 1936.[96] But McGuire's support was more in concept than in specifics. His Special Committee still aimed to author its own bill after attaining provisional ABA support for that effort in the fall of 1935.[97]

Throughout 1936, McGuire published articles on administrative reform and continued to publicly advocate for the creation of a specialized court.[98] One of his writings was especially important and revealing. In an article published in the *ABA Journal* in March 1936, McGuire wrote that his Special Committee was focused on securing judicial review of the facts

91 57 A.B.A. REP. 539, 539 (1934) (annual report of the Special Committee).

92 58 A.B.A. REP. 57, 136 (1935) (Caldwell addressing ABA members).

93 *Id.* ("The Special Committee on Administrative Law is before you without a report this year . . . due, partly to the new turn given to the course of events by the recent Supreme Court decisions . . . ."); Shepherd, *supra* note 79, at 1562–63; 61 A.B.A. REP. 720, 757 (1936).

94 W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (5–4 opinion with Justice Owen Roberts in the majority); Shepherd, *supra* note 79, at 1563 ("*Parrish* and its progeny represented a fundamental shift in Supreme Court doctrine. . . . The new Court . . . subsequently approved every New Deal law that faced challenge.").

95 *E.g.*, *1941 S. Hearings on Admin. Law Bills*, *infra* note 278, at 937, 943; 61 A.B.A. REP. 720, 793 (1936); 62 A.B.A. REP. 789, 794 n. (1937).

96 80 CONG. REC. 5557 (Apr. 15, 1936); S. 3787, 74th Cong. (1936).

97 *Executive Committee Meets at Jacksonville*, 21 A.B.A. J. 133, 133 (1935).

98 *E.g.*, O.R. McGuire, *Federal Administrative Action and Judicial Review*, 22 A.B.A. J. 492, 496 (1936).

of any controversy—*except* in two particular fields: those "involving foreign relations" or "the conduct of the Army and Navy in time of war."[99]

It was then that the two key exceptions to proposed administrative law reforms, one regarding foreign relations (later termed foreign affairs) and another regarding military functions, were first publicly introduced. However, they were not exceptions to judicial review of any legal conclusions, only to review of agencies' findings of facts, which was the aim of the reform effort of that era.[100]

Although the reasons for including these two exceptions were not expressly stated, several sources and apparent conspicuities point to a highly probable cause: the Supreme Court. In none of their many writings up to that time had anyone on the Special Committee suggested such exceptions—or any for that matter.[101] But both Caldwell and McGuire often referenced the Supreme Court's 1935 shift as the reason why the Special Committee needed to reconsider and revise its proposals for a reform bill.[102] And of the few cases to overturn a New Deal program, the most well-known was *Panama Refining Co. v. Ryan*,[103] which was the first holding to use the legislative nondelegation doctrine to strike down any law in U.S. history.[104]

In reaching its monumental *Panama Refining* opinion, the Supreme Court conducted a detailed survey of statutes conferring certain authorities to the President going back to the start of our republic.[105] Stating that the identified kinds of early acts "afford no adequate basis for a conclusion that the Congress assumed that it possessed an unqualified power of delegation," the Court distinguished several because they vested in the President, "an authority which was cognate to the *conduct* by him of the *foreign relations* of the government."[106]

Nowhere in *Panama Refining* was the term "foreign affairs" used.[107] But conspicuously, the term that McGuire used in 1936, "conduct [of]

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99 O.R. McGuire, *The Proposed United States Administrative Court*, 22 A.B.A. J. 197, 197 (1936) [hereinafter McGuire, *Administrative Court*].

100 *See id.*

101 *See generally, e.g.*, O.R. McGuire, *Proposed Reforms in Judicial Reviews of Federal Administrative Action*, 19 A.B.A. J. 471 (1933); *see also supra* note 93 and accompanying text.

102 58 A.B.A. REP. 136 (1935); McGuire, *Administrative Court*, *supra* note 99, at 197.

103 293 U.S. 388 (1935).

104 *Id.* at 430; *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Caldwell, *infra* note 117, at 966 ("[T]he 'hot oil' and the 'sick chicken' cases have been cited so frequently and for so many different propositions, that both the possibilities of the cases and the patience of the listening public might justly be regarded as exhausted.").

105 *Panama Refin.*, 293 U.S. at 422–25.

106 *Id.* at 422 (emphases added).

107 *See generally Panama Refin.*, 293 U.S. 388.

foreign relations," was in that 1935 opinion.[108] The Court used the term to distinguish that the laws it listed involved the President's discretion over the conduct of the Army and Navy and preserving neutrality.[109] The Court also noted that such laws "were not the subject of judicial decision."[110] In other words, such matters concerning foreign relations were considered non-justiciable, because courts did not think it was appropriate to second guess actions in areas where they would not have all the necessary considerations.[111] As cases before, during, and after this era would hold, judges are not well positioned to decide matters affecting foreign relations because they do not have relevant facts and context, which are often not available due to the need for speed, secrecy, or discretion.[112]

The term "foreign relations," and the associated considerations identified by the Court in *Panama Refining* clearly caught the attention of

108 *Id.* at 422 & n.9.

109 *Panama Refin.*, 293 U.S. at 422 & n.9, 428 (discussing delegations to the President).

110 *Id.*; *see also* 61 A.B.A. REP. 720, 769 (1936) (citing *Panama Refin.*, 293 U.S. at 422).

111 *See Panama Refin.*, 293 U.S. at 422 & n.9, 428; *see also cases cited infra* note 112.

112 Marshall Field & Co. v. Clark, 143 U.S. 649, 683–94 (1892) (listing statutes later reproduced in *Panama Refining* and *Curtiss-Wright* for the principle that a President can ascertain facts and take discretionary actions); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); Coleman v. Miller, 307 U.S. 433, 454–55 (1939) ("In determining whether a question falls within that [political or not justiciable] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations. There are many illustrations in the field of our conduct of foreign relations . . . ." (citation omitted)); *Panama Refin.*, 293 U.S. at 432 & n.15 ("We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching to executive action."); United States v. Belmont, 301 U.S. 324, 328 (1937) ("This court held that the conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power was not subject to judicial inquiry or decision . . . ."); United States v. Pink, 315 U.S. 203, 229 (1942) (similar); *see also* Baker v. Carr, 369 U.S. 186, 211 (1962) ("Foreign relations: . . . resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." (citations omitted)); Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."); S. Puerto Rico Sugar Co. Trading Corp. v. United States, 334 F.2d 622, 631–32 (Ct. Cl. 1964) (collecting pre-1946 Supreme Court cases and stating that "[i]n the external sector of the national life, Congress does not ordinarily bind the President's hands so tightly that he cannot respond promptly to changing conditions or the fluctuating demands of foreign policy").

the Special Committee. In its 1936 report to the ABA, the committee specifically excerpted the part of the opinion that began with "[t]hese early acts were not the subject of judicial decision" and ended with "an authority which was cognate to the conduct of him [the President] of the foreign relations of the government."[113] Plus, in a speech on August 6, 1936, just shortly before the Special Committee would file its 1936 report for the ABA convention that would occur later that month,[114] McGuire similarly called for

> an independent review of both the law and the facts of all administrative decisions except, possibly, questions involved in the conduct of the army and navy in time of war and in the conduct of our foreign relations.[115]

Given the context and case law surrounding this time, it seems highly probable that these first proposed exceptions to judicial review of administrative agency decisions were directly influenced by the Supreme Court.[116] This is evidenced by (1) the fame and timing of the *Panama Refining* opinion, (2) its particular phrasing, (3) that its unique phrasing was quoted and repeated by the committee and McGuire, (4) that no member of the committee had ever previously used the term despite their many writings, (5) the committee's acknowledged study of Supreme Court case law, and (6) the committee's statement that such cases largely influenced their proposed legislation.[117] When viewed with subsequent history, support for the exception stemming from the Supreme Court only increases.

While the Special Committee was exhaustively examining the issue of administrative law and possibilities for reform, it eventually became apparent that its initial approach, creating a specialized court, would not gain traction. Due to objections of specialized bars, the committee could not get ABA support for Senator Logan's 1936 bill or even any similar set of principles.[118] Consequently, instead of proposing specific reforms, the

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113 61 A.B.A. REP. 720, 769 (1936).

114 *Id.* at 1043.

115 O. R. McGuire, *Federal Administrative Decisions and Judicial Reviews Thereof; or Bureaucracy under Control*, 36 BRIEF 21, 31 (1937) (reproducing remarks given on Aug. 6, 1936) (emphasis added).

116 *See supra* notes 111–12; *infra* notes 150, 413.

117 *E.g.*, Louis Caldwell, *A Federal Administrative Court*, 84 UNIV. PA. L. REV. 966, 972 (1936) (commenting on *Panama Refining*); *see also* 61 A.B.A. REP. 720, 727 & n.16, 767–77, 769 n.2 (1936) (report of the Special Committee in 1936 repeatedly citing *Panama Refining* and devoting significant space in its report to study various Supreme Court decisions).

118 McGuire, *Administrative Court*, *supra* note 99, at 199; O.R. McGuire, *A Bill to Provide for the More Expeditious Settlement of Disputes with the United States*, 23 A.B.A. J. 609, 610 (1937) ("The Committee evolved a plan, which .... encountered the hostility of several groups within the Association."); 61 A.B.A. REP. 221, 233–34 (1936); Gellhorn, *supra* note 79, at 220 ("That idea expired,

Special Committee's August 1936 report instead submitted a resolution to the ABA without any "specific items of jurisdiction to be conferred on the [administrative] court, [and] to ask the Association to commit itself on this subject."[119] The ABA, in turn, only committed to having the matter "re-referred . . . for further study and consideration."[120]

Stopped and stuck, but with two new members, the committee started from scratch in the fall of 1936 and began to formulate a fundamentally different approach.[121] Part of the Special Committee's effort to start anew included reaching out to a parallel committee of the Federal Bar Association ("FBA") and its chairman, John Dickinson, in late 1936 for collaboration and new ideas.[122] McGuire had once served on that FBA committee, and Dickinson had worked with the Special Committee two years before.[123] But in December 1936, amidst their meetings and while the committee was rethinking its approach and developing ideas, another profound impact occurred. That impact would confirm the nuance that the committee had already picked up from *Panama Refining*, but which many others did not. And it would lead to a small but critical change in language and approach: abandoning the term "foreign relations" and a limited exception for related reviews of facts, in favor of the term "the conduct of foreign affairs" and a broader exception to preclude judicial review in that area.

B. *1936:* United States vs. Curtiss-Wright Export Corporation[124]

In December of 1936, the Supreme Court decided *Curtiss-Wright*. At the time, it was already considered a major decision.[125] But even today, it remains a judicial lodestar, often cited by courts to define constitutional

in large part because some of the specialized bars—customs, tax, patent—preferred things as they were . . . ." (citation omitted)).

119 61 A.B.A. REP. 720, 745 (1936).

120 61 A.B.A. REP. 1, 233 (1936) (proceedings of the ABA annual meeting).

121 *1941 S. Hearings on Admin. Law Bills*, *infra* note 278, at 947 (McGuire testifying that "[i]n the fall of 1936, when the new committee was organized and commenced work and I still continued as chairman, we decided that we could not fit any alien system of administrative courts to our American system of government and that we should start anew, basically and fundamentally"); *see also A Bill to Provide for the More Expeditious Settlement of Disputes with the United States*, *supra* note 118, at 610.

122 John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 436 (1947). John Dickinson was at the time both the Chairman of the Administrative Law Committee of the Federal Bar Association and an Assistant Attorney General.

123 57 A.B.A. REP. 539, 564 (1934).

124 299 U.S. 304 (1936).

125 *E.g.*, *Conboy Acclaims Embargo Decision*, N.Y. TIMES, Dec. 27, 1936, at 2N, https://perma.cc/7FKY-A5SL (quoting the government attorney who argued the case and stated: "The decision will stand as a landmark in judicial history. Of this there can be no doubt.").

responsibilities and the ambit of the Executive.[126] Less understood, however, is that *Curtiss-Wright* had an enormous influence on the foreign affairs exception.

As discussed above, *Panama Refining*'s 1935 opinion famously invoked the nondelegation doctrine, and soon thereafter many anti-New Deal critics and companies began invoking the doctrine in court.[127] Among those was Curtiss-Wright Export Corporation, which was criminally indicted for conspiring to violate a neutrality law activated by a presidential finding and proclamation, which in turn triggered a prohibition on certain arms exports.[128] Curtiss-Wright argued, as part of its defense and based on *Panama Refining*, that the law "did not accomplish a valid delegation of legislative power to the Executive."[129] The District Court for the Southern District of New York agreed with the corporation and dismissed the case.[130] A few days later, on rehearing, the court held as it did before, but recharacterized the "conduct of . . . foreign relations" argument as "the conduct of foreign affairs."[131] It was a small yet conspicuous difference in phrasing. The government then appealed the decision directly to the Supreme Court.[132]

In a 7–1 decision, the Supreme Court firmly reinforced the Executive's prerogative and held that the same nondelegation doctrine concerns that applied to "domestic affairs" did *not* apply to "foreign affairs."[133] There were several reasons given for this distinction. Among those noted was that the President has constitutional authority as "the sole organ of the federal government in the field of international relations."[134] The Court then elaborated that

> if, in . . . our international relations, embarrassment . . . is to be avoided and success for our aims achieved, . . . negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[135]

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126 *E.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 3 (2015); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414–15 (2003); Haig v. Agee, 453 U.S. 280, 291 (1981).

127 *E.g.*, United States v. Minchew, 10 F. Supp. 906 (S.D. Fla. 1935).

128 United States v. Curtiss-Wright Exp. Corp., 14 F. Supp. 230, 231 (S.D.N.Y.), *rev'd*, 299 U.S. 304 (1936).

129 *Id.* at 232, 235.

130 *Id.* at 238.

131 *Id.* at 239–40.

132 *See Curtiss-Wright Exp. Corp.*, 299 U.S. at 314 (noting that the direct appeal was made under 18 U.S.C. § 682 (1936)).

133 *Id.* at 315, 321, 327–28.

134 *Id.* at 320.

135 *Id.*; *see also id.* at 322 ("'As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those

The Court continued by observing that the President

> has the better opportunity of knowing the conditions which prevail in foreign countries . . . . [including] confidential sources of information . . . . [and] agents in the form of diplomatic, consular and other officials . . . . [plus,] [s]ecrecy in respect of information gathered by them may be highly necessary.[136]

All of these reasons led the Court to hold that it would be an "unwisdom" to "requir[e] Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed."[137]

Apart from the crucial distinctions made between domestic and foreign affairs, and associated considerations, another illuminating part of *Curtiss-Wright* was the very terminology it used. The term "foreign affairs" was used five times in the Court's opinion, while "foreign relations" was used three times in similar contexts.[138] Each time either term was used, it was to differentiate actions that focused on achieving an external effect from actions that primarily had an internal effect.[139] Thus, the Court likely used the term foreign affairs because it could be easily contrasted with internal or domestic affairs; whereas contrasting foreign relations with internal or domestic relations would not work linguistically.

But before *Curtiss-Wright*, "foreign affairs" was not at all a common term, at least not in judicial opinions. A search of all federal cases from 1929 to 1936 found that, apart from the *Curtiss-Wright* district court case and Supreme Court cases, only twice was the term "foreign affairs" ever used in a federal judicial opinion other than as part of a formal office or committee title.[140] One case simply said that the question of the authority of a foreign minister was a "political action in foreign affairs," determined "exclusively by the political branch of the government."[141] The other referred to the term generically when discussing national sovereignty.[142] Even searches of secondary sources revealed only sparse mentions of the

which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.'" (quoting Mackenzie v. Hare, 239 U.S. 299, 311 (1915))).

136 *Id.* at 320.

137 *Id.* at 321–22.

138 *See generally Curtiss-Wright Exp. Corp.*, 299 U.S. 304.

139 *E.g.*, *id.* at 321, 324; *see also id.* at 315 ("[W]e first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.").

140 Search performed by author on Westlaw for cases between 1929 and 1936.

141 State of Russia v. Nat'l City Bank of New York, 69 F.2d 44, 47 (2d Cir. 1934).

142 Los Angeles Soap Co. v. Rogan, 14 F. Supp. 112, 116 (S.D. Cal. 1936).

term in relevant context.[143] Congress was similarly silent in using the term descriptively during that same time period, only using it to reference the magazine or a congressional committee.[144] Truly then, the 1936 *Curtiss-Wright* case was the only major case in that era to use the term "foreign affairs" in any analogous manner to how it would appear in administrative law reform bills and in the APA.[145]

C. *1937: An Exception for "the Conduct of Foreign Affairs" First Appears*

Curtiss-Wright came at a particularly impactful time. After failing to get ABA approval for its ideas to reform administrative law in August 1936, the committee decided that it "should start anew, basically and fundamentally."[146] And so, in the fall of 1936 and into early 1937, the Special Committee began drafting a different set of proposals and language for a new bill.[147] Whereas prior bills had focused on expanding judicial review of agencies' decisions, the new proposal aimed to also reform administrative procedures, including rulemaking, which the committee called "adjective law."[148]

What started as a "skeleton draft" sometime in the fall of 1936, later became a "rough draft of the bill, rather crude in form," before finally, in June 1937, the committee had the bill in such shape that they "took each section of the bill and annotated it."[149] The annotation was done "carefully . . . on the basis of the studies [the committee] had made, upon the basis of Federal statutes, [and] *decisions of the courts*."[150]

That same month, the committee sent its annotated bill to "all the professors of administrative law," members of the ABA, members of

143 Search performed by author on ProQuest Congressional and HeinOnline for the years 1929 to 1936.

144 For the years from 1929 to 1936, a diligent search was performed on electronic databases containing the *Congressional Record* and legislative documents to see if there was any other mention of "foreign affairs" in a non-committee context. None were found.

145 Even looking at federal judicial opinions after *Curtiss-Wright* in 1936 until the end of 1939, the term was only used one other time, in a Supreme Court case deciding whether a foreign government was subject to a statute of limitations. Guar. Tr. Co. of N.Y. v. United States, 304 U.S. 126, 136 (1938). Congressional documents only referenced the term between 1937 and 1939 in the context of administrative law reform bills.

146 *E.g.*, *1941 S. Hearings on Admin. Law Bills*, *infra* note 278, at 947; *see also A Bill to Provide for the More Expeditious Settlement of Disputes with the United States*, *supra* note 118, at 610.

147 *See sources cited supra* note 146; *see also, e.g.*, O.R. McGuire, *The American Bar Association's Administrative Law Bill*, 1 LA. L. REV. 550, 551 (1939).

148 *E.g.*, 62 A.B.A. REP. 789, 810 (1937); 86 CONG. REC. 13664 (Nov. 19, 1940).

149 *1941 S. Hearings on Admin. Law Bills*, *infra* note 278, at 948–49.

150 *Id.* at 949 (emphasis added).

Congress, and a revised copy was even sent to "every judge of the circuit courts of appeal of the United States."[151] After receiving some feedback and making certain changes, the Special Committee submitted its bill to the ABA on September 27, 1937, as part of its annual report.[152] That 1937 bill soon "became [the 1939] Logan-Walter Bill," and it would go on to influence every successive administrative law reform bill, including the one that was finally enacted as the APA.[153]

Significantly, it was that June 1937 draft bill that, for the first time, contained exceptions, including ones for the

> conduct of foreign affairs by the Department of State; or any case involving military or naval operations in time of war.[154]

Thus, by virtue of timing, the December 1936 *Curtiss-Wright* opinion—and its unique use of the term "foreign affairs"—undoubtably had an enormous impact on the inclusion and scope of the exception. The case's influence is also evinced by the fact that the Special Committee had, during that very time, consulted with John Dickinson, the chairman of the FBA's parallel Committee on Administrative Law.[155] Dickinson had previously been the Assistant Secretary of Commerce, taught international law at the University of Pennsylvania, was then an Assistant AG, and had only a year and a half earlier given a long speech on the very subjects at issue in *Curtiss-Wright*, neutrality and exports.[156] Given his position, experience, and interests, it would be practically inconceivable for him to have not studied the *Curtiss-Wright* case closely, let alone Supreme Court cases generally.

The Special Committee itself had already engaged in a deep study of Supreme Court case law, particularly during that pivotal time. Indeed, in the same *ABA Journal* where McGuire was twice published in 1936 and in August 1937,[157] a lengthy discussion of *Curtiss-Wright* was published in

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151 *Id.*

152 *See id.* at 950.

153 *E.g.*, *id.*; *see also* Shepherd, *supra* note 79, at 1582 ("The bill proposed to reform agency procedure and to provide additional judicial review of agency decisions. The bill's approach led, after nine years of debate and modification, to the Administrative Procedure Act.").

154 Letter from the Special Comm. on Admin. L. to All Members of the House of Delegates of the Am. Bar Ass'n (June 26, 1937), *reprinted in 1941 S. Hearings on Admin. Law Bills*, *infra* note 278, at 979, 995.

155 *E.g.*, O. R. McGuire, *Administrative Procedure Reform Moves Forward*, 27 A.B.A. J. 150, 150 (1941); *see also, e.g.*, ADMINISTRATIVE PROCEDURE: REPORT OF THE COMM. ON ADMIN. L. OF THE FED. BAR ASS'N, S. DOC. NO. 76-71, at 3 (1939) (McGuire stating that the bill's basic principles were made "in 1936 and 1937").

156 *See* John Dickinson, *Neutrality and Commerce*, 29 AM. SOC'Y INT'L L. PROC. 106, 106 (1935).

157 McGuire, *supra* note 98, at 492; McGuire, *A Bill to Provide for the More Expeditious Settlement of Disputes with the United States*, *supra* note 118, at 609.

February 1937.[158] Moreover, even aside from McGuire's government position as a counsel to the Comptroller General, or his chairmanship of an ABA committee, his writings and frequent publications show that he kept himself well apprised of Supreme Court opinions.[159]

The trait of extensive study and citation to Supreme Court case law continued into the committee's operative September 1937 ABA report. Using that report to publish and formally present the ABA with its updated draft bill—which included several exceptions—the committee cited to various Supreme Court cases, including *Panama Refining*, no less than thirty-eight times.[160] The citations were particularly substantive, offering direct quotes or summaries of Court holdings to explain why the committee included certain provisions.[161] The committee explained the citations were included because the bill was partly based on the "*decisions of the courts*."[162] Thus, even though it was not directly cited, it appears evident that the exception for the conduct of foreign affairs was derived from *Curtiss-Wright*.

The exception did, interestingly, undergo certain modifications before it was presented in the Special Committee's September 1937 report. In the June 1937 version of the draft bill, that section began as follows:

> Section 6. Exceptions and Reservations: . . .
>
> . . . .
>
> (b) That nothing contained in this Act shall confer jurisdiction on the courts of appeals of the United States or the Court of Claims to review any decision of a board as approved, disapproved or modified by the head of the department concerned or any independent agency *in any case involving the conduct of foreign affairs by the Department of State*; *or any case involving military or naval operations in time of war* . . . .[163]

By September 1937, however, that text had been tweaked to remove "the Department of State"—which effectively broadened the foreign affairs

158 *See* Edgar Bronson Tolman, *Review of Recent Supreme Court Decisions*, 23 A.B.A. J. 125, 125 (1937); *see also* Kenneth C. Sears, *Summaries of Articles in Current Legal Periodicals*, 23 A.B.A. J. 984, 985 (1937); David Ernest Hudson, *Reviews of the Decisions of the Supreme Court of the United States: October 1936 to June 1937*, 3 FED. BAR ASS'N J. 77, 80 (1937).

159 *E.g.*, O.R. McGuire, *Judicial Reviews of Administrative Decisions*, 26 GEO. L. J. 574 (1938); O.R. McGuire, *Controversies with the Federal Government*, 10 U. CIN. L. REV. 63 (1936); O.R. McGuire, *Politics and the Administration of Justice*, 20 J. AM. JUD. SOC'Y 91 (1936); O.R. McGuire, *Some Problems Arising from Government Corporations*, 85 U. PENN. L. REV. 778 (1937).

160 Author's count of the mentions in 62 A.B.A. REP. 789–850 (1937) (not including cases cited in quoted excerpts).

161 *See* 62 A.B.A. REP. 789–850 (1937).

162 *See supra* note 150.

163 Letter from O.R. McGuire to the ABA House of Delegates, June 26, 1937, *reprinted in 1941 S. Hearings on Admin. Law Bills*, *infra* note 278, at 979, 995 (emphasis added).

exception by making it applicable to any agency instead of just the one.[164] What would become the military affairs exception was also broadened, adding "or civil insurrection" as an extra condition.[165] The relevant clause then read this way:

> . . . in any case involving the conduct of foreign affairs; or the conduct of military or naval operations in time of war or civil insurrection . . . .[166]

While the Special Committee provided and mostly explained the full text of its draft bill to the ABA's House of Delegates, it had learned from its prior efforts that gaining approval of specific text would be difficult.[167] So instead, the 1937 Special Committee initially asked the ABA delegates to adopt several recommendations for what concepts must be included in a future administrative law bill and to allow the smaller ABA Board of Governors to later approve the resulting bill for submission to Congress.[168] Mirroring the draft bill's provisions, one of the recommendations stated that the future bill must have a general "right to appeal from the findings and decision of [a] . . . board or agency to the [proper] United States Circuit Court of Appeals."[169] The appellate courts would then be able to set aside the decision if, among other reasons, it was "unsupported by evidence" or "based on arbitrary and capricious findings of facts"—concepts the committee also derived from cited case law.[170] But as an exception, another recommendation would not allow such court review in "any case involving the conduct of foreign affairs" or several other listed exceptions.[171]

After consideration, the ABA formally approved certain requirements for its future bill, including for notice-and-hearing rulemaking.[172] But as for the other conceptual requirements sought by the Special Committee, the delegates adopted them only as "a declaration of principle."[173]

Importantly, however, the ABA delegates made one (and only one) change to the text of the recommendations before adopting them, and it affected the exceptions. Instead of having certain exceptions apply to only the right to appeal an agency's factual findings and decisions, the ABA delegates changed the text to make the exceptions applicable to all parts

164 62 A.B.A. REP. at 850.

165 *Id.*

166 *Id.*

167 *E.g.*, *id.* at 806.

168 *Id.* at 790.

169 *Id.* at 793.

170 62 A.B.A. REP. at 841 n.32 (citing Dismuke v. United States, 297 U.S. 167, 171 (1936) (collecting cases)). *Compare id.* at 793, 840–41 & n.32, *with* 5 U.S.C. § 706(2).

171 62 A.B.A. REP. at 794.

172 *Id.* at 790.

173 *Id.* at 789 n.

of the draft bill.[174] This meant that the listed exceptions would also apply to the requirements for notice-and-hearing rulemaking and for the specialized judicial review of rules.[175]

And so, the foreign affairs exception as we know it was born in 1937.[176] Its parents: O.R. McGuire, the Special Committee of the ABA, and the ABA delegates. Its purpose: recognizing the functional differences and considerations *Curtiss-Wright* identified between foreign affairs and domestic affairs.[177] In contrast to the committee's lack of direct explanation for the foreign affairs exception—and in contrast to its annotated comments that the provisions of the exceptions and reservations section "are self-explanatory" and that "[n]o comment thereon seems necessary"[178]—some other exceptions were explained elsewhere in the committee's report.

For example, another part of the committee's report noted that certain ABA groups previously objected to changing existing review processes in certain specialized courts like those for tax, customs, or patent matters.[179] Unsurprisingly, the exceptions section included "any case arising under the internal revenue, customs, [or] patent . . . [l]aws."[180] Similarly, in discussing the review of agency decisions, the report noted that the Longshoremen's and Harbor Worker's Compensation Act, and the Interstate Commerce Commission Act had different statutory standards for judicial review and cited supporting cases.[181] Those too were included as exceptions in the draft bill.[182]

The takeaway is that the few listed exceptions were not arbitrary, capricious, or invented from whole cloth; like most other provisions in the bill, they came from Supreme Court case law or statutes.[183] So too for the

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174 *Id.* (adopting the resolution to read "[t]hat there shall be excluded from any such bill *all matters* involving the conduct of foreign affairs; or the conduct of military and naval operations in time of war or civil insurrection" (emphasis added)).

175 *Id.* at 789. For the other, non-relevant parts of the bill that were adopted as a declaration of principle, the exceptions were still applicable to those parts, but also only as a declaration.

176 So too was the start of the exception for a military affairs function. 62 A.B.A. REP. at 789.

177 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315 (1936); *see also supra* notes 133–39 and accompanying text; *infra* note 185.

178 62 A.B.A. REP. at 844.

179 *Id.* at 806, 835 ("There developed hostility on the part of the members of the [ABA]—particularly those engaged principally in the tax, customs or patent law litigation . . . ."); 61 A.B.A. REP. 1, 234 (1936).

180 62 A.B.A. REP. at 850.

181 *Id.* at 840 (citing Crowell v. Benson, 285 U.S. 22 (1932); 33 U.S.C. § 921 (1936)); *see also* McGuire, *supra* note 98, at 494; Voehl v. Indem. Ins. Co. of N. Am., 288 U.S. 162, 166 (1933).

182 62 A.B.A. REP. at 850.

183 *E.g.*, *1941 S. Hearings on Admin. Law Bills*, *infra* note 278, at 948.

military and foreign affairs exceptions that were intertwined with nondelegation doctrine concerns and case law, which were paramount in 1935 and 1936, and were a particular focus of the Special Committee.[184]

Indeed, the Supreme Court's rationale against applying nondelegation principles to certain fields in *Panama Refining* and *Curtiss-Wright* were part and parcel of why it made little sense for the bill to (1) have an agency provide substantial evidence for the facts it had to show, which in those areas would often be confidential; (2) constrain an agency acting for the Executive in a way that might hinder or cause embarrassment to our international sovereignty, or to our relations or intercourse with other countries; or (3) have the judiciary review facts and conclusions of agencies involved in foreign relations and national security.[185] These non-justiciability principles were not, however, new; they were embodied within scores of other long-standing precedent those key cases relied upon.[186]

As the most recent case at that time, *Curtiss-Wright* simply provided "foreign affairs" as a term of art to succinctly incorporate related case law as a subject-matter exception to the bill's provisions. In this way, the committee and the ABA simply continued and codified that jurisprudence and were careful to not accidently create new areas of judicial review that ran counter to those precedents and their undergirding principles.

With this key contemporaneous context and history, the conspicuous absence of any direct explanation behind the initial exception for "foreign affairs" actually becomes strongly suggestive. The exception could only be, as the bill's authors put it, "self-explanatory" to ABA attorneys because of the recency, fame, and heft of the Supreme Court's holdings in *Panama Refining* and *Curtiss-Wright*—and the latter's unique use of the term "foreign affairs." Otherwise, given the detailed citations provided alongside most of the bill's other provisions and exceptions, combined with the dearth of any use of the term "foreign affairs" in almost any

184 62 A.B.A. REP at 794, 809–11 (citing the issue of delegated legislative power several times, including when citing *Panama Refining*); *see also* Caldwell, *supra* note 117 *passim* (discussing the doctrine extensively).

185 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320, 322 (1936); Mackenzie v. Hare, 239 U.S. 299, 311 (1915) ("[T[he United States is invested with all the attributes of sovereignty. . . . especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers."); *see also* 86 CONG. REC. 4537 (Apr. 15, 1940); 64 A.B.A. REP. 575, 589 (citing *Panama Refining* for the proposition that "one of the three requisites for the exercise of delegated legislative power—or the issuance of rules having general application—was a requirement of a finding by the administrative agency in the exercise of the authority delegated"); Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." (internal quotation marks omitted)).

186 *E.g.*, cases cited *supra* note 112.

federal judicial opinion or writing in the eight years before 1937, its meaning would not at all have been obvious.[187]

D. *1939–40: The Logan-Walter Bills*

The next year, progress stalled. In 1938, Senator Logan had once again introduced another administrative law bill, which continued to focus on creating a specialized court.[188] But during April hearings on that bill, McGuire testified that the ABA was going in a different direction and had already sent out a draft bill for comment to every member of Congress.[189] Hearing that, Logan did not press his own bill further.

However, the progress the Special Committee was counting on in the ABA similarly stalled. In May 1938, the ABA Board of Governors approved the Special Committee draft bill, but the ABA House of Delegates did not approve it in their later July convention.[190] Under a prior resolution, the draft bill could not be provided to Congress on behalf of the ABA until it gained support from the House of Delegates.[191] The next opportunity for that would not come until January 1939.[192]

In stark contrast to the stalls in 1938, the start of 1939 saw a flurry of activity on administrative law reform. In January 1939, McGuire, who had just again become chairman of the Special Committee, presented a new version of the bill and offered section-by-section explanations yet stated that it was largely based on the 1937 draft.[193]

Notably, in 1939, the section regarding exceptions finally had annotated explanations. As to the various matters, laws, and agencies

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187 *See supra* text accompanying notes 139–45.

188 S. 3676, 75th Cong. 3d Sess. (as introduced on Mar. 17, 1938); 83 CONG. REC. 3539 (Mar. 17, 1938); *United States Court of Appeals for Administration, Hearings before a Subcomm. of the S. Comm. on the Judiciary*, 75th Cong. 1–5 (April 1938) [hereinafter *1938 COA Hearings*]. The 1938 bill drew from the 1936 bill on the similar subject but had notable differences. One such difference was that in the January 1936 bill there were twenty-two non-exhaustive examples of statutes and administrative regimes over which the proposed court would have jurisdiction, which included the State Department-led interagency National Munitions Control Board and State's licensing arms exports under a successor statute to the one at issue in *Curtiss-Wright*; however, the 1938 bill no longer included any State Department function. *Id. at* 2–4.

189 *1938 COA Hearings*, *supra* note 188, at 137–51 (McGuire's testimony).

190 *Id.* at 157, 159–61; 63 A.B.A. REP. 156 (1938) (voting to "recommit the bill to the Committee for further study and report").

191 63 A.B.A. REP. at 331 n.

192 *1941 S. Hearings on Admin. Law Bills*, *infra* note 278, at 951.

193 64 A.B.A. REP. 575, 575–86 (1939); *Second Session—Debate on Administrative Law Committee's Report Continues—Provisions for Administrative and Judicial Review under Fire—Chairman McGuire Explains Provisions—Bill as Amended Finally Approved by Decisive Vote*, 25 A.B.A. J. 97–102 (1939) [hereinafter *ABA Second Session*].

excepted from the bill, there were fulsome reasonings provided.[194] But as to the foreign affairs exception, once again, no express reason was given—only that it was "obvious":

> Subparagraph (b) [the exceptions] would appear to need little explanation. It obviously would be improper to include the conduct of foreign affairs or questions arising out of such administration of the laws relating to foreign affairs in any court review procedure.[195]

After much spirited debate during its convention regarding other aspects of the bill, and after years of efforts by the Special Committee, the ABA House of Delegates approved presenting the bill to Congress on behalf of the ABA.[196]

The ABA-approved bill was quickly forwarded to Congress, and then submitted as S. 915, or "the Logan Bill," since Senator Logan introduced it on January 24, 1939.[197] The 1939 Logan Bill then became the first congressional bill to contain a foreign affairs exception, taking it verbatim from the Special Committee's draft bill. While a few other nonrelevant exceptions were added, the "Exceptions and Reservations" section of the first version of the Logan Bill read:

> (b) Nothing contained in this act shall apply to or affect any matter concerning or relating to the conduct of foreign affairs; the conduct of military or naval operations in time of war or civil insurrection . . . .[198]

However, by the time the Logan Bill was reported out of the Senate Judiciary Committee on May 17, 1939, that exceptions section had again undergone certain changes. No longer would there be a "conduct of foreign affairs" exception. Instead, the exception was made for "the conduct of the Department of State."[199]

The change came at the request of the Department of State, specifically its representative, Assistant Legal Adviser ("ALA") William Vallance.[200] During the April 1939 hearings on the identical House version

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194 64 A.B.A. REP. at 618–20.

195 64 A.B.A. REP. at 619. This would be the same explanation later reprinted in EXPEDITIOUS SETTLEMENT OF DISPUTES WITH THE UNITED STATES: ANNOTATED COPY OF THE BILL S. 915, S. DOC. NO. 76-145, at 24–25 (1940).

196 *ABA Second Session,* supra note 193, at 102.

197 *Id.* at 116; 64 A.B.A. REP. 281 (1939); Letter from O. R. McGuire to Rep. Hatton W. Sumners, Chairman, H.R. Comm. on the Judiciary (Jan. 19, 1939) (on file with author); Letter from O. R. McGuire to Rep. Hatton W. Sumners, Chairman, H.R. Comm. on the Judiciary (Apr. 22, 1939) (on file with author).

198 *Report of Administrative Law Committee and Draft of Proposed Bill*, 25 A.B.A. J. 113, 118 (1939) [hereinafter *Report of Administrative Law*].

199 *Id.*; S. REP. NO. 76-442, at 5 (May 17, 1939).

200 Letter from Cordell Hull, U.S. Sec'y of State, to Rep. Hatton W. Sumners, Chairman, H.R. Comm. on the Judiciary (Apr. 3, 1939) (on file with author; obtained from the National Archives).

of S. 915 (H.R. 4236), ALA Vallance stated that, with respect to the exception "concerning or relating to the conduct of foreign affairs," the Department was "quite glad to have that provision in there, but it is not far reaching enough."[201] ALA Vallance, also a member of the ABA[202] and the FBA,[203] and thus well familiar with the history of the bill, instead asked that "all of the employees of the Department should be excepted from the provision of this bill in accordance with the exemption granted to other agencies."[204] Representative Francis Walter, who chaired the House Judiciary Subcommittee No. 4 that conducted the hearings, then asked whether the existing "conduct of foreign affairs" exception would "adequately meet the situation that you complain of?"[205] The State Department attorney responded by stating:

> I want to make certain that it does; because, for example, the issuance of a passport to an American citizen might be said to be a domestic matter and not one relating to foreign affairs. And the question whether a consul should issue a visa to an alien coming over here as an immigrant requires a decision as to his eligibility under our immigration law. I feel that that might not be considered a matter involving "foreign affairs."
>
> . . . .
>
> There is also the act providing for the registration of foreign agents, which was recently passed by Congress. The Department has issued regulations under that act and is conducting that registration. Would a court review of the decisions made by the Department be prevented on the ground they involved "foreign affairs."
>
> There is also the Neutrality Act, which requires exports of munitions to be regulated. . . .
>
> All of these questions are taken care of satisfactorily in the courts with the present laws and regulations and there is no criticism, so far as we know, of the present functioning of the Department under the system now employed in dealing with these problems. It is therefore believed that the State Department should be exempted from this proposed legislation.[206]

ALA Vallance would go on to comment about the impact of the bill on "extensive regulations regarding the functioning of our diplomatic and consular services," and note that in visa cases

> [t]here might be some information as to this prospective immigrant which was given to this Government in confidence and it might require the State Department to produce

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201 *Administrative Law: Hearings on H.R. 4236, H.R. 6198, and H.R. 6234 Before the Subcomm. No. 4 of the H. Comm. on the Judiciary*, 76th Cong. 50 (1939) [hereinafter *Hearings on 1939 Admin. L. Bills*].

202 64 A.B.A. REP. 516, 517, 527–28 (1939). Vallance was Chairman of the ABA's Section of International and Comparative Law.

203 62 A.B.A. REP. 283–84 (1937) (Vallance questioning O.R. McGuire on the foreign affairs provision within the proceedings of the ABA House of Delegates).

204 *Hearings on 1939 Admin. L. Bills*, *supra* note 201, at 50.

205 *Id.*

206 *Id.* at 50–51.

> that confidential information. . . . Our officers would not get such information afterward. It would close these channels of information which are very valuable to us.[207]

These confidentiality concerns echoed those presented in *Curtiss-Wright.* The ALA concluded his remarks by stating that "this bill would hamper the operations of the Department of State and we would prefer to be exempted from its provisions."[208]

The State Department's request was granted and the exception for "the conduct of foreign affairs" was changed to "the conduct of the Department of State" in the next version of the bill.[209] That change was made to ensure that it would cover most State Department functions, particularly in the face of potential different readings of "the conduct of foreign affairs." While some might wonder whether that change of language away from "foreign affairs" suggests that it then had a narrower scope, not necessarily encompassing the specific subject areas ALA Vallance raised, that should not be the takeaway. After all, Chairman Walter considered the term broadly encompassing. Instead, the better understanding would be that the specific subject areas were always intended to fall under the exception. And the change in phrasing was made out of an abundance of caution to "make certain" that they would, particularly in case persons unfamiliar with foreign affairs would misconstrue these subject areas to not qualify.

Notably, it was not just the State Department that asked for changes to the exceptions section. The War Department "urgently recommended that [the bill] be amended to exclude wholly from its application all matters concerning or relating to the operations of the War Department and Army of the United States."[210] The War Department's request was similarly granted and "the conduct of military or naval operations in time of war or civil insurrection" was changed to simply, "the conduct of military or naval operations."[211] Apart from these two changes concerning exceptions to military and foreign affairs—and another nonrelevant change—the subsection was otherwise the same as the introduced version of the bill.[212] Put together, these relevant parts then read:

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[207] *Id.* at 53. Notably, visa matters are currently one of the subject areas where the applicability of the exception is questioned today. *See* cases cited *supra* note 55.

[208] *Hearings on 1939 Admin. L. Bills*, *supra* note 201, at 54.

[209] *Report of Administrative Law*, *supra* note 198, at 118; S. REP. NO. 76-442, at 5 (May 17, 1939).

[210] *Hearings on 1939 Admin. L. Bills*, *supra* note 201, at 102–03 (reproducing a letter from Secretary of War Harry Woodring to Chairman Summers, dated May of 1939, which warned of "radical and far reaching" changes, and listed examples).

[211] *Report of Administrative Law*, *supra* note 198, at 118; 84 CONG. REC. 9392 (July 18, 1939).

[212] *Hearings on 1939 Admin. L. Bills*, *supra* note 201, at 124 ("A series of exceptions are made to its provisions. It may be, however, that such exceptions are not made as concessions to the principle of the bill, but rather to organized specialties at the bar.").

> (b) Nothing contained in this Act shall apply to or affect any matter concerning or relating to the conduct of military or naval operations; . . . [or] the conduct of the Department of State . . . .[213]

The exceptions remained the same when the bill was reported from the Senate Judiciary Committee in May 1939, and when it passed the Senate on July 18, 1939.[214]

A day later, on a procedural motion, the Senate voted to reconsider the bill since it passed by default, but by the time it was restored to the calendar for the session starting in September 1939, World War II had started, and as McGuire put it, "the second session of the congress was exclusively devoted to the neutrality legislation."[215] Moreover, Senator Logan was sick and would succumb to his illness, dying in office on October 3, 1939.[216] With the Senate (Logan) bill stalled, and without its stalwart proponent and namesake, focus shifted to the House's (Walter) bill, H.R. 6324.

The House would not take up debate on H.R. 6324—now called the Logan-Walter Bill and sometimes the Walter-Logan Bill—until April 15, 1940.[217] When it did, part of the debate focused on the exceptions section of the bill, and numerous amendments were offered to expand the specific agencies excepted.[218] Some critiqued the arbitrary inclusion of excepted agencies.[219] And some wondered whether by excepting so many older agencies and fields of law, the bill was mostly aimed at New Deal-era agencies, especially since a national election would occur later that year.[220]

Ultimately, the House passed the bill on April 18, 1940, with the relevant exceptions to the entire bill in § 7(b) still stating, "[n]othing contained in this Act shall apply to or affect any matter concerning or relating to the conduct of the military or naval establishments . . . the conduct of the Department of State," and a host of other agencies.[221] The agency-focused exceptions dominated. Of the initial function-focused exceptions, including the "conduct of foreign affairs" and the "conduct of

213 S. REP. NO. 76-442, at 5 (May 17, 1939).

214 84 CONG. REC. 9392 (July 18, 1939).

215 O.R. McGuire, *Opposition to Administrative Law Bill*, 23 J. AM. JUD. SOC. 143, 143 (1939).

216 85 CONG. REC. 81 (Oct. 3, 1939).

217 86 CONG. REC. 4530–36 (Apr. 15, 1940).

218 *E.g.*, *id. at* 4531 (Reps. Rayburn and Cox discussing the exceptions, the reasons for them, and whether the New Deal era commissions should be more of a target than others, like some older commissions that were exempted); *id.* at 4722–23 (Apr. 18, 1940).

219 *Id.* at 4547 (Apr. 15, 1940).

220 *Id.* at 4531.

221 H.R. 6324, 76th Cong. (as passed by the House, Apr. 18, 1940); 86 CONG. REC. 4743–44 (Apr. 18, 1940).

military or naval operations," only "any matter relating to the internal revenue, customs, patent, trademark, [or] copyright" survived.[222]

This set up one of the main critiques of the bill. As Representative Emanuel Celler put it, only "[t]hose bureaus that yelled most loudly got their answers in exemptions."[223] This was the paradox of the bill's exceptions. They were first written by McGuire and the Special Committee to hew to Supreme Court decisions and to not disturb special fields or areas where specialized judicial review was already available or where it was considered non-justiciable. However, once it got into Congress, the bill, and what other exceptions to include, became a political referendum on New Deal agencies.

Further complicating the issue was that President Roosevelt, who likely viewed the bill as an attack on the New Deal, asked the AG to conduct a more empirical and administration-driven study of administrative law in February 1939.[224] The tactic, whether shrewd or genuine, allowed more opposition and delay to form against the bill, as the AG's committee methodically undertook a comprehensive review that would take nearly two years to complete.[225] The tactic also had the secondary effect of preventing a cohesive strategy from the executive branch to comment on the bill and its exceptions. While the AG's study was underway, the White House and Justice Department were mostly silent in public pronouncements. Into that void stepped many executive agencies, who fought for themselves to be excluded, relegating function-specific exceptions and the principles that underpinned them in favor of agency-specific exceptions.[226]

The bill sat stagnant in the Senate for some time. The full Senate did not finally consider the bill until mid-November 1940, two weeks after the national election.[227] But even at that time, knowing the President would veto it, the Senate still moved to debate and pass the bill.[228] Among the amendments to the bill made during the Senate floor debate were, of course, ones to the exceptions section.[229] After the Senate amendments were agreed to, the relevant part of the exceptions section removed "conduct," again slightly broadening the exception, and read:

222 H.R. 6324, 76th Cong. (as passed by the House, Apr. 18, 1940).

223 86 CONG. REC. 4547 (Apr. 15, 1940).

224 *See* 1940 FDR PUBLIC PAPERS, *infra* note 233, at 619–20.

225 *E.g.*, 86 CONG. REC. 13743–44 (Nov. 26, 1940); *see infra* notes 241–42.

226 Notably, Rep. Dirksen suggested that in similar future cases, "instead of eliminating or exempting a whole agency because of one involved function, why not pick out the function and say that that shall be excepted." 86 CONG. REC. 4735 (Apr. 18, 1940).

227 *Id.* at 13660–62 (Nov. 19, 1940).

228 *Id.*

229 *Id.* at 13746–47 (Nov. 26, 1940).

> Nothing contained in this act shall apply to or affect any matter concerning or relating to the Military or Naval Establishments . . . [or] the Department of State . . . .[230]

The bill finally passed the Senate in late November 1940.[231] Rather than proceed to conference, the House, eager to pass the bill, simply voted to concur with the Senate's amendments.[232]

President Roosevelt was presented with the Logan-Walter Bill in December 1940, but vetoed it, publicly stating several concerns.[233] Among them was that the bill was passed "without substantial congressional hearings to consider the problems of the executive departments affected," and that he was awaiting the imminent final report of the AG's study.[234] But one other publicly presented concern was tellingly relevant to the topic of this Article:

> It appears from the text of the Bill that the Congress considered the procedures and the delays incident to the procedures provided by the Act inappropriate to agencies engaged in National Defense functions. . . . Functions as important to our economic defense as Foreign Funds Control in the Treasury, where general regulations must be made with utmost promptness, would be subjected to delay for hearing and notice of hearing in advance.
>
> Quite apart from the general philosophy of this Bill, its unintentional inclusion of defense functions would require my disapproval at this time.[235]

In other words, President Roosevelt was concerned that only matters relating to the Department of State were excepted, and not the broader function-focused conduct of foreign affairs by agencies other than the State Department.

Indeed, the Foreign Funds Control ("FFC"), established in April 1940 and charged with freezing foreign funds and property in the United States, was a direct predecessor to today's Office of Foreign Assets Control ("OFAC"), also still housed within the Treasury Department.[236] President Roosevelt thought it so necessary to have it included as an exception to the administrative reform bill that he partly based his veto on it.[237]

The House attempted to override the veto the same day it was issued, but that effort failed by thirty-four votes, with many previous supporters

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230 *Id.* at 13747.

231 *Id.* at 13748.

232 86 CONG. REC. 13815 (Dec. 2, 1940); *see also id.* at 13808.

233 FRANKLIN D. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 616, 619 (1940) [hereinafter 1940 FDR PUBLIC PAPERS]; 86 CONG. REC. 13942 (Dec. 18, 1940).

234 *1940 FDR Public Papers*, *supra* note 233, at 620–21.

235 *Id.*

236 Exec. Order No. 8389, 5 Fed. Reg. 1400 (Apr. 12, 1940). Notably, the Office of Foreign Assets Control ("OFAC") still relies on the exception today. *See infra* note 402; U.S. DEP'T OF THE TREAS., OFFICE OF FOREIGN ASSETS CONTROL, https://perma.cc/H6CV-75JT.

237 *See supra* text accompanying note 235.

switching to vote against the bill and not override the President's veto.[238] Echoing the President's concerns, some representatives also became alarmed at what the exceptions would not cover, highlighting the FFC. Members debating the bill noted: "[i]t was an important part of our national defense and it was done to prevent Hitler from stealing the moneys that could go back to those people if they regain their independence," and that in the "10 days of public hearing required before such action as the President took in those crises could be taken . . . . Hitler would have those credits out of this country."[239] In other words, the FFC likely would have been excepted from the bill's requirements had the foreign affairs language been used. But since the language of the exception was changed to apply to the State Department, it was not. Moreover, the FFC was not related to the military establishment, so it did not qualify for that exception either, even though it exercised a function for the national defense. Even AG Robert Jackson weighed in, and his analysis, attached to the President's veto message, focused on other agencies that performed "important functions affecting national defense," like the Department of Commerce issuing regulations governing the clearance of foreign vessels.[240]

Consequently, by excepting agencies and not functions, national defense-related functions that would have qualified as foreign affairs functions were not excepted. Instead, they wound up as a non-excepted missing middle between State Department matters and those of the military establishment. And to the AG, the President, and many others in Congress, having such functions be subject to notice-and-hearing rulemaking, delay, and other bill requirements was unacceptable.

E. *1941: The AG's Committee Report and Hearings*

1. The Report of the AG's Committee on Administrative Procedure

Just over one month after President Roosevelt vetoed the Logan-Walter Bill, the AG's Committee on Administrative Procedure issued its

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238 86 CONG. REC. 13953 (Dec. 18, 1940); *see also* Shepherd, *supra* note 79, at 1630 (stating that had conversative Democrats voted as they had on the bill, the veto would have been overridden).

239 86 CONG. REC. 13948 (Dec. 18, 1940) (statement of Rep. John McCormack). The same worry was also expressed in reference to the "regulations relating to the neutrality law." *Id.* at 13949. But since the exception was not matter-specific for foreign affairs, there was likely a worry that the parts of the 1939 Neutrality Act that were not solely conducted by the State Department, like § 12 that established an interagency National Munitions Control Board, would not be excepted. *See id.*; Neutrality Act of 1939, ch. 2, § 12, 54 Stat. 4, 10.

240 86 CONG. REC. 13944 (Dec. 18, 1940).

final report ("AG's CAP Report") on January 24, 1941.[241] The report took nearly two years to complete from February 1939, when President Roosevelt asked then-AG Frank Murphy to first form the committee and study the issue.[242]

The capability and credibility of the committee was widely respected. Moreover, its proponents would only further increase the report's reputation as their own accomplishments grew. Midway through the study, Murphy, who appointed the committee but did not serve on it, was appointed to serve on the Supreme Court on February 5, 1940.[243] Robert Jackson, who was a member of the committee, then became the succeeding AG and issued and endorsed the AG's CAP Report.[244] He too would soon be appointed to the Court in July 1941.[245] The substance of the January 1941 AG's CAP Report was itself similarly revered and meticulous. The 189-page main part of the Report served as the decisive authority on pre-1946 administrative practice, both for the judicial and legislative branches, as Congress debated what to change with a new statute on administrative law.[246] The AG's CAP Report is also still used today by courts to show what the APA did not alter.[247]

The AG's CAP Report's explanation of existing practice was largely based on a careful study of forty-nine listed agencies.[248] Among these, three were included from the State Department, pertaining to passports, visas, and the control of arms exports, as well as one from the War Department, pertaining to licensing of bridges over navigable waters.[249]

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241 ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT, S. DOC. NO. 77-8 (Jan. 24, 1941) [hereinafter 1941 AG'S CAP REPORT].

242 *Id.* at 1. Notably, it was Attorney General ("AG") Homer Cummings who, in a letter dated December 14, 1938, recommended to the President that a committee be put together to study administrative law reform. 66 A.B.A. REP. 439, 446 (1941). That request came after the Special Committee sent AG Cummings a draft of its bill, and shortly before it secured the last step to gain a formal ABA endorsement and have it introduced in Congress just a month later. *Id.*

243 *Justices 1789 to Present*, U.S. SUPREME COURT, https://perma.cc/VKN6-96SN.

244 1941 AG'S CAP REPORT, *supra* note 241, at iii, 1; *see also id.* at 253 (AG Frank Murphy's order adding Robert Jackson to the committee as of March 15, 1939). Along with Justice Felix Frankfurter, who was once on the Special Committee in 1933, the Supreme Court was suddenly comprised of Justices who had deeply studied administrative law.

245 *Justices 1789 to Present*, *supra* note 243.

246 *See e.g.*, Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 511 n.1 (1943) (Murphy, J., dissenting); *1941 S. Hearings on Admin. Law Bills*, *infra* note 278, at 916 (statement of ABA president describing the usefulness of the report).

247 *E.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 302 n. 31 (1979).

248 1941 AG'S CAP REPORT, *supra* note 241, at 3–4 (listing each).

249 *Id.* at 3–4 (listing "agencies which substantially affect persons outside the Government through the making of rules" and including among them three State Department divisions); *see also infra* text accompanying notes 271–72.

From these staff studies, twenty-seven monographs were issued that each described a particular agency's administrative practice.[250] Quite notably, as to the three State Department subagencies studied, the AG's CAP Report stated that while "a preliminary staff investigation adequately disclosed the nature of this Department's procedures[,] completion and publication of the staff report were deemed inadvisable because of the confidential character of the material."[251]

In contrast, some other fields were studied but did not have their staff reports issued on grounds that differed from the confidentiality concerns that accompanied the State Department agencies. For example, the staff report on the Department of Justice's ("DOJ's") Immigration and Naturalization Service was completed and made available to the committee, though it happened not to be published in the monograph series.[252]

The series of specific-agency staff reports all helped to inform the study of administrative procedure in the main part of the AG's CAP Report. But the second part of that report offered two main recommended bills, one by the committee's Roosevelt administration-friendly majority known as the "Majority Bill," and one by the committee's conservative minority, known as the "Minority Bill." Another bill was also offered, but it was only supported by then-Chief Judge D. Lawrence Groner, and it was not particularly influential on the APA. In the same vein, the Majority Bill was markedly different from any other bill before it, plus it did not substantively constrain agencies and only a few parts of it would affect the eventual APA.[253]

a. *The AG's CAP Minority Bill*

The views of the minority and their Minority Bill, introduced in Congress a week after the report as S. 674, were, however, enormously influential on the APA.[254] That Minority Bill is also more recognizable as an antecedent to the APA, with many of its sections and concepts ultimately incorporated into that law. For example, instead of notice and a hearing for rulemaking, it was the first bill to offer an alternative of

250 Shepherd, *supra* note 79, at 1632.

251 1941 AG'S CAP REPORT, *supra* note 241, at 4 n.2.

252 *Id.* Notably, this shows that immigration matters were considered separately from visa matters. *See also infra* note 384 (explaining this difference).

253 *See* Shepherd, *supra* note 79, at 1632–33; 1941 AG'S CAP REPORT, *supra* note 241, at 191 (introduction to the majority bill).

254 *See* Shepherd, *supra* note 79, at 1636; Davis & Gellhorn, *supra* note 80, at 514 ("The final APA was essentially what the *minority* of the committee brought in. . . .").

notice and comment.[255] And instead of having universal exceptions by agency or function (e.g., foreign affairs) apply to all aspects of the bill, including judicial review, the Minority Bill built in different specific exceptions, including foreign affairs, into two main titles of the bill: rulemaking and adjudication.[256]

Speaking to the influence of the 1940 Logan-Walter Bill, the minority views of the AG's CAP stated that the 1940 bill "received much attention as a solution of the problems of administrative law and procedure," so much so, that it would expressly indicate when their own Minority Bill provisions differed from the Logan-Walter Bill to avoid confusion.[257] Notably, the ABA also propelled the Minority Bill by adopting a resolution in March 1941 that stated certain principles should be reflected in any administrative law reform bill, and that the Minority Bill best reflected them.[258]

Later that year, O.R. McGuire would be replaced on the ABA's Special Committee after a tenure of eight years, and the chairmanship would be given to Carl McFarland, one of the four members of the AG's CAP's minority views.[259] McFarland was viewed as less brash, more diplomatic, and having served only a year before as an Assistant AG, would work with the administration to pass a bill.[260] But McGuire's impact on the rulemaking and adjudication exceptions in the Minority Bill would remain. Indeed, after abandoning the agency-specific exceptions Congress added to the Logan-Walter Bill, the Minority Bill returned to the original function-specific exceptions for foreign affairs and the military, which the 1936–37 Special Committee originally developed from case law. The Minority Bill's only exceptions to rulemaking read as follows:

> SEC. 201. Exceptions.—Whenever expressly found by an agency to be contrary to the public interest, the provisions of this title, in whole or part, shall not apply to:
>
> (a) The conduct of military, naval, or national-defense functions, or the selection or procurement of men or materials for the armed forces of the United States; or
>
> (b) the conduct of diplomatic functions, foreign affairs, or activities beyond the territorial limits of the United States affecting the relation of the United States to other nations.

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255 S. 674, 77th Cong. (as introduced Jan. 29, 1941), *reprinted in Admin. Proc.: Hearings before a Subcomm. of the S. Comm. on the Judiciary*, 77th Cong. at 1, 8 (Apr. 2 to 29, 1941) [hereinafter *Related 1941 Hearings*]; Shepherd, *supra* note 79, at 1650–51.

256 1941 AG'S CAP REPORT, *supra* note 241, at 225, 232–33.

257 *Id.* at 214.

258 66 A.B.A. REP. 397, 401–03, 439 (1941).

259 *Id.* at 401, 439, 446.

260 Shepherd, *supra* note 79, at 1640; Davis & Gellhorn, *supra* note 80, at 514, 518, 523–24 (noting McFarland's outsized impact on the APA and notice and comment rulemaking in particular).

> Such findings shall be published unless, in any given case, the President shall in writing direct the withholding of such publication. [261]

A note was also appended immediately after the provision in the AG's CAP Report, offering further explanation.

> Note.—There are certain obvious exceptions that must be made to the disclosure of policy in the form of published rules and regulations. Even in such cases, nondisclosure should be contingent upon the making of a bona fide finding of necessity.[262]

Clearly then, the rulemaking exceptions in the Minority Bill were different from prior proposals in that not only would a function-focused exception have to apply, but the agency invoking the exception would also have to make a published finding, unless directed otherwise by the President.

Further insight can be gleaned by comparing parallel exceptions in that same bill's adjudication part, which had several other exceptions—in contrast to the two exceptions in the bill's rulemaking part—and which applied only when a statute required a hearing.[263]

> Sec. 301. Exceptions.—Nothing contained in this title shall apply to or affect any matter concerning or relating to—
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> . . . .
>
> (b) Diplomatic functions or foreign affairs, except in cases where particular citizens or residents of the United States are parties;
>
> (c) The conduct of the military or naval establishments, and the selection or procurement of men or materials for the armed forces of the United States . . . .[264]

A corresponding explanatory note likewise followed this provision to emphasize the purposeful choice of subject-specific as opposed to agency-specific exceptions:

> Note—Certain obvious exceptions must be made to care for purely discretionary activities or those which, for some special reasons, it is customary to regard as removed from procedural requirements. In the Logan-Walter bill, as the Attorney General has said, "the principles that governed what should be included and what should be excepted are not discernible." In stating exceptions, greatest care should be taken to state excepted *subjects* and not, as in the Logan-Walter bill, to except *agencies,* since agencies almost always perform a variety of functions regarding a variety of subjects and those subjects which should be governed by legislative principles of fair procedure ought not escape by virtue of their administration by a particular agency or department.[265]

Again, in announcing the foreign and military affairs exceptions, the Minority Bill followed the pattern which frustratingly also appeared in

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261 1941 AG'S CAP REPORT, *supra* note 241, at 225.

262 *Id.*

263 *Id.* at 232–33.

264 S. 674 § 201, *reprinted in Related 1941 Hearings, supra* note 255; 1941 AG'S CAP REPORT, *supra* note 241, at 232–33.

265 1941 AG'S CAP REPORT, *supra* note 241, at 233.

former bills' annotations—that the rationale behind these exceptions, and thus their scope, was "obvious."

b. *The "Obvious" Reasons for the Foreign Affairs Exception*

As discussed in Sections II.C–D, the authors of prior bills that used the term foreign affairs understood its meaning to be "obvious" due to the recency of the Supreme Court's *Curtiss-Wright* opinion and its unique use of the term. No other evidence has been found to suggest any other influence. And no other commentary has suggested any other source.

The AG's CAP Report also supports this conclusion. Like the reports of the Special Committee, the AG's CAP Report contained many citations to Supreme Court opinions, and even highlighted the nondelegation questions at issue in *Panama Refining* and *Curtiss-Wright*.[266] Moreover, the personal archives of Carl McFarland, author of the Minority Bill, contained several versions of the Special Committee's 1937–39 era bills and annotated explanations.[267]

In addition, there are other clues within the AG's CAP Report that might help shed further light on why the exceptions were thought to be obvious and what they meant. Even though the committee's minority presented its own bill, the factual findings of the entire AG's CAP Report had a similar influence on all resulting bills.[268] As the minority wrote in its additional views, it "accepted the major outlines of the report and . . . departed as little as possible from the solutions suggested by the full Committee. Indeed, in this separate statement [the Committee has] made free and full use of the studies, views, and experience of all our associates."[269]

Recall that while only twenty-seven agency-specific monographs were issued, a total of forty-nine agencies were listed as studied by the AG's CAP Report.[270] Among the forty-nine were three subagencies within the State Department: the "Passport Division, Visa Division, and the Division of Controls, having to do with the international traffic in arms and with the supervision and administration of neutrality laws."[271] But the studies pertaining to the three State Department subagencies were not

266 *See id.* at 87.

267 Based on the author's personal review of the entire McFarland archives at the University of Virginia.

268 1941 AG'S CAP REPORT, *supra* note 241, at 203 (additional views).

269 *Id.*

270 *See supra* text accompanying notes 250–52.

271 1941 AG'S CAP REPORT, *supra* note 241, at 3.

published because, according to the Report, doing so was "deemed inadvisable because of the confidential nature of the material."[272]

Still, in that statement regarding the advisability of publishing confidential information, another likely reason emerged as to why the Minority Bill contained only two categorical exceptions for military and foreign affairs type functions.[273] Because the bill required publication of statements of policy in instances that contained or relied on sensitive or confidential material, doing so would be even more inadvisable than publishing the corresponding agency study, which again, the AG's CAP Report purposefully chose not to do. The same principle would also apply to the bill's public rulemaking procedures. Under that bill, when an agency was required to hold informal or formal rulemaking hearings, it would have to present its "views or argument with reference to proposed rules," and accept and consider testimony or written views.[274] The promulgating agency was also encouraged to explain "the results of [its] investigation or consideration."[275] But particularly for military and foreign affairs functions, the purpose of public presentation and participation would be obviously frustrated because agencies cannot typically present the confidential considerations that necessitated a rule. Requiring an agency to then consider public comments, oral or written, in such fields would therefore be incomplete and illusory.

And so, if the AG's CAP Report did not disclose the studies as to the three State Department agencies for reasons of confidentiality, it is logical to presume the same reasons underpinned the Minority Bill's exceptions. Conducting military and foreign affairs often requires relying on confidential information and not prematurely disclosing certain actions.[276]

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[272] *Id.* at 4 n.2. Locating and reviewing these three State Department studies in the files of the National Archives, this author did not note material that was particularly sensitive. Rather, the studies contained descriptions of internal procedures and noted that these agencies issue rules that become effective immediately, without notice or hearing. Record Group 60, Records of the Attorney General's Committee on Administrative Procedure, Entry 377, Box 25, Natl' Archives.

[273] The three examples of foreign-affairs type functions were overlapping. *See supra* note 261; *e.g.*, Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps (the doctrine of noscitur a sociis).").

[274] 1941 AG'S CAP REPORT, *supra* note 241, at 228–29.

[275] Id.

[276] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320, 322 (1936) (discussing "serious embarrassment" risks "in the maintenance of our international relations" and the need for "[s]ecrecy" with "confidential sources of information" gathered by the Executive's agents at the risk of such "premature disclosure" causing "harmful results"); Panama Refin. Co. v. Ryan, 293 U.S. 388, 432 (1935) ("We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review . . . .").

From this history, it is apparent that the Minority Bill from the AG's CAP Report took and echoed the rationale for many concepts that originated in the Logan-Walter Bill, and thus, in turn, from the Special Committee's bill, and *Curtiss-Wright* before that. The concepts were propelled not just into that 1941 bill, but also later into APA. With this context, it is apparent (and perhaps now even obvious) that there is indeed a long history, reasoning, and even explanation behind the foreign affairs exception that helps to show its scope.

2. The 1941 Hearings on Administrative Procedure Bills

Because the three administrative procedure bills from the AG's CAP Report—the Minority Bill; the Majority Bill, and the Groner Bill[277]—were introduced around the same time, a special committee of the Senate Judiciary Committee held a series of extensive hearings on all three bills beginning in April 1941 in order to "get the entire subject before this committee so it could be studied . . . [and] to work out a worth while [sic] and workable measure."[278]

Even though the War Department and several other departments and agencies testified or submitted statements on any or all of the three bills, the State Department did not.[279] Its absence was notable since it had previously testified and written letters on the prior bill. But given that (1) the AG's CAP studied the department but did not issue a monograph or report; (2) diplomatic functions and foreign affairs were excepted in the Minority Bill; and (3) there was no objection with excepting foreign affairs functions by *any* person or agency that testified in the detailed hearings, spanning 1600-plus pages, there was likely no reason for the State Department to appear. After all, World War II was heating up, and there was no appetite to delay the effectiveness of any rule that would impact foreign policy or national defense.

Still, other parts of the hearing did shed more light on the intent of the exceptions. After each agency submitted or testified about desired changes in the bill, Carl McFarland, an AG CAP member, testified and addressed the exceptions in the two sections of his Minority Bill. As to the exceptions for the rulemaking requirements, McFarland stated:

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277 Not explained much here because it was never well embraced. *See* Shepherd, *supra* note 79, at 1636–37. Moreover, it had the same exceptions text as in the Minority Bill. *See id.*

278 *Administrative Procedure: Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. of the S. Comm. on the Judiciary*, 77th Cong. 35 (1941) [hereinafter *1941 S. Hearings on Admin. Law Bills*]. The printed hearings' report consisted of more than 1,600 pages and gave fascinating insights from diverse views within and outside of government, most of which are beyond the scope of this Article.

279 *See generally id.*

> We have thought that it was necessary to make certain exceptions to the requirements or the policy with respect to rules, chiefly in connection with the national defense and foreign affairs. . . . No one has objected to these exceptions.[280]

As to the exceptions for adjudication, McFarland repeated much of what was already in annotated comments to the bill: that "[c]ertain obvious exceptions must be made to care for purely discretionary activities or those which, for some special reasons it is customary to regard as removed from procedural requirements," and that only "subjects and not . . . agencies" be excepted.[281]

Significantly, in responding to several agencies that advocated for their own exceptions, McFarland gave specific responses and valuable insights into what he thought would and would not be covered by the foreign affairs term he used in his bill. For example, to respond to concerns about the Customs Bureau not being excepted, McFarland pointed to § 301(a), which excepted decisions subject to de novo review in a court, and not to § 301(b), which contained the foreign affairs exception for adjudications.[282] And as to the Immigration Service's objection that it should be excepted from the adjudication procedures, McFarland likewise did not point to the foreign affairs exception but rather stated that he agreed to add an entirely new exception for "the admission or control of aliens" to respond to that ask.[283] McFarland thereby indirectly stated that immigration laws (but not visa or passport laws), were not thought to be excepted as foreign affairs functions.[284] Later, the whole minority group of the AG's CAP submitted a joint statement to answer criticisms of its bill that arose at the hearings.[285] In that joint statement, the same positions were given as what McFarland presented regarding the rulemaking and adjudication exemptions.[286] These positions are therefore quite illuminating as to what the bill's authors thought was and was not a foreign affairs function.

When the hearings concluded in early July 1941, no more action was taken, as just weeks before, the President declared an unlimited national emergency, and just a few months later, the United States was attacked at Pearl Harbor and entered World War II.

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280 *Id.* at 1336.

281 *Id.* at 1347.

282 *Id.* at 1349.

283 *Id.* For the defense functions of the Coast Guard, McFarland stated that the military establishment exception in § 301(c) would apply. *Id.*

284 This aligns with the AG's CAP treating the Justice Department's immigration functions as distinct from the State Department's visa functions. *See supra* note 252 and accompanying text.

285 *1941 S. Hearings on Admin. Law Bills*, *supra* note 278, at 1370, 1376–77.

286 *Id.* at 1382, 1389–90.

F. *1944–46: A Return to Reforming Administrative Law, Spurred by the ABA*

After 1941, no administrative law bill was introduced in Congress for the next few years as the desire for administrative law reform took a backseat to other priorities during World War II.[287] The Special Committee, however, jump-started a dormant conversation and once again harnessed legislative action out of public resentment over administrative agencies, which had grown as a result of their wartime restrictions.[288] That process began in August 1943, when McFarland (who authored the Minority Bill and had since become chairman of the ABA's Special Committee on Administrative Law), addressed the ABA's House of Delegates and asked permission to prepare proposals and make specific recommendations to Congress.[289] With that ask, McFarland included a draft bill to show the delegates what he had in mind, and the ABA subsequently approved his request to prepare a more detailed proposal for formal approval.[290]

In the 1943 Special Committee's draft bill of this era, its section on rulemaking contained the same overarching types of exceptions as the Minority Bill, but this time much more condensed:

> Sec. 3. Rule Making.—Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States—. . . .[291]

Following that, a helpful comment was offered by the authors:

> Comment.—The introductory exception to this section, which is slightly broader than the exception to section 2, is designed to relieve military, naval, and diplomatic agencies from the simple requirements of the following subsections. Very few rules are issued by such agencies and, if issued, are subject to the requirements of publication contained in section 2, unless of a type "requiring secrecy in the public interest."[292]

The exception in section 2, discussed by the above comment, was entitled "Public Information," and except for the last few words, its language was very similar.

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287 70 A.B.A. REP. 270, 270 (1945); 67 A.B.A. REP. 226, 226–27 (1942) (noting that when the "war came to the United States[,] . . . the committee recognized that it should reduce its general activity to a minimum and give its time and attention to such problems as might occur in connection with the national war effort").

288 *See* Shepherd, *supra* note 79, at 1641.

289 68 A.B.A. REP. 147, 254 (1943); *Committee on Administrative Law Submits a Program for Action*, 29 A.B.A. J. 589, 591 (1943).

290 68 A.B.A. REP. at 148; *id.* at 254–57.

291 *Fair Administrative Procedure for Federal Agencies is Offered in Improved Draft of a Proposed Bill*, 30 A.B.A. J. 6, 6–7, 9 (1944) [hereinafter *Fair Administrative Procedure*] (reproducing the second draft of the 1943 Special Committee's bill); 1941 AG'S CAP REPORT, *supra* note 241, at 225.

292 *Fair Administrative Procedure, supra* note 291, at 9.

> Sec. 2. Public Information.—Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States *requiring secrecy in the public interest*—. . . .[293]

Carl McFarland's 1943 Special Committee bill was subsequently introduced in Congress in June 1944 by two of its key members, each chairman of judiciary committees in their respective chambers, Senator Pat McCarran and Representative Hatton Sumners.[294] Both members' bills were identical to each other and to the Special Committee's bill. Though the bills became known as the McCarran-Sumners Bill, the official title was "the Administrative Procedure Act."[295]

The next year, on January 6, 1945, Senator McCarran re-introduced the bill as S. 7, which would ultimately be enacted as the APA a year and a half later.[296] On January 8, 1945, Representative Sumners introduced the House version of S. 7 as H.R. 1203.[297] Both bills continued to have the same exceptions, verbatim, as most other bills of the era, and just as they existed in their 1944 versions. As to adjudication, there were then no exceptions. As to rulemaking and public information, the core exceptions remained very similarly written. For the public information section, the relevant provision in S. 7 first read:

> Sec. 3. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States requiring secrecy in the public interest—. . . .[298]

In S. 7's rulemaking section, the relevant exception provision first read the exact same way, only without the extra qualifier:

> Sec. 4. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States—. . . .[299]

With the momentum brought by the ABA and with a new Congress, several other bills were also introduced.[300] However, from the outset, and especially given the ABA's backing and that the chairmen of both

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293 *Id.* at 8 (emphasis added).

294 S. 2030, 78th Cong. (as introduced on June 21, 1944); H.R. 5081, 78th Cong. (as introduced on June 21, 1944).

295 S. 2030, 78th Cong. (as introduced on June 21, 1944); H.R. 5081, 78th Cong. (as introduced on June 21, 1944).

296 S. 7, 79th Cong. (as introduced on Jan. 6, 1945); Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946).

297 H.R. 1203, 79th Cong. (as introduced Jan. 8, 1945).

298 S. 7, 79th Cong. § 3 (as introduced on Jan. 6, 1945).

299 *Id.* § 4.

300 *See generally Federal Administrative Procedure: Hearings on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the H. Comm. on the Judiciary*, 79th Cong. (1945) [hereinafter *1945 H.R. Hearings on Admin. Law Bills*] (conducting hearings on six enumerated administrative procedure bills included in the subtitle); *see also* Shepherd, *supra* note 79, at 1653–54 (collecting a few bills).

congressional judiciary committees sponsored the same bill, the McCarran-Sumners bill had the most attention and viability.

1. The State Department's Responses to McCarran's Outreach on the APA

In January 1945, when it became clear that McCarran's bill would be the vehicle for reform, the Senate Judiciary Committee, which he chaired, wrote to twenty-some agencies asking for comment.[301] Many agencies responded, including the Departments of State, War, and the Navy.

Fortunately, these responses are well preserved in the National Archives. The responses of the War and Navy Departments have already been well researched and documented by Professor Kathryn Kovacs in her article, *A History of the Military Authority Exception*.[302] Pointing to her article for more depth, it is briefly noted that both the War and Navy Departments were not at all certain of what was meant by military and naval functions.[303] Instead, they advocated for more certain exceptions that would mention each agency.[304] But the approach of having permanent agency-specific exceptions had been long abandoned, and the language in the bill was not changed.

Quite notably, however, one and only one part of the rulemaking exception language did change, and it was once again changed because of State Department engagement. Recall that at its urging in 1939, the term "foreign affairs" was somewhat broadened to instead capture all "conduct of the Department of State."[305] Well, in February of 1945, it was the Acting Secretary of State Joseph Grew,[306] who asked that the language in the

301 Record Group 46, Records of the U.S. Senate, 79th Cong., 79A-E1, Box 4, Nat'l Archives [hereinafter NARA APA Records] (on file with author).

302 Kathryn E. Kovacs, *A History of The Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 699–702 (2010).

303 *Id.* at 699.

304 *Id.* at 699–700; *see also* Letter from Henry Stimson, U.S. Sec'y of War, to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (June 13, 1945) (copy on file with author, obtained from NARA APA Records, *supra* note 301) (repeating that "the term 'military function' has no precise statutory meaning. The use of such a term of exemption on the various sections of the legislation would result in uncertainty concerning the exact scope of the several exemptions phrased in that manner."); Online Appendix, *infra* note 308, at app. B-1, B-5, C-1, C-11 (reproducing original letters from the War and Navy Departments to Senator McCarran on APA drafts).

305 *See supra* text accompanying notes 199–209.

306 Acting Secretary Joseph Grew had a fascinating history and perspective. Prior to and during the attack on Pearl Harbor, he was the U.S. Ambassador to Japan. After the attack, relations between the two counties were terminated and U.S. diplomats, including Grew, were interned in Japan for several years before being exchanged for Japanese diplomats in 1942. *See generally* JOSEPH C. GREW, TEN YEARS IN JAPAN (1944).

sections on public information and rulemaking be changed from "diplomatic function" to something broader.[307]

That February 1945 letter, newly discovered in the National Archives and not known to be excerpted in any other source, is particularly illuminating. While the whole letter can be viewed in this Article's online appendix,[308] its most significant parts are reproduced here. Pertaining to section 3 regarding public information, the State Department asked for a different term to avoid doubt that most of its functions would be covered: "Unless the words 'diplomatic function' are interpreted to mean any function relating to foreign relations, it is doubtful whether the Department would be sufficiently protected in its security measures."[309] Pertaining to section 4 on rulemaking, a similar sentiment was conveyed: "As in the case of the preceding section, unless the words 'diplomatic function' are interpreted extremely broadly, a great many of the function of the Department would be included within the scope of this section."[310] Concluding, Acting Secretary Grew stated that "'diplomatic function' . . . is not sufficiently broad" and asked that different words be inserted to the definition of "agency" to except "functions relating to the conduct of foreign relations by the Department of State, including matters relating to passports and visas, and the performance of duties abroad by diplomatic and consular officers of the United States."[311]

As a direct result of the February 1945 State Department letter asking for more encompassing exception language for most of its activities, Senator McCarren changed the "diplomatic function" language in the public information and rulemaking sections to instead read "foreign

[307] Letter from Joseph Grew, Acting U.S. Sec'y of State, to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (Feb. 17, 1945) (copy on file with author, obtained from NARA APA Records, *supra* note 301); *see also* Online Appendix, *infra* note 308, at app. A-1 (reproducing the letter).

[308] Photographs of many relevant original documents taken by the author at the National Archives have been compiled for purposes of greater accessibly and viewing helpful context. They have been organized into seven lettered and individually paginated appendices to this Article, from Appendix A to Appendix G, which can be viewed or downloaded online at https://perma.cc/8MJT-N9GL or https://lawreview.gmu.edu/print_issues/the-lost-history-of-the-apas-foreign-affairs-exception. Where this Article cites a document that also appears in an appendix, a parallel citation to "Online Appendix," and internal cross-reference to this note (for the link and an explanation), followed by the letter and page of the relevant appendix has been provided.

[309] Letter from Joseph Grew, Acting U.S. Sec'y of State, to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (Feb. 17, 1945) (copy on file with author, obtained from NARA APA Records, *supra* note 301); *see also* Online Appendix, *supra* note 308, at app. A-1 (reproducing the letter).

[310] *Id.*

[311] *Id.*

affairs . . . function."[312] The changed text appeared in the next committee print of the bill in May 1945.[313] The same language was also then added as a new exception to the adjudication section of the bill.[314] Moreover, while "directly involved" had been the qualifier for sections 3, 4, and 5 (regarding public information, rulemaking, and adjudication), the May 1945 version had each qualifier changed to simply "involved."[315]

This author reviewed every document preserved in the voluminous records relating to the 1945–46 APA in the National Archives and found no other comment that suggested changing "diplomatic function." Therefore, it appears that the February 1945 letter from the State Department caused the change. Moreover, since the Judiciary Committee only asked certain executive departments and agencies for comments on the bill prior to May, the changes reflected in the May bill draft must have been made because of those agencies' comments.[316] This much is evident not just from the records in the National Archives but in several annotated committee prints from mid-1945, where certain changes that were not adopted but which were still being considered were annotated along with the name of the agency that suggested them and the date of their letter.[317]

On May 30, 1945, the Senate Judiciary Committee Clerk again sent out a revised committee draft of S. 7 to the many agencies and departments.[318] The State Department and Acting Secretary Grew again promptly responded in mid June. That June 1945 letter, also previously undiscovered in publications, again has its most pertinent parts reproduced here.

> The bill as now drafted takes care of a number of misgivings expressed by the Department in that letter. It is noted with particular gratification that foreign affairs functions are exempted from the provisions of Sections 3, 4, and 5 of the bill.
>
> . . . .
>
> In order to avoid any ambiguity as to the meaning of "foreign affairs function", which unlike "military or naval function", does not have an established meaning, the

312 STAFF OF THE S. COMM. ON THE JUDICIARY, 79TH CONG. S. 7 (Comm. Print 1945) (copy on file with author, obtained from NARA APA Records, *supra* note 301) (reproduction also viewable at Online Appendix, *supra* note 308, at app. F-1).

313 *Id.*

314 *Id.*

315 *Id.*

316 S. Comm. on the Judiciary Memo (undated but written after June 1945) (copy on file with author, obtained from NARA APA Records, *supra* note 301).

317 *See generally* Staff of the S. Comm. on the Judiciary, 79th Cong. S. 7 (Comm. Print June 1945) (obtained from NARA APA Records, *supra* note 301); *see also* Online Appendix, *supra* note 308, at app. G-1 (reproducing the committee print).

318 SENATE APA REPORT, *supra* note 62, at 5. The Senate APA report expressly acknowledges agency engagement.

> Department suggests the propriety of defining that term in Section 2. For example, it is not clear to the Department whether the issuance of regulations pertaining to shipping and seamen to be applied by consular officers of the United States stationed in foreign ports relates to "foreign affairs function". Obviously a good argument could be made for such an interpretation as shipping is a vital factor in world trade the stimulation and facilitation of which is certainly part of the conduct of foreign affairs. However, if, as suggested above, a definition of foreign affairs functions could be formulated, such definition would help remove any latent ambiguities. It is believed that a definition in words somewhat as follows might serve: "'Foreign affairs function' means a function relation to the conduct of foreign relations, including the issuance, denial or revocation of passports and visas, and the performance of duties abroad by diplomatic and consular officers of the United States."[319]

It was the commentary from that letter, including the suggested definition, that was later annotated across sections of the June 1945 draft committee print.[320] But elsewhere in that annotated print, the sections on public information, rulemaking, and adjudication had no explanation of the change from "diplomatic function" to the broader "foreign affairs function," apparently because the change was uncontroversial and had already been made.

However, committee annotations in the June 1945 draft did show that a definition of "foreign affairs functions," as suggested by the State Department's June 1945 letter, was still being considered to be added in section 2 as a specific and defined term:

> It has been suggested that "foreign-affairs functions" should be defined and added to section 2 in order to exclude from the operation of the measure all passport and visa functions as well as all duties of consular and diplomatic officers abroad. However, so far as these are not foreign affairs functions "requiring secrecy in the public interest," there would seem to be no reason why they should not be subject to the simple public information requirements of section 3. Whether or not they are in all aspects strictly "foreign-affairs functions," the rule making provisions of section 4 do not apply to organizational or procedural rules nor to other rules where the simple procedures required are found impracticable.[321]

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[319] Letter from Joseph Grew, Acting U.S. Sec'y of State, to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (June 12, 1945) (copy on file with author, obtained from NARA APA Records, *supra* note 301); *see also* Online Appendix, *supra* note 308, at app. A-9 (reproducing the letter).

[320] STAFF OF THE S. COMM. ON THE JUDICIARY, 79TH CONG. S. 7 (Comm. Print 1945); *see also* Online Appendix, *supra* note 308, at app. G-1 (reproducing the committee print). Note that this four-column print was also typed out and inserted into a printed compendium of the APA's legislative history. *See* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 79TH CONGRESS, 1944–46, at 11–44 (1946) (printed as S. DOC. NO. 79-248 (1946)). It was also attached as an exhibit to the public court filing cited *supra* note 34. The textual reproduction is harder to read and visualize than the photographed original print in the online appendix, which provides better context.

[321] STAFF OF THE S. COMM. ON THE JUDICIARY, 79TH CONG. S. 7 (Comm. Print June 1945) (reproduction on file with author; obtained from NARA APA Records, *supra* note 301) (copy also viewable at Online Appendix, *supra* note 308, at app. G-1, G-3).

Similarly, elsewhere in the June committee print, in section 9(b), entitled "Licenses," another revealing annotation appeared: "It is suggested that the provision for the withdrawal of licenses in the second sentence should not be applicable to foreign affairs, including such matters as visas or airplane permits granted foreigners."[322] That was apparently also made in response to the State Department's June 1945 letter. These annotations suggest that the proposed definition and language was apparently reasonable enough to be seriously considered. Internal committee memoranda later explained that comments made by agencies before June 26, 1945, were considered when specific requests were presented. Ultimately, neither suggested edit was adopted in the final APA.[323]

Nevertheless, between the State Department's two 1945 letters, including that its first letter resulted in having the term "diplomatic function" changed to the broader "foreign affairs function," that its subsequent letter contained a proposed definition for foreign affairs that was similar to its first request and was seriously considered, and that other subsequent annotations in the definition and licenses sections showed similar serious consideration, additional contemporaneous evidence emerges for what the APA drafters thought "foreign affairs" meant in 1945.

Tacitly, then, the Judiciary Committee appeared to internally: (1) recognize that passport, visa, and officers' functions abroad are generally foreign affairs functions; (2) leave open the possibility that not every listed function would always strictly be dealing with foreign affairs, perhaps referring to the officers abroad;[324] and (3) nevertheless defer, as other parts of the APA did, to the State Department's assessment of what a foreign affairs function is.

By the same token, the State Department's letters also strongly suggest that the APA drafters considered at least four of the seven State Department functions enumerated in the letters to be examples of foreign affairs functions: matters pertaining to passports, visas, officers' performance of certain duties abroad, and airplane permits granted to foreigners. The other three functions mentioned in other sections of the letters pertained to matters involving arms exports licenses, the registration of foreign agents, and licenses affecting lands acquired in connection with projects administrated by the International Boundary Commission, which was established by treaty.[325] It is not at all a stretch to presume that these functions would also be covered by the exception,

322 *Id.* at 17.

323 *Id.*; *see also* Administrative Procedure Act, ch. 324, § 9, 60 Stat. 237, 242–43 (1946).

324 SENATE APA REPORT, *supra* note 62, at 13. The Senate report states the exception should not "be loosely interpreted to mean any function extending beyond the borders of the United States." *Id.*

325 *See* Treaty in Regard to the Boundary Between the United States and Canada, Can.-U.S., Feb. 24, 1925, 44 Stat. 2102.

given the similarities to what was already apparently included and by the text of the terms themselves. But other contextual clues further suggest that these three other functions were indeed included.

Recall that the AG's CAP Report investigated the operations of the State Department as to visas, passports, and exports of arms and other munitions, but the committee chose not to complete or publish the corresponding monograph.[326] As the final AG's CAP Report noted, the committee deemed doing so "inadvisable because of the confidential nature of the material."[327] A direct link can be made from that concern to another part of the APA bill draft: the public information section. As originally drafted in S. 7, the rulemaking section's exception mirrored the public information section's exception, with the only difference being the latter added an appending clause and extra qualifier "requiring secrecy in the public interest." After the State Department's February 1945 letter to the Senate Judiciary Committee, both sections' "diplomatic function" text was broadened and changed to "foreign affairs function." The May 1945 committee print draft shows this parallel language in its public information section, requiring publication of certain documents, rules, orders, and more—"[e]xcept to the extent that there is involved . . . any military, naval, foreign affairs, or other function of the United States requiring secrecy in the public interest."[328] The May 1945 draft rulemaking section, apart from omitting the ending extra qualifier, similarly stated that its requirements applied, "[e]xcept to the extent that there is involved . . . any military, naval, foreign affairs, or other function of the United States."

Clearly then, if the final AG's CAP Report—which McFarland and Senator McCarran largely based their bills on—considered visas, passports, and the exports of arms and other munitions to be so confidential as to not even be published, it seems that they would logically also consider those to fall under the exception to the public information section. And since that section had a higher bar and extra qualifier, "requiring secrecy in the public interest,"[329] anything thought to apply to that section would surely have to apply to the definition in the rulemaking section, which used the same language but omitted the narrowing extra qualifier.

Lastly, it must be remembered that the very reason Senator McCarren solicited agency feedback was to get the support from the administration

326 *See* 1941 AG'S CAP REPORT, *supra* note 241, at 4 n.2.

327 *Id.*

328 S. 7, 79th Cong. § 3 (as introduced on Jan. 6, 1945).

329 *Id.*

and particularly the AG.[330] Not gaining that support sank the prior administrative reform bill in 1940 when it was close to being passed.[331] So, at several points in the APA drafting process, AG Tom Clark (who would later be appointed to the Supreme Court in 1949) was given internal committee drafts with annotations and explanations.[332] Only after that Senate engagement with agencies did AG Clark approvingly write to Senator McCarran on October 19, 1945. In that letter, he praised the Judiciary Committee's interaction with government agencies, ultimately crediting that involvement as a large reason why he would recommend the bill.[333] In relevant part, AG Clark's letter read:

> The agencies of the Government primarily concerned have been consulted and their views considered. . . .
>
> The revised Committee Print issued October 5, 1945, seems to me to achieve a considerable degree of reconciliation between the views expressed by the various Government agencies and the views of the proponents of the legislation. . . .
>
> The bill appears to offer a hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government. Insofar as possible, the bill recognizes the needs of individual agencies by appropriate exemption of certain of their functions.
>
> After reviewing the Committee Print, therefore, I have concluded that this Department should recommend its enactment.[334]

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330 *E.g.*, Davis & Gellhorn, *supra* note 80, at 514 ("Many of those savings clauses that you read in the sections of the [APA] that say 'except in respect of this or that, such and such will be the rule' were exceptions that were incorporated not at the behest of the ABA Committee or Carl McFarland, but at the behest of the Attorney General speaking through Louis Jaffe."); Shepherd, *supra* note 79, at 1655–56 ("The committees had no choice but to please the agencies and the attorney general. Unless the agencies and attorney general approved the bill, Truman . . . would not sign it."); Gellhorn, *supra* note 79, at 230 (stating that the AG "'struck a deal'" with APA proponents and were therefore involved in "intensive consultation and collaborative efforts"); Willis Smith, *Drafting the Proposed Federal Administrative Procedure Act*, 29 J. AM. JUD. SOC'Y. 133, 134 (1946), *reprinted in* 92 CONG. REC. 2148 (Mar. 12, 1946) ("The Attorney General was requested to act as a liaison officer between the legislative committee and the several administrative agencies. Representatives of the staff of the Senate committee, with the aid of the representatives of the Attorney General and other interested parties, engaged in an extensive series of conferences at which points made were discussed and alternative proposals as to language were debated. Then, in May 1945, the Senate committee issued a committee print in which the text of S. 7 appeared in one column and a tentatively revised text in the parallel column.").

331 *See supra* notes 234–40 and accompanying text.

332 *E.g.*, Shepherd, *supra* note 79, at 1661–62 ("Clark and his representatives had involved themselves closely in the negotiations over the bill, and the bill granted almost all of the administration's demands.").

333 Letter from Tom Clark, U.S. Att'y Gen., to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (Oct. 19, 1945), *reprinted in* SENATE APA REPORT, *supra* note 62, at 37–39.

334 *Id.*

In other words, largely because the agencies' positions were considered, and partly because the needs of individual agencies were recognized by appropriate exception, the APA won DOJ's and thus the Administration's approval.[335] Consequently, the bill was able to gain large support in Congress without any threat of veto.[336]

More simply stating what was just presented, the letters between the State Department and the Judiciary Committee, the incorporation of the State Department's ask as to exceptions, and the resulting approval of the Justice Department, all further suggest that most State Department activities at the time were considered "foreign affairs functions" by the APA's drafters.[337] Notably, that understanding would wholly comport with the 1937-era ABA Special Committee that originally drafted the first APA bill and used the same "foreign affairs" term based on Supreme Court cases that discussed arms exports and other functions vested in the discretion of the Executive. Remarkably then, the understanding of the term "foreign affairs" appeared fairly consistent, at least as to many State Department functions, from December 1936 to 1946.

2. Senate and House Reports on the APA Bill

Most of the recounted behind-the-scenes agency interactions preceded the formal June 1945 House hearings on the bill, so nothing relevant changed during the course of those hearings, which were silent on the subject of the exception. [338] A few months later, the Senate issued its report on the APA bill in November 1945.[339] In it, the history of the prior bills' impacts on the development of the APA were well-acknowledged, including the Walter-Logan Bill and the AG's CAP bills.[340] Also in that

335 *E.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950) ("[The APA's] consideration and hearing, especially of agency interests, was painstaking. All administrative agencies were invited to submit their views in writing. A tentative revised bill was then prepared and interested parties again were invited to submit criticisms. The Attorney General named representatives of the Department of Justice to canvass the agencies and report their criticisms, and submitted a favorable report on the bill as finally revised.").

336 *E.g.*, Shepherd, *supra* note 79, at 1661–62 ("In effect, the administration, through the attorney general, had veto authority over the bill.").

337 *Accord* Bonfield, *supra* note 12, at 259 ("Although not completely clear, this seems to suggest that 'foreign affairs function' was intended to encompass at least 'all passport and visa functions as well as all duties of consular and diplomatic officers abroad.'").

338 *See generally 1945 H.R. Hearings on Admin. Law Bills*, *supra* note 300.

339 SENATE APA REPORT, *supra* note 62, at 1.

340 *Id.* at 1–4 ("For more than 10 years Congress has considered proposals for general statutes respecting administrative law and procedure.").

report, the Judiciary Committee recommitted itself to the principle that functions and not agencies are excepted.[341]

As to the foreign affairs function specifically, the Senate Report did contain a brief explanation:

> 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. . . . The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rule making procedures they will adopt in a given situation within their terms. It should be noted, moreover, that the exceptions apply only "to the extent" that the excepted subjects are directly involved.[342]

A pause must be taken now from the historical progression to provide commentary on these explanations from the Senate (and House) Report, particularly because courts and commentators have viewed the reports as the only legislative history and misconstrued them to establish problematic tests.

First, it must be noted that the Senate Report's explanation conflicts with the draft and enacted text. In the early versions of the bill, and before the State Department's February 1945 letter, the text of the provision read: "Except to the extent that there is *directly* involved any . . . diplomatic function . . . ."[343] But when the second committee print was circulated in May 1945, not only had "diplomatic function" been changed to "foreign affairs function," but the "directly involved" language was changed to simply "involved."[344] Oddly then, the Senate Judiciary Committee evidently attempted to reinsert language via report commentary that it had deleted from the text of the law.

Second, the entire APA, to this day and by its own terms, excludes from judicial review "agency action [that] is committed to agency discretion by law."[345] If "foreign affairs" is so gray as to have no "judicially manageable standards," as is the test for that statutorily vested discretion,[346] then it is curious why courts could render decisions on the

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341 *Id.* at 5.

342 *Id.* at 13.

343 S. 7, 79th Cong. (as introduced Jan. 6, 1945) (emphasis added).

344 *See supra* text accompanying note 315.

345 5 U.S.C. § 701(a)(2).

346 *E.g.*, Heckler v. Chaney, 470 U.S. 821, 830 (1985) (holding an action is "committed to agency discretion" when "statutes are drawn in such broad terms that in a given case there is no law to apply," meaning that "a court would have no meaningful standard against which to judge the agency's exercise of discretion" (internal quotation marks omitted)).

exception in close-call cases.[347] In that same vein, the most usual APA judicial scope of review is based on whether the agency action was arbitrary, capricious, and an abuse of discretion.[348] Crucially, those tests mainly look at the underlying reasons that an agency provides for its actions. But in the delicate field of foreign affairs, it has long been settled that the desire for transparency necessarily differs than for actions in domestic affairs, and there are often no reasons publicly provided.[349] These points underscore the difficulties and reluctance courts ordinarily have in this sphere, and suggest that if a case on the exception offers a close call, the drafters of the APA era might have expected deference to the agency.

Third, some have mistaken the "definitely undesirable international consequences" language as an integrated and required test to qualify for the function.[350] But that is clearly not so. It was merely one non-exclusive example of what would "so" (i.e., more than incidentally) affect relations with other governments; and we know that by the text in the commentary that says: "for example." At least one astute appellate court has noted the same, calling it an "illustration," not a "definition."[351]

Fourth, while not a test, and certainly not an exclusive test, the "undesirable international consequences" example is itself often misunderstood.[352] But when contextualized with the history of the act, the purposeful decision by the AG's CAP not to publish examined State Department functions, and particularly vis-a-vis the public information section, the illustration is best understood to mean *not* something that causes an international incident, but instead something that if made public or subject to delay would not be desirable.[353] Often, the State or Defense Departments cannot and ought not to say why a particular

347 92 CONG. REC. 2150 (Mar. 12, 1946). Senator Pat McCarran, advocating for the bill on the day it would pass the Senate, stated: "[N]o section or paragraph of the bill is completely independent: all parts of it are closely interrelated. The bill must be read and considered as a whole . . . ." *Id.*

348 5 U.S.C. § 706(2).

349 *Cf.* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (discussing the need to afford the "President a degree of discretion" so that "perhaps serious embarrassment—is to be avoided," also discussing the need for "[s]ecrecy," including in deliberations, to avoid "premature disclosure of it productive of harmful results"); *see also* cases cited *supra* note 112.

350 *E.g.*, cases cited *supra* notes 42, 45–46.

351 City of New York v. Permanent Mission of India to U.N., 618 F.3d 172, 202 (2d Cir. 2010) ("To hold otherwise would turn the phrase 'provoke definitely undesirable international consequences' from an illustration given in the APA's legislative history . . . into the definition for 'foreign affairs function.' That we are not prepared to do.").

352 *Cf.* E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 776 (9th Cir. 2018) ("[C]ourts have approved the Government's use of the foreign affairs exception where the international consequence is obvious or the Government has explained the need for immediate implementation of a final rule." (citing Yassini v. Crosland, 618 F.2d 1356, 1360 n. 4 (9th Cir. 1980))).

353 *Cf. Curtiss-Wright Exp. Corp.*, 299 U.S. at 320.

decision has been made, either with respect to a particular country or to many or all countries equally. The *Curtiss-Wright* and *Panama Refining* decisions expressly recognized as much.[354] As does the political question doctrine, which existed in Supreme Court case law well before the APA.[355]

For the same reasons, public comment on notices of proposed rulemaking is also of questionable value. If agencies that make rules in these fields need to explain or provide the facts underlying their actions, most of the time the public would not be informed enough to meaningfully comment. And even if some of the underlying reasons were made public, query whether it would be beneficial to have foreign or military policies be made by non-governmental parties—including foreign parties—commenting on rulemaking. The Constitution vests the Executive as the sole organ of our foreign affairs and as our commander in chief,[356] and that office primarily acts through the State and Defense Departments, which ordinarily could not fully present or contextualize the reasons for their actions in a proposed rule. This distinction is one of the main reasons why courts abstain from such political questions.[357] Domestic affairs matters differ vastly, because the reasons for regulatory action are generally not confidential and geopolitically complex. Due in significant part to the nondelegation doctrine, domestic matters operate within more pronounced statutory standards of action and apply focused regulations to facts found and announced by the agency.[358]

And fifth and finally, it is not certain, but the "beyond the borders" explanation appears to reflect the hesitation internally noted by the committee when it considered inserting a definition of foreign affairs into section 2 of the bill that not all matters involving consular and diplomatic officers abroad would be "strictly" foreign affairs functions.[359]

These attempts to manifest extra restrictions by inserting language into the Senate Report (and later also the House Report) were also made to other sections of the APA and have been noted by other scholars. Most prominently, Professor George Shepherd's authoritative history of the APA goes into detail to discuss how opposition-party members of the Senate and House sought to create legislative history favorable to their desired interpretations, as opposed to what the administration and the AG wanted and were prepared to enact.[360] And so, for the sake of compromise

354 *See supra* note 276 and accompanying text.

355 *See* cases cited *supra* note 112.

356 U.S. CONST. art. II, § 2.

357 *See* cases cited *supra* note 112.

358 *E.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 408 (1928); *Curtiss-Wright Exp. Corp.*, 299 U.S. at 315.

359 *See supra* text accompanying notes 321–24.

360 *See* Shepherd, *supra* note 79, at 1665.

and enactment, and in hopes that courts would look to the report language, some statutory text was left either purposefully ambiguous or altered to what the administration wanted, but those in charge of the committee reports made efforts to restrict and reexplain some of these provisions differently.[361]

Tying this together, the confusion over the term "foreign affairs" came not from its own text, but by these odd restrictions, and at times contradictions, found in the committee reports that aimed to restrict the language of the law. But the text is operative. The reports are not the law. And the statutory text was meant to carry forward the unique considerations of dispatch and discretion in the conduct of foreign affairs, enshrined in case law, and well known before, during, and for decades after a period of world wars and foreign instability.

Returning to finish the historical progression, the Senate passed S. 7 on March 12, 1946, with the same foreign affairs exception language as was in the June 1945 draft.[362] The bill was referred to the House Committee the next day, and the whole House overwhelmingly passed the bill just weeks later, on May 28, 1946.[363] With the AG's endorsement, President Harry Truman signed the APA into law on June 11, 1946.[364]

G. *The 1947 AG's Manual on the APA*

The AG's Manual on the Administrative Procedure Act ("the AG's APA Manual") was formally published in 1947.[365] The Supreme Court has historically given it "some weight . . . since the Justice Department was heavily involved in the legislative process that resulted in the Act's enactment in 1946."[366] This is wholly true. Without the blessing of the executive branch agencies, and particularly without the approval of the AG, the fate of the APA bill would have been far different.[367] This is just what occurred in 1940 when the first administrative reform bill was vetoed—largely due to controversy over its exceptions.[368] Moreover, the historical records from the National Archives show that AG's CAP member, Assistant AG Clark (and as of June 1945, AG Clark), was deeply

361 *Id.*

362 92 CONG. REC. 2148, 2167 (Mar. 12, 1946).

363 92 CONG. REC. 5668, 5685 (May 28, 1946).

364 Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946).

365 *See* AG'S MANUAL ON THE APA, *supra* note 73.

366 Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979); *see also* Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546 (1978) (similarly stating).

367 *See supra* text accompanying notes 331–36.

368 *See supra* text accompanying notes 234–40.

involved in different iterations of the three main Senate Judiciary Committee bill prints in May, June, and October, before finally giving his blessing in mid-October 1945.[369]

Less known about the AG's APA Manual, however, was that it was not authored all at once. Instead, it was originally written piecemeal, and as memoranda to executive agency heads over the course of several months.[370] The part relating to the rulemaking section was issued in August 1946:

> As to the meaning of "foreign affairs function," . . . It is equally clear that the exemption is not limited to strictly diplomatic functions, because the phrase "diplomatic function" . . . was discarded in favor of the broader and more generic phrase "foreign affairs function." In the light of this legislative history, it would seem clear that the exception must be construed as applicable to most functions of the State Department and to the foreign affairs functions of any other agency.[371]

Since at least partial deference is owed to this contemporary interpretation written by the AG—who was deeply involved in drafting the law and obtaining necessary administration support for it—his characterization of the "foreign affairs function" as "broad and generic" is reliable, telling, and in line with the history and sources presented above.[372] So too is his conclusion that "the exception must be construed as applicable to most functions of the State Department."[373]

Moreover, if, as the Supreme Court said, some deference is due to the AG for his role in drafting the law, then some weight should also be given to the contemporaneous letters of the State Department, which decidedly contributed to the language and breadth of the foreign affairs exception. The key February 1945 State Department letter specifically listed seven specific functions that it felt should be excepted.[374] And because that letter directly led to the phrasing change, it strongly suggests that those listed State Department functions were indeed generally considered exempt—just as the AG's APA Manual asserted.

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369 Letter from Thomas Clark, U.S. Att'y Gen., to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (Oct. 19, 1945) (copy on file with author, obtained from NARA APA Records, *supra* note 301).

370 *See, e.g.*, Memorandum from the Att'y Gen. to the Heads of Dep'ts and Agencies (Aug. 16, 1946) (copy on file with author, obtained from NARA APA Records, *supra* note 301).

371 AG'S MANUAL ON THE APA, *supra* note 73, at 26–27.

372 *Id.*

373 *Id.*; *see also* Shepherd, *supra* note 79, at 1663 ("Because the Senate committee appended Clark's letter and appendix to its report, an argument exists that the Senate adopted Clark's material as its own interpretation."); *accord* sources cited and accompanying text, *infra* note 375.

374 *See supra* notes 322–26.

H. *Summary of the History of the Foreign Affairs Function Exception*

To put all of this in perspective, the APA's foreign affairs function exception was enacted and phrased in its current form because of the State Department's ask to have it cover most of its functions. If the broader and more encompassing phrasing change was not made, the APA might not have been passed by Congress; or, if it somehow did, it was likely to be vetoed.[375] Such a function-specific exception was needed not only to hew to the case law it derived from, but also because it was clear from prior administrative law reforms that including agency-specific exceptions might again open the door to more agencies being excepted for arbitrary or political reasons. The AG's CAP had vowed to preclude that.[376] So the language of the exception was written as a way to avoid expressly favoring or naming agencies, yet still accommodate the asks of the State and War Departments to have most of what they regulate be excepted. Their functions, after all, had usually not been subject to judicial review, and their decisions often required speed and secrecy, or at least discretion, in what reasonings were made public. Consequently, the benefit of public comment on proposed rulemaking would be particularly inefficient or ineffective in these fields for the same reasons that the Supreme Court case law has repeatedly noted make such fields usually non-justiciable.[377]

At the same time, the particular phrasing of the enacted APA's foreign affairs exception can be traced from the 1935 and 1936 Supreme Court cases, *Panama Refining* and *Curtiss-Wright*, to 1936–37 when the first exceptions were conceived and authored by the ABA's Special Committee. Then, the ABA's draft bill of 1939 incorporated those very same exceptions, which were introduced in Congress within the 1939–40 Logan-Walter Bill. That bill, in turn, heavily influenced the 1941 Minority Bill from the AG's CAP, which imported the same exceptions language. The 1941 Minority Bill, partly authored by Carl McFarland, was then reformulated by the 1943 ABA Special Committee, led by McFarland, and was submitted to Congress in 1944 and 1945 as the McCarren-Sumner Bill.

375 *E.g.*, 92 CONG. REC. 2150 (Mar. 12, 1946) (Senator McCarran stating that the "bill . . . . has the active support of the Attorney General. Not one agency in the executive branch of Government is on record as opposing it."); Shepherd, *supra* note 79, at 1655–56 ("[T]he committees asked the attorney general to act as a liaison between the committees and the agencies. The committees had no choice but to please the agencies and the attorney general. Unless the agencies and attorney general approved the bill, Truman—Roosevelt had died on April 12—would not sign it."); *id.* at 1660–74 (more detail on the same).

376 *See supra* note 281 and accompanying text.

377 *See* cases cited *supra* notes 111–12. The reasons for the non-justiciability of these two functions overlap with why they were not subject to the same nondelegation doctrine concerns as for domestic matters. *E.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315–16 (1936).

Finally, the 1945 bill was enacted as the APA in 1946. Each bill at one point had the "foreign affairs" language and each one largely influenced a successive bill, right up to the final APA.

At the risk of oversimplifying a complex topic, the history of the term can be compressed to say the following: "foreign affairs function" is a term of art, both by how the APA drafters conceived it and how the State Department asked for it in order to encompass most of its functions, and that term of art was largely based on how and why the particular phrase was first uniquely used in a legal sense in *Curtiss-Wright*.

III. Analyzing Whether Something is a Foreign Affairs Function

With the benefit of history and context behind the foreign affairs exception, consider again the problematic and divergent court decisions presented in Part I. A split exists, largely based on questionable language inserted into the House and Senate Reports.[378] That language, in turn, conflicts with much of the history, context, and prior draft text presented above. Nonetheless, the split appears to be somewhat entrenched. So, what to do?

Clearly, a balance must be struck for how to review an agency's invocation of the foreign affairs exception. That balance must give predictability to agencies that have a long-standing history invoking the exception in certain matters, but it must also allow for other uses of the exception when agencies that do not traditionally deal in foreign affairs must. But this balance cannot be a blank check either. Otherwise, agencies can abuse the exception. Any proposed solution should also factor in the reality that wholly upending the recent decades of case law would be difficult and disfavored.

To those ends, what is proposed here only lightly modifies a reasonable two-tracked approach used by the Court of Appeals for the Second Circuit in 2010. Faced with prior case law that separately used both the "clearly and directly involved" and the "undesirable international consequences" tests, the court in *City of New York v. Permanent Mission of India*[379] astutely realized the underlying reasons why these tests developed.[380] The court knew that some "areas of law like immigration . . . only indirectly implicate international relations" and that in such situations a case-by-case determination would likely be needed to prevent

[378] *See supra* Section II.F.2; *see also supra* notes 52, 63–74 (explaining how the undesirable consequences and the clearly and directly involved test originated from the House and Senate reports as purported evidence of the legislative history of the exceptions).

[379] City of New York v. Permanent Mission of India to U.N., 618 F.3d 172 (2d Cir. 2010).

[380] *Id.* at 202.

abuse of the exception.[381] Even for this indirect or irregular test, however, the court shrewdly noted that "undesirable consequences" was just an "illustration" and an example within the larger test presented in the congressional reports: matters that "affect the relations of the United States with other governments."[382]

At the same time responding to the other test, the court noted that there are "quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign missions [that] are different," and which do not call for the first test.[383] So the Court of Appeals for the Second Circuit essentially called for a sequential two-track test that can be easily tweaked. First, as a variation of the clearly and directly involved test, courts should (1) see if a rule's subject matter (i.e., its function), and not its effect, is "quintessential," as a usual or obvious foreign affairs function. If it is not, then the inquiry does not end; rather courts should then (2) look deeper to see whether the atypical topic might affect foreign relations. This is particularly apt for immigration, since courts have generally not considered it to be a de facto foreign affairs function, but occasionally have accepted it as such, including when the rule's subject matter had unobvious implications.[384]

With the benefit of the above history and close study, this proposed two-track test can more faithfully fulfill the text of the law, its use of a term of art, and its purpose. The caveat and trick to the test is to avoid prophesizing on the possible and unknown effects of a specific rule or the reasons underlying it. The effect of a particular rule can be excepted through a different standard, the good cause exception, which requires an accompanying explanation for why it should not undergo notice and comment or delay.[385] In deliberate contrast, the foreign affairs exception was made as a topical one, by virtue of its subject area, and was not supposed to be solely based on a possible effect of a particular rule.[386] The other important consideration to the test is that safeguards are already

381 *Id.*

382 *Id.* (internal quotation marks omitted).

383 *Id.*

384 *E.g.*, Yassini v. Crosland, 618 F.2d 1356, 1361 (9th Cir. 1980) (referencing submitted affidavits). Immigration must also be distinguished from visa rules. Immigration rules usually affect non-U.S. persons (non-citizens or non-legal permanent residents) in the United States or seeking to enter at a U.S. port of entry. In contrast, visa rules usually deal with non-U.S. persons *outside* of the United States who wish to apply for a visa to later present themselves at a U.S. port of entry. Visa rules are a tool of foreign affairs and are matters of negotiation or reciprocity with foreign governments. Immigration rules, however, do not usually involve such governmental relations.

385 5 U.S.C. § 553(b).

386 *See supra* notes 265, 281. Another way to put this is that the input of the rule via its topic should be considered, not just any particular output. *See supra* note 18 and accompanying text.

embedded to prevent abuses of the exception in either track. Indeed, both tracks, reflecting the split in jurisprudence, developed as a way to have confines for the exception in absence of other legislative history.[387]

A. *Track One: Obvious and Established Functions*

Within the first analytical track, core foreign affairs functions should be excepted. These would include subject areas that have long asserted the exception, to give the government agency a kind of reliance interest. Subject areas that were specifically known at the time the foreign affairs function was developed or advocated for would also qualify. Within this track, these functions should continue to be accepted without extra tests or restrictive readings. Such are the kinds of obvious or quintessential subjects that the Court of Appeals for the Second Circuit discussed.[388] This kind of first level of review is needed because under the restrictive "undesirable consequences" test, many of these core functions would not facially qualify, despite much in the history of the APA showing that they should.

In that vein, other history and practice should also inform this track. For example, the seven functions that the State Department identified in its 1945 letter that led to its desired inclusion of the broader "foreign affairs" term should qualify. The APA's congressional drafters were put on express notice that these functions needed to be excepted so the State Department and the administration would not object to the bill, and Congress essentially agreed to them by broadening the text as requested.[389] Three of those seven—visas, passports, and arms exports—are additionally supported by the fact that the AG's CAP did not publicly release studies of those functions due to confidentially concerns.[390] Thus, they would have been captured under the exact same exception language in the public information section draft language before it was broadened. But these functions should not be the only quintessential ones.

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387 *See* cases cited *supra* note 69 (showing how the clearly and directly involved test began); *see also supra* note 69 and accompanying text (showing how the Senate and House reports did not align on the clearly and directly language); *Yassini*, 618 F.2d at 1360 n.4 (worrying about distending the foreign affairs exception to immigration matters, and relying on definitely undesirable international consequences text from the reports to limit it). As the tracks proposed here are considered, note how they contain principles that limit abuse or overbreadth, but actually allow for the functions that the APA and its drafters meant to except. In this way, the limits on the foreign affairs exception are reasonable and do not swallow it to leave only the good cause exception.

388 City of New York v. Permanent Mission of India to U.N., 618 F.3d 172, 201–02 (2d Cir. 2010).

389 *See supra* notes 312–15, 321–25 and accompanying text.

390 *See supra* notes 271–72.

Longstanding and unchallenged practice shows not only congressional, but public and judicial acquiescence.[391] So a history, especially shortly after the APA was enacted, of issuing similarly scoped substantive rules without notice and comment or without a delayed effective date should be taken as convincing evidence of quintessence.[392] This can be analyzed by going into the *Federal Register* to look for how analogous rules were issued in the years and decades following the APA.[393] It could also be demonstrated by statements made by the State Department, such as one in 1957 made in response to a House survey which estimated that about 40% of its rules were foreign affairs functions, and detailed which.[394] Another survey across executive agencies was later undertaken in 1969 by the Administrative Conference of the United States ("ACUS").[395]

In a similar vein, near-contemporaneous pronouncements should also qualify. According to the Supreme Court, "respect [is] due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion."[396] So, for example, the fact that Dean Acheson, after serving as chair of the AG's CAP, issued visa rules as Secretary of State and invoked the foreign affairs exception shortly after the APA was enacted, would be particularly relevant.[397] Also weighty is that the core notion of what was a considered a foreign affairs function was remarkably similar

391 *E.g.*, NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 49:3 (7th ed. 2012) (collecting cases); Alaska Stock, LLC v. Houghton Mifflin Harcourt Pub. Co., 747 F.3d 673, 685 & n.56 (9th Cir. 2014) ("A longstanding administrative interpretation upon which private actors have relied aids in construction of a statute precisely because private parties have long relied upon it.").

392 *Cf.* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 327–28 (1936) ("A legislative practice . . . evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice . . . .").

393 *E.g.*, *supra* note 34 and accompanying text (listing a long-standing practice of the State Department invoking the exception for visa rules—220 times since 1946).

394 Bonfield, *supra* note 12, at 233 n.39, 261–66 (collecting survey responses and other agency views).

395 *Id.* at 232. Notably, a statute bars the Administrative Conference of the United States ("ACUS") from studying or addressing military or foreign affairs functions. 5 U.S.C. § 592(1).

396 Power Reactor Dev. Co. v. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO, 367 U.S. 396, 408 (1961) (internal quotation marks omitted).

397 Priority of Quota Immigrants, 11 Fed. Reg. 14607, 14611 (Dec. 24, 1946); Miscellaneous Amendments, 14 Fed. Reg. 2433, 2437 (May 11, 1949). This aligns with McFarland's views as well. *See supra* note 284 and accompanying text.

during the arc of drafting the APA, from McGuire to McFarland to AGs (and later Justices) Jackson and Clark.[398]

Comparably, congressional pronouncements of foreign affairs functions or analogous terms like foreign policy in statutes that give rulemaking authority should also be considered prima facie evidence of their applicability. Often Congress makes such declarations in the laws it enacts.[399] But conversely, the lack of such statements should not be fatal either. Some functions are so clearly foreign affairs functions that they should not require affirmative pronouncements—particularly when the source authority derived well before the APA was enacted.

Along the same lines, long-standing regulations asserting certain functions are foreign affairs functions should be similarly honored. Only three such regulations exist in all of the Code of Federal Regulations, and they are related to arms exports,[400] arms imports,[401] and global sanctions.[402] Indeed, the Court of Appeals for the Ninth Circuit recently indicated that had it reached the issue, it would have accepted the pronouncement in such a regulation, especially since at least one was effectively ratified by Congress.[403]

Finally, it appears clear that regulations issued to implement not just treaties but also international instruments, binding and non-binding, have been well-accepted by courts and commentators as exempt foreign affairs functions.[404] Constraining the implementation of these agreements and arrangements would degrade the United States' ability to negotiate as a sovereign nation, and it would limit its ability to do what it promised and receive the benefit underlying that instrument. Moreover, after the United States has already "effectively committed itself through

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398 *See supra* notes 162–63 and accompanying text (for McGuire); *supra* notes 241, 245 and accompanying text (for Jackson); *supra* notes 280–84 and accompanying text (for McFarland); *supra* notes 369–73 and accompanying text (for Clark).

399 *E.g.*, 21 U.S.C. § 811(d)(1); 22 U.S.C. § 2751. One of the earliest of our statutes, 22 U.S.C. § 2656, specifically envisions that many functions assigned to the State Department are "matters respecting foreign affairs."

400 22 C.F.R. § 120.20 (2023) (International Traffic in Arms Regulations ("ITAR") primarily pertaining to arms exports). This provision originated in 1954. *See* Miscellaneous Amendments, 19 Fed. Reg. 7405, 7405 (Nov. 17, 1954).

401 27 C.F.R. § 447.54 (2023) (Bureau of Alcohol, Tobacco, Firearms and Explosives regulations pertaining to arms imports, which, prior to 1968, were administered by the State Department as part of the ITAR).

402 31 C.F.R. § 501.804 (2023) (OFAC sanctions regulations). Other regulations reference or repeat the foreign affairs exception, but only those in this and the preceding two notes affirmatively invoke it.

403 Washington v. U.S. Dep't of State, 996 F.3d 552, 558 n.3 (9th Cir. 2021).

404 *E.g.*, cases cited *supra* notes 48, 50; Int'l Bhd. of Teamsters v. Pena, 17 F.3d 1478, 1486 (D.C. Cir. 1994).

international agreement" requiring post-hoc public comment to a related rule would be "unlikely to impact [it]."[405]

B. *Track Two: Irregular Functions*

In the second proposed analytical track, non-established or non-obvious invocations of the exception should be examined. When these harder questions arise is where a deeper analysis could begin. But the analysis should not be the problematic tests suggested in the Senate Report. Indeed, it would be a disservice to the text and purpose of the law if the skewed commentary in the reports became the law's text—or test. The now-illuminated history and origins of the exception show how problematic the reports' language was—and that it did not accurately reflect the actual legislative history or the understanding of the law when it was written or enacted. Given that, a series of non-weighted questions could help analyze the foreign affairs function, based on the true history and principles of the exception and the APA, and just like the non-justiciable political question doctrine does today.

Remember, the foreign affairs function originally stemmed from *Curtiss-Wright* and *Panama Refining*.[406] Looking to these cases to analyze the exception in non-obvious uses seems particularly apt since (1) rulemaking is often viewed as a quasi-legislative function on which the nondelegation doctrine particularly focuses; and (2) non-justiciability concerns center around the fact that the President may have confidential or other sources of information, or other close-hold considerations in the fields of military or foreign affairs.[407]

Moreover, because "foreign affairs" was imported into the text as a term of art, originating from these cases and concepts, it imported the understanding of that era and the cases and their rationale behind it. In other words, even if more recent or future case law dynamically changes how we understand the foreign affairs role of the Executive for nondelegation or non-justiciability principles, the APA statically locked in these understandings and source case law at the time it was enacted. Thus, cases where the term or its derivative were used prior to 1946, and to some degree, cases and examples of the same principles and rationales shortly after that era, should be given greater weight in analyzing the static term because it was what the drafters understood and what Congress enshrined into its new law for rulemaking and adjudication.

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405 E.B. v. U.S. Dep't of State, 583 F. Supp. 3d 58, 66 (D.D.C. 2022).

406 These cases also relied on prior ones to carry forward these understandings. *See supra* note 112 and accompanying text.

407 *See* cases cited *supra* note 112.

In light of this history and context, the core principles of key cases that undergirded the exception can be turned into the following questions for a non-obvious or irregular foreign affairs function analysis.

(1) Whether the functions at issue are at least partially given to the discretion of the Executive by the Constitution, subject to limitations that Congress may enact.[408]

(2) Whether a delayed effective date would harm foreign policy objectives, or analogously national defense objectives.[409]

Because a more limited exception to public information in the APA bill also used the same term to except public disclosures, and because the AG's CAP itself did not disclose certain functions it studied for similar reasons, the next question is suggested.

(3) Whether the facts or rationale needed to inform the reason for rulemaking are confidential or not suitable for public release.[410]

The key concept behind public notice and comment, to gather facts and information and to lay out rationale to ensure an agency's action is reasonable, may also then be inapplicable or illusory in certain cases, supporting not just the preceding question, but also the next one.

(4) Whether interested persons could meaningfully and informedly comment on the rulemaking, including on the underlying facts that necessitated it.[411]

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[408] *E.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 316 (1936) (discussing that powers affecting internal affairs were only partly carved out from the states, but foreign affairs powers implicate external sovereignty issues and have different constitutional considerations); *see also* Parker, *supra* note 80, at 593 n.106 ("Historically, the military and foreign affairs function of the chief of state were the starting point, so to speak, for Locke's and Montesquieu's separation of powers doctrines.").

[409] *E.g.*, *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320 (finding that the need to avoid embarrassment in international relations required according a higher degree of discretion and freedom, and warning that "premature disclosure" of confidential information would produce harmful results); *supra* note 239 (explaining Congress's concerns about the Office of Foreign Funds Control (later OFAC) being subject to a delay in its rules that would harm its objective).

[410] *See supra* note 328 and accompanying text; *infra* note 416 (citing a case that determined this as a definitely undesirable consequence).

[411] In 1976, ACUS and some members of Congress considered eliminating or narrowing the foreign affairs and other exceptions. *Administrative Procedure Act Amendments of 1976: Hearings on S. 796-800, S. 1210, S. 1289, S. 2407-2408, S. 2115, S. 2792, S. 3123, S. 3296-3297 Before the Subcomm. on Administrative Practice & Procedure of the S. Comm. on the Judiciary*, 94th Cong. 244–45, 299–301, 315, 473, 485 (1976). That effort was unsuccessful, and Congress retained the exceptions. But to defend the need for the foreign affairs exception at the time, the State Department wrote that "[r]ulemaking involving foreign affairs functions might in some instances be so permeated with foreign policy considerations that public participation would not be in the public interest. . . . A more detailed statement of the reason for finding that public participation would be contrary to the public interest might itself have to be kept secret in the interest of national defense or foreign policy." *Id.* at 300. The Nuclear Regulatory Commission argued that even when there were no confidentiality concerns when

Next, recall that the purpose of enacting the APA in the first place was to afford more Due Process protections to persons dealing with agencies who were thought of as too powerful and too final.[412]

(5) Whether the rule affects a liberty or property interest protected by the Due Process Clause.[413]

And since the same exception is present in adjudication, and rulemaking would be judicially reviewed anyway, additional questions would be based on whether the action was a non-justiciable political question. This aligns with the two core cases that influenced the exception, and the fact that the exception was initially written into a section of the bill that would preclude not just public participation in rulemaking, but also related judicial review.

(6) Whether the non-justiciable political question doctrine applies.[414]

The above question also applies because APA judicial review is itself based on 5 U.S.C. § 706(2), which is inapplicable when the action is committed to agency discretion by law.[415] That discretion is usually applicable to foreign affairs functions whose statutes, which authorize rulemaking, are written to confer broad discretion, also leading to the next question.

(7) Whether the rule is otherwise committed to agency discretion by law.

And finally, that every action could have an impact beyond our borders does not give it a pass to avoid public comment. The non-obvious effects

obligations that the United States had already agreed to were implemented by rulemaking, the later implementing stage would not be the proper forum for public participation. *Id.* at 473, 485–86.

412 *E.g.*, Shepherd, *supra* note 79, at 1621.

413 *E.g.*, The Vessel Abby Dodge v. United States, 223 U.S. 166, 176–77 (1912) (stating that there is no right to carry on foreign commerce). Due process is listed as a consideration because the whole point of the APA was that existing methods for notice and an opportunity to be heard, whether by an agency or by courts, were insufficient. *E.g.*, 62 A.B.A. REP. 789, 826, 834, 841 (1937) (Special Committee's report on its first draft of a bill that would become the APA); 61 A.B.A. REP. 720, 728, 733 (1936); 92 CONG. REC. 2045 (Mar. 8, 1946) (statement of Sen. Pat McCarran) (reprinting remarks by AG Clark to the ABA, who called the APA "a restatement of the law of due process for administrative agencies"); 92 CONG. REC. 2149 (Mar. 12, 1946) (statement of Sen. Pat McCarran) (stating that the APA is "designed to provide guaranties of due process in administrative procedure"); Davis & Gellhorn, *supra* note 80, at 516 (Walter Gellhorn describing Senator Logan's approach as: "We're seeking to require due process.").

414 *E.g.*, *supra* notes 110–12 and accompanying text; Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 429 (2012) ("There are . . . certain areas where the judiciary's proper role is seen as particularly limited. Foreign affairs is a prime example. . . . [D]eference in this area. . . . may also . . . reflect limitations on the judiciary's expertise and access to information, limitations that are thought to be especially acute in the area of foreign affairs." (citations omitted)). In the global arena, an undesirable consequence could stem from the "potentiality of embarrassment from multifarious pronouncements" by separate branches, which is a consideration in political questions. *E.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962).

415 5 U.S.C. § 701(a)(2).

of the rule, if apparent, or if submitted as a sealed declaration, should show a significant purpose to effect relations, including travel or commerce, with one country or with several, regionally or globally.

(8) Whether the rule could more than incidentally impact foreign relations or policy.

There are a few overlaps with these questions, and perhaps even some flaws and compounding. But they are suggested as a starting point. Notably, the so-called "undesirable consequences" look does not have to go away, it could merely be adjusted to evaluate the factors in the non-obvious track test.[416] But, because neither the foreign affairs exception itself nor the undesirable consequences test requires that the rule expressly state a nexus to either,[417] courts should be ready to allow in-camera declarations by Senate-confirmed or senior agency officials,[418] and not further distend the test to have it blend with the good cause exception. Regardless, by considering some or all of these questions, courts analyzing the function could keep with the text, history, tradition, and even purpose of the APA. But perhaps more importantly, courts could finally give predicable chalk lines to both agencies and the public, so both can better know what is out of bounds in advance, instead of later struggling to make sense of the foreign affairs exception.

Conclusion

The APA's foreign affairs exception does have a traceable history and understanding, rich with a term of art, abundant context, apparent purpose, and contemporaneous understandings. Unfortunately, without the benefit of any of that context, courts have struggled to make sense of the exception's scope to guard against its abuse. These struggles stemmed from a flawed understanding of legislative history and an overreliance on problematic text from the Senate and House reports. Steered askew, some courts have now effectively cabined the foreign affairs exception into a good cause exception, and look for an affirmative showing, even in quintessential foreign affairs functions with over fifty years of unquestioned practice. Hopefully now, with the benefit of deeper history

[416] There are no set standards for what undesirable consequences are, but the Court of Appeals for the Second Circuit has previously offered three examples, relating to (1) disclosing sensitive foreign intelligence, (2) publicly debating why foreign nationals are dangerous, and (3) the slow and cumbersome rulemaking process that would affect intelligence gathering and our defenses. Rajah v. Mukasey, 544 F.3d 427, 437 (2d Cir. 2008). These consequences all happen to fit into the factors suggested here.

[417] *Id.* at 437 ("There is, however, no requirement that the rule itself state the undesirable consequences." (citing Jean v. Nelson, 711 F.2d 1455, 1478 (11th Cir.1983))).

[418] The court did so in *Yassini v. Crosland*, 618 F.2d 1356, 1358, 1361 (9th Cir. 1980).

and explanation, courts and commentators can understand the aims of the APA and its foreign affairs exception, restore the original balance, and offer agencies and the affected public alike better and more practical expectations as to what is and what is not a foreign affairs function.