GOVERNING FOR IMPACT

Notice and Comment

Part II: Good Cause and Other Exceptions

May 2025
Issue Brief

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I. INTRODUCTION

When an agency wants to promulgate, amend, or rescind a regulation, the Administrative Procedure Act (APA) generally requires notice and comment: the agency must give the public notice of its plans in a proposed rule, invite and consider comments on that proposal, and then respond to those comments in any final rule.[1] These general requirements are subject to certain narrow exceptions.[2] We have elsewhere addressed how litigants might identify and challenge agencies' improper use of the APA exception for guidance documents.[3] Here, we focus on the APA's other exceptions,[4] which cover rules where an agency finds good cause to bypass notice and comment,[5] procedural rules,[6] rules concerning agency management and

[1] 5 U.S.C. § 553(b)-(c).

[2] *Id.* § 553(a), (b)(A)-(B); *see Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236 (D.C. Cir. 1994).

[3] 5 U.S.C. § 553(b)(A) ("interpretative rules" and "general statements of policy"); *see Notice and Comment, Part I: Legislative Rules and Guidance Documents*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[4] We do not cover notice-and-comment provisions in specialized statutory rulemaking schemes that "expressly" displace the APA's, 5 U.S.C. § 559, although we note that such exemptions "are not lightly to be presumed," *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *compare Mann Construction, Inc. v. United States*, 27 F.4th 1138, 1144–48 (6th Cir. 2022) (surveying cases and concluding that the Internal Revenue Service is not exempt from the APA's requirements under § 559) *with Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998) (concluding that procedures Congress provided for a certain Federal Aviation Administration rulemaking in 49 U.S.C. § 45301(b)(2) displaced the APA's).

[5] 5 U.S.C. § 553(b)(B). The APA separately requires final rules' effective dates to be at least 30 days after publication, *id.* § 553(d), subject to certain exceptions, *see id.* § 553(d)(1)-(3), including a different good cause exception, *id.* § 553(d)(3). Given the different purposes that they serve, courts have concluded that the good cause notice-and-comment exception in § 553(b)(B) and the good cause effective-date delay exception in § 553(d)(3) are subject to different standards, the latter somewhat more flexible. *See Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). Here, we address the notice-and-comment exception but note that the purpose of the effective-date delay requirement "is to give affected parties a reasonable time to adjust their behavior before the final rule takes effect," and so "[i]n determining whether good cause exists" under 5 U.S.C. § 553(d)(3), "an agency should 'balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling.'" *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (quoting *United States v. Gavrilovic*, 551 F.2d 1099, 1105 (8th Cir. 1977)).

[6] 5 U.S.C. § 553(b)(A) ("rules of agency organization, procedure, or practice").

personnel,[7] proprietary rules,[8] and rules concerning military and foreign affairs functions.[9]

The Trump administration has announced and undertaken plans to invoke certain of these exceptions broadly, notwithstanding their narrow scope. For example, in April 2025 President Trump directed agencies to invoke the good cause exception to rescind regulations that the agencies deem to be "facially unlawful."[10] Additionally, in March 2025 Secretary of State Marco Rubio purported to "determine" that all rulemakings concerning immigration and trade fall within the notice-and-comment exception for foreign affairs functions.[11] And on a single day in May 2025 the Department of Energy published thirteen direct final rules, a rulemaking procedure reserved for mundane or even trivial matters, on a wide range of topics.[12] More generally, the Trump administration's efforts to reduce the federal workforce[13] will leave fewer civil servants to draft rules and review public comments.

Notice-and-comment rulemaking requires substantial time and agency resources; notice-and-comment exceptions are understandably tempting. But courts have repeatedly reaffirmed "the firm understanding that the exceptions … 'will be narrowly construed and only reluctantly countenanced.'"[14] For good reason: notice-

[7] *Id.* § 553(a)(2) ("matter[s] relating to agency management or personnel").

[8] *Id.* § 553(a)(2) ("matter[s] relating to … public property, loans, grants, benefits, or contracts").

[9] *Id.* § 553(a)(1) (rules involving "a military or foreign affairs function of the United States").

[10] *Directing the Repeal of Unlawful Regulations*, Presidential Mem. (Apr. 9, 2025), https://perma.cc/YJF4-LT5X; *Rapid Response: Presidential Memorandum on "Directing the Repeal of Unlawful Regulations,"* Governing for Impact (Apr. 2025), https://governingforimpact.org/wp-content/uploads/2025/04/Rapid-Response-re-Directing-the-Repeal-of-Unlawful-Regulations-final.pdf.

[11] 90 Fed. Reg. 12,200 (Mar. 14, 2025).

[12] *See* https://www.federalregister.gov/documents/2025/05/16 (scroll down to "Energy Department"); *see also* Paul Ray, *Department of Energy Rulemakings Show What's in Store Under Trump's Deregulatory Initiative*, Global Policy Watch (May 13, 2025), https://www.globalpolicywatch.com/2025/05/department-of-energy-rulemakings-show-whats-in-store-under-trumps-deregulatory-initiative/.

[13] *See* Elena Shao & Ashley Wu, *The Federal Work Force Cuts So Far, Agency by Agency*, *N.Y. Times*, https://www.nytimes.com/interactive/2025/03/28/us/politics/trump-doge-federal-job-cuts.html (last updated May 12, 2025).

[14] *Am. Fed'n of Gov't Emp., AFL-CIO*, 655 F.2d at 1156 (quoting *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)).

and-comment procedures are meant to ensure "fair notice,"[15] "foster public participation[,] and facilitate reasoned decisionmaking."[16]

Litigants might challenge agency rules that invoke overbroad interpretations of the APA's notice and comment exceptions in seeking to vacate those rules.[17] This Issue Brief describes the exceptions and how litigants might identify rules that improperly rely on them. First, though, a brief note on agency practice and terminology: When an agency bypasses notice and comment, it often invokes more than one exception,[18] often calls the rule an "interim final rule," and sometimes requests post-promulgation comment.[19]

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[15] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

[16] *Humane Soc'y of the United States v. United States Dep't of Agric.*, 41 F.4th 564, 568 (D.C. Cir. 2022) (quoting *American Hospital Association v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987)); *see also Azar v. Allina Health Servs.*, 587 U.S. 566, 582 (2019) (explaining that notice and comment "gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision").

[17] 5 U.S.C. § 706(2)(D) requires courts to "hold unlawful and set aside agency action[s]" taken "without observance of procedure required by law." Typically, failure to follow notice-and-comment procedures is a "fundamental flaw" that requires vacatur of the rule. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009). For more about remedies, see *Remedies*, Governing for Impact (May 2025), https://governingforimpact.org/apa-library/.

[18] *See, e.g.*, 89 Fed. Reg. 48,710, 48,759 (June 7, 2024) (good cause and foreign affairs).

[19] *See, e.g.*, *id.*; *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 665–67 (2020). Leaning on *Little Sisters*, the government may argue that a challenge to an agency's invocation of good cause to publish an interim final rule that requests comment is mooted when the agency subsequently publishes a final rule. *See* 591 U.S. at 686 & n.14. In resisting such an argument, litigants might look to established D.C. Circuit caselaw explaining that "'permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way.'" *E.B. v. U.S. Dep't of State*, 583 F. Supp. 3d 58, 68 (D.D.C. 2022) (quoting *New Jersey*, 626 F.2d at 1049) (brackets omitted). Among other things, "if courts allowed the 'provision' of 'post hoc' notice and comment to 'cure' an agency's failure to follow the APA's notice-and-comment procedures,' those requirements would be 'virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act.'" *Id.* (quoting *New Jersey*, 626 F.2d at 1049) (brackets omitted). In other words, "the timing of the procedures" matters. *Id.* In addition, as scholars have explained, given certain unique features of the rulemaking at issue in *Little Sisters* "the Court has plenty of room" in a future case "to distinguish the circumstances of a more conventional interim-final rule." Kristin E. Hickman & Mark R. Thomson, *Textualism and the Administrative Procedure Act*, 98 Notre Dame L. Rev. 2071, 2102 (2023).

II. GOOD CAUSE

5 U.S.C. § 553(b)(B) permits forgoing notice and comment if the agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[20] To invoke the good cause exception, therefore, an agency must set forth its rationale in its rule, and if tested in court, the agency bears the burden.[21]

Whatever the precise standard (whether de novo or somewhat more deferential),[22] lower courts have subjected agencies' rationales to "'meticulous and demanding'" review,[23] cognizant that while the good cause exception is "an important safety valve to be used where delay would do real harm," it should not be used "to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them."[24] In addition, while "no particular catechism is necessary to establish good cause, something more than an unsupported assertion is required."[25] "To hold otherwise would permit the exception[] to carve the heart out of the statute."[26] At minimum, then, as the Supreme Court recently affirmed, agencies must point to "something specific … to forgo notice and comment."[27]

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[20] 5 U.S.C. § 553(b)(B). For comprehensive treatments on the good cause exception from an agency, see Department of Transportation, Good Cause to Waive Notice and Comment (last updated June 8, 2022), https://www.transportation.gov/regulations/good-cause-waive-notice-and-comment; and from the Congressional Research Service, see Jared P. Cole, Cong. Rsch. Serv., R44356, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action* (2016) (hereinafter "CRS Report"), https://www.congress.gov/crs-product/R44356.

[21] *See, e.g.*, *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113–14 (2d Cir. 2018); *N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987).

[22] *See* CRS Report at 13–16 (addressing different circuits' approaches).

[23] *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (quoting *New Jersey*, 626 F.2d at 1046).

[24] *N. Arapahoe Tribe*, 808 F.2d at 751 (quotation omitted).

[25] *Sorenson Commc'ns*, 755 F.3d at 707; *see id.* at 706 (highlighting that the agency made "no factual findings supporting the reality of the threat" that it articulated).

[26] *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 800 (D.C. Cir. 1983).

[27] *Biden v. Missouri*, 595 U.S. 87, 96 (2022) (quotation omitted).

While the Court "has never precisely defined what an agency must do to demonstrate good cause,"[28] consistent with the APA's legislative history lower courts have often interpreted the good cause exception as "generally limited to 'emergency situations, or where delay could result in serious harm;'"[29] rejected the notion that the exception is an "'escape clause[]' that may be arbitrarily utilized at the agency's whim;"[30] and interpreted each of the exception's three prongs separately.[31] We therefore address each "exacting standard[]" in turn.[32]

A. "Impracticable"

"Impracticality is fact and context specific, but is generally confined to emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety."[33] Courts have articulated an arguably broader standard based on the APA's legislative history; for example, in one case the D.C. Circuit quoted the AG Manual for the proposition "'that a situation is 'impracticable' when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required

[28] *Id.* at 106 (Alito, J., dissenting).

[29] *NRDC*, 894 F.3d at 114 (quoting *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)); *see Am. Fed'n of Gov't Emp., AFL-CIO*, 655 F.2d at 1156 (the exception is "limited to emergency situations" (citing S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* Administrative Procedure Act, Legislative History, 79th Cong. 1944-46 at 200)); *see also Missouri*, 595 U.S. at 106 (Alito, J., dissenting) (citing Mack *Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012), and *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001)); *N. Arapahoe Tribe*, 808 F.2d at 751 ("The exception is 'essentially an emergency procedure.'" (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982))).

[30] *Am. Fed'n of Gov't Emp., AFL-CIO*, 655 F.2d at 1156 (citing S. Rep. No. 752, 79th Cong. 1944-46 at 200, 201).

[31] *See, e.g.*, *NRDC*, 894 F.3d at 114; *Mack Trucks*, 682 F.3d at 94; *N. Arapahoe Tribe*, 808 F.2d at 751 (quoting S. Rep. No. 752); *see also* Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30–31 (1947) (hereinafter "AG Manual"), https://archive.org/details/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947/ (addressing the exception's three prongs, which "are written in the alternative," one-by-one). The Supreme Court "gives some deference to the [AG] Manual 'because of the role played by the Department of Justice in drafting the legislation.'" *Kisor v. Wilkie*, 588 U.S. 558, 582 (2019) (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 546 (1978)); *see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (collecting cases).

[32] *NRDC*, 894 F.3d at 114.

[33] *Id.* (citing *Mack Trucks*, 682 F.3d at 93 (collecting cases)); *see Sorenson Commc'ns*, 755 F.3d at 706 (collecting cases).

in [§ 553].'"[34] But that case immediately provided an emergency situation as an example — "when a safety investigation shows that a new safety rule must be put in place immediately"[35] — and the D.C. Circuit has otherwise rejected an agency's invocation of the impracticable prong where an IFR did "not stave off any imminent threat to the environment or safety or national security" and did "not remedy any real emergency at all."[36] Where there may be "[c]ause for concern" but "hardly a crisis," notice and comment is not impracticable.[37]

Agencies facing deadlines for their rulemakings — or potentially heeding the urgency expressed in President Trump's April 2025 memorandum, notwithstanding that it does not mention the impracticable prong[38] — sometimes invoke that prong, but courts have repeatedly held that "[a] tight 'statutory, judicial, or administrative deadline' alone … 'by no means warrant[s] invocation of the good cause exception.'"[39] The D.C. Circuit has even gone so far as to reject an agency's argument that notice and comment was impracticable where the court permitted the agency only 90 days to issue a rule effectuating the court's prior remand.[40] In addition, whether in the face of a deadline or not, an agency's delay in acting can defeat its invocation of the impractical prong: "[q]uite simply," "'an emergency of the agency's own making'" cannot "'constitute good cause.'"[41]

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[34] *Util. Solid Waste Activities Grp.*, 236 F.3d at 754 (brackets in the original) (quoting AG Manual at 30); *see N. Arapahoe Tribe*, 808 F.2d at 751 (quoting a similar formulation from S. Rep. No. 752 at 14).

[35] *Util. Solid Waste Activities Grp.*, 236 F.3d at 754; *see Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 n.2 (9th Cir. 1992) (similar).

[36] *Mack Trucks*, 682 F.2d at 93.

[37] *Sorenson Commc'ns*, 755 F.3d at 707.

[38] *See supra* note 10.

[39] *Am. Pub. Gas Ass'n v. United States Dep't of Energy*, 72 F.4th 1324, 1339 (D.C. Cir. 2023) (citation omitted, second brackets in the original) (first quoting *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981) (per curiam), then quoting *Methodist Hospital*, 38 F.3d at 1236); *see NRDC*, 894 F.3d at 114–15. Only where a congressional deadline was "'very tight,'" the statute was "'particularly complicated,'" and Congress "'expressed its clear intent that APA notice and comment procedures need not be followed'" has the D.C. Circuit approved an agency's invocation of good cause based on an impending deadline. *Am. Pub. Gas Ass'n*, 72 F.4th at 1339 (quoting *Methodist Hospital*, 38 F.3d at 1236–37).

[40] *Id.* at 1339–40.

[41] *NRDC*, 894 F.3d at 115 (brackets omitted) (quoting *NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004)); *see Missouri*, 595 U.S. at 96–97 (acknowledging that "delay" can be "inconsistent with" a "finding of good cause," yet concluding that in the context of the COVID-19 response a two-month delay was not); *Council of S. Mountains*, 653 F.2d at 581.

B. "Unnecessary"

The unnecessary prong "'is confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry … and to the public.'"[42] The APA's legislative history states that "'[u]nnecessary'" means notice-and-comment procedures are "'unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved.'"[43] The fact that a rule may be of limited duration or effect is irrelevant: "if a rule's interim nature were enough … , then agencies could issue interim rules of limited effect for any plausible reason, irrespective of the degree of urgency and the good cause exception would soon swallow the notice and comment rule."[44]

Courts have held that the unnecessary prong applies where an agency issues a rule to implement a court decision.[45] More broadly, when agencies do not expect adverse comments they sometimes issue so-called "direct final rules"—rules not preceded by a proposed rule and accompanied by a request for comment—in at least implicit reliance on the unnecessary prong.[46] If a significant adverse comment is submitted and the agency does not withdraw the rule, however, litigants might challenge it.

President Trump's April 2025 memorandum suggests that the unnecessary prong applies to agencies' rescissions of rules that they have determined are unlawful.[47] While there is admittedly "some superficial appeal to the … argument that a provision which was promulgated in error is void *ab initio* and can be deleted without more

[42] *NRDC*, 894 F.3d at 114 (quoting *Mack Trucks*, 682 F.3d at 84).

[43] *N. Arapahoe Tribe*, 808 F.2d at 751 (quoting S. Rep. No. 752 at 14); *see* AG Manual at 31 (similar).

[44] *Mack Trucks*, 682 F.2d at 94 (quotations omitted).

[45] *See, e.g.*, *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 134–35 (D.C. Cir. 2015); *Ctr. for Biological Diversity v. Zinke*, 369 F. Supp. 3d 164, 180 (D.D.C. 2019), *aff'd sub nom. Friends of Animals v. Bernhardt*, 961 F.3d 1197 (D.C. Cir. 2020).

[46] *See, e.g.*, 14 C.F.R. § 11.13; 49 C.F.R. § 553.14; 90 Fed. Reg. 20,766 (May 16, 2025); *see generally* Ronald M. Levin, *Direct Final Rulemaking*, 64 Geo. Wash L. Rev. 1 (1995); Mark Squillace, *Report for the Administrative Conference of the United States: Best Practices for Agency Use of the Good Cause Exemption for Rulemaking* 29–31 (2024), https://www.acus.gov/document/best-practices-agency-use-good-cause-exemption-rulemaking-final-report.

[47] *See supra* note 10.

ado,"[48] the D.C. Circuit has rejected that argument as "untenable," including because it "ignore[s] the fact that the question whether the regulations are indeed defective is one worthy of notice and an opportunity to comment."[49]

C. "Contrary to the Public Interest"

Finally, the contrary to the public interest prong "is met only in the rare circumstance when ordinary" notice-and-comment "procedures — generally presumed to serve the public interest — would in fact harm that interest."[50] It "contemplates real harm to the public, not mere inconvenience to the agency."[51] An example that has been recognized by courts and that appears in the AG Manual concerns situations "when the notice provided by notice and comment would enable manipulation," as in the context of price or other financial controls, such that "surprise to the parties is necessary."[52]

Notwithstanding the suggestion in President Trump's April 2025 memorandum, rescissions of rules an agency deems unlawful are not likely to qualify.[53] The question is not, as the administration seems to believe, whether retaining a purportedly unlawful rule is contrary to the public interest, but instead whether *providing notice and comment before rescinding that rule* is contrary to the public interest. The President's memorandum provides no basis for such a conclusion, and it is unlikely that agencies following the memorandum will be able to substantiate it.

[48] *Nat'l Treasury Emps. Union v. Cornelius*, 617 F. Supp. 365, 371 (D.D.C. 1985).

[49] *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982), *aff'd sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

[50] *Mack Trucks*, 682 F.2d at 95.

[51] *Action on Smoking & Health*, 713 F.2d at 802.

[52] *NRDC*, 894 F.3d at 114 n.13 (citing *Util. Solid Waste Activities Grp.*, 236 F.3d at 755); *see* AG Manual at 31.

[53] *See supra* note 10.

III. PROCEDURAL RULES

5 U.S.C. § 553(b)(A) exempts "rules of agency organization, procedure, or practice" from notice-and-comment requirements. This "limited carveout is intended for 'internal house-keeping measures organizing agency activities,'" thereby ensuring that agencies have flexibility "'in organizing their internal operations.'"[54] While among "the hardest to define" of the APA's exceptions,[55] "the critical feature of a rule that satisfies the so-called procedural exception is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency."[56] In contrast, where a rule "imposes substantive burdens, … encodes a substantive value judgment, … trenches on substantive private rights or interests, … or otherwise alters the rights or interests of parties, it is not procedural."[57]

In *AFL-CIO v. NLRB*, the D.C. Circuit applied this test to certain provisions of a National Labor Relations Board regulation governing "how the Board supervises representation elections that determine whether a union will represent a group of employees."[58] In a comprehensive opinion, the court held that three of the challenged provisions were substantive rules outside the scope of the procedural exception because they affected a union's "substantive interest," "cut back on an employer's legal duty," and established "new substantive criteria … that directly affect regulated parties' interests."[59] By contrast, the court concluded that two of the challenged provisions were procedural because they were "'primarily directed toward' internal agency operations" in that they "govern[ed] the presumptive timing of when" a Board official would "resolve election-related disputes prior to an election."[60] Litigants

[54] *AFLCIO v. NLRB*, 57 F.4th 1023, 1034 (D.C. Cir. 2023) (first quoting *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987), and then quoting *Mendoza v. Perez*, 754 F.3d 1002, 1047 (D.C. Cir. 2014)).

[55] *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980).

[56] *AFLCIO*, 57 F.4th at 1034 (quotation omitted).

[57] *Id.* at 1034–35 (quotation omitted).

[58] *Id.* at 1035.

[59] *Id.* at 1035; *see id.* at 1035–43.

[60] *Id.* at 1305 (quoting *Mendoza*, 754 F.3d at 1023); *see id.* at 1043–46.

challenging an agency's invocation of the procedural exception might mine *AFL-CIO* and the precedents it discusses for support.

IV. AGENCY MANAGEMENT AND PERSONNEL

5 U.S.C. § 553(a)(2) exempts from notice and comment rules "to the extent that there is involved … a matter relating to agency management or personnel."[61] As with the other § 553(a) exceptions described below, the D.C. Circuit has held that the statute's prefatory "to the extent that there is involved" language indicates that this exception applies "whenever the 'named subjects'"—here, agency management or personnel—"are 'clearly and directly' implicated."[62] And somewhat like the procedural exception described above, the D.C. Circuit has indicated that this exception applies to rules that do not have a "substantial effect on persons outside the agency."[63]

Rules that tend to fall inside the exception include hiring standards, notwithstanding their incidental effects on applicants,[64] and many provisions of agency personnel manuals.[65] In contrast, the Federal Circuit held that rules about the removal of Administrative Law Judges did not qualify for the exception because of the "broader interest of the public in having private rights adjudicated by persons who have some independence from the agency opposing them."[66]

[61] 5 U.S.C. § 553(a)(2).

[62] *Stewart v. Smith*, 673 F.2d 485, 497 (D.C. Cir. 1982) (quoting *Humana of S.C., Inc. v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978)).

[63] *Id.* at 498–99; *see* AG Manual at 18 ("If a matter is solely the concern of the agency proper, and therefore does not affect the members of the public to any extent, there is no" notice-and-comment "requirement.").

[64] *Stewart*, 673 F.2d at 498.

[65] *Ysla v. United States*, 171 Fed. Cl. 333, 344 (2024).

[66] *Tunik v. Merit Sys. Prot. Bd.*, 407 F.3d 1326, 1344 (Fed. Cir. 2005).

V. PROPRIETARY RULES

5 U.S.C. § 553(a)(2) also exempts from notice and comment rules "to the extent that there is involved … a matter relating to … public property, loans, grants, benefits, or contracts."[67] While "the D.C. Circuit has said little about this exception,"[68] it has observed that, notwithstanding the general good-governance advantages of notice and comment, the proprietary exception "still prevails when 'grants,' 'benefits' or other named subjects are 'clearly and directly' implicated," allowing the government to act in its proprietary interests without being encumbered by public procedures.[69] "Even construed narrowly," the exception "cuts a wide swath through the safeguards generally imposed on agency action."[70]

Perhaps for these reasons, several agencies maintain so-called "Richardson waivers," voluntarily waiving reliance on the exception.[71] Agencies initially adopted these waivers at the recommendation of the Administrative Conference of the United States, which argued for notice and comment notwithstanding the exception because the rules the exception covers "bear heavily upon nongovernmental interests" and, even at the time, encompassed hundreds of billions of dollars of government spending and assets.[72] ACUS also maintained that forgoing "generally applicable procedural requirements is unwise."[73]

Yet agencies may withdraw Richardson waivers, including in ways that could give rise to challenges against rules relying on the withdrawals. In March 2025, for example, in a short notice with scant reasoning the Secretary of Health and Human Services

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[67] 5 U.S.C. § 553(a)(2).

[68] *Alphapointe v. Dep't of Veterans Affairs*, 475 F. Supp. 3d 1, 14 (D.D.C. 2020).

[69] *Humana of S.C.*, 590 F.2d at 1082.

[70] *Id.*

[71] *See, e.g.*, 29 C.F.R. 2.7 (Department of Labor); 36 Fed. Reg. 13,804 (July 24, 1971) (Department of Agriculture); 36 Fed. Reg. 16,716 (Aug. 25, 1971) (Small Business Administration); 44 Fed. Reg. 1,606 (Jan. 5, 1979) (Department of Housing and Urban Development); 36 Fed. Reg. 8,336 (May 4, 1971) (Department of the Interior); 36 Fed. Reg. 13,851 (July 27, 1971) (Department of the Treasury).

[72] Administrative Conference of the United States, *Recommendation 69-8 Elimination of Certain Exemptions from the APA Rulemaking Requirements* (Oct. 21-22, 1969), https://www.acus.gov/sites/default/files/documents/69-8.pdf.

[73] *Id.*; *see* Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. Pa. L. Rev. 540, 553–70 (1970).

rescinded the agency's Richardson waiver, citing the "costs" to the agency "and the public" of not relying on the proprietary exception and the need for "efficient operation" and "flexibility to adapt quickly to legal and policy mandates."[74] Litigants therefore might challenge not only inappropriate invocations of the proprietary exception generally but also those specifically relying on the exception with citation to an arbitrary and capricious withdrawal of a Richardson waiver. Such a withdrawal might not adequately explain the good reasons for shifting to now relying on the exception, or might not address significant reliance interests in the old policy.[75]

VI. MILITARY AND FOREIGN AFFAIRS FUNCTIONS

involved … a military or foreign affairs function of the United States."[76] As with the other § 553(a) exceptions described above, courts generally agree that rules fall within this exception "to the extent that" a military or foreign affairs function of the United States "is clearly and directly involved."[77]

A. Military Function

Few cases interpret the military function exception. The Ninth Circuit has instructed that its "contours are defined by the specific *function* being regulated," not, for example, whether the *agency* in question is military or civilian.[78] That court held that a regulation governing the conduct of civilian contractors who enabled a military function — nuclear weapons research and development — did not "directly involve a

[74] 90 Fed. Reg. 11,029 (Mar. 3, 2025).

[75] *See FCC v. Fox Television Stations, Inc.*, 515 U.S. 502, 515 (1999).

[76] 5 U.S.C. § 553(a)(1).

[77] *Humana of S.C.*, 590 F.2d at 1082; *see City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010). *But see E.B.*, 583 F. Supp. 3d at 65 (suggesting that the Second Circuit's approach, discussed below, conflicts with this standard).

[78] *Indep. Guard Ass'n of Nevada, Loc. No. 1 v. O'Leary on Behalf of U.S. Dep't of Energy*, 57 F.3d 766, 769 (9th Cir.) (emphasis added), *opinion amended on denial of reh'g*, 69 F.3d 1038 (9th Cir. 1995).

military function."[79] By contrast, courts have found that a rule defining substantive criminal offenses in the "special and exclusive system of military justice"[80] and a rule establishing a "temporary security zone comprised of a combined area of ocean and land adjacent to a bombing range at a military installation"[81] did fall within the exception.

B. Foreign Affairs Function

Circuits apply different tests to determine whether rules qualify for the foreign affairs function exception.[82] Briefly, some courts, including the Ninth, Eleventh, and Federal Circuits, "permit the exception to be invoked when notice-and-comment procedures 'would provoke definitely undesirable international consequences.'"[83] The Second Circuit has stated that while "a case-by-case" application of that test "may well be necessary" in "areas of law like immigration that only indirectly implicate international relations," the exception may apply more categorically to "quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign missions."[84]

The D.C. Circuit has not adopted the "definitely undesirable international consequences" test, and a comprehensive decision by Judge Kelly on the District Court for the District of Columbia, *E.B. v. Department of State*, criticized it.[85] Rather, with reference to the plain meaning of the APA's text and the admittedly sparse D.C. Circuit caselaw, Judge Kelly concluded that "to be covered by the foreign affairs function exception, a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations."[86] As examples of "heartland cases," he cited a rule that "implements an international agreement between the

[79] *Id.* at 770.

[80] *United States v. Mingo*, 964 F.3d 134, 140 (2d Cir. 2020) (quotation omitted).

[81] *United States v. Ventura-Melendez*, 321 F.3d 230, 233 (1st Cir. 2003).

[82] *See* Stephen Migala, *The Lost History of the APA's Foreign Affairs Exception*, 31 Geo. Mason L. Rev. 119, 129–30 (2023).

[83] *E.B.*, 583 F. Supp. 3d at 64 (quoting *Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985)) (collecting cases).

[84] *City of New York*, 618 F.3d at 202.

[85] *E.B.*, 583 F.3d at 63 & n.5, 64–65.

[86] *Id.* at 64.

United States and another sovereign state"—noting that "that is the only circumstance to which the D.C. Circuit has applied" the exception[87]—and "rules that regulate foreign diplomats in the United States."[88] By contrast, "courts of appeals have generally rejected the idea that the exception applies just because a rule implicates foreign affairs … or touches on national sovereignty."[89]

Applying this test, Judge Kelly rejected the State Department's invocation of the exception with respect to a rule requiring individuals applying to diversity visa programs to possess a valid passport.[90] The rule did not "itself involve the mechanisms through which the United States conducts relations with foreign states" and it was not "the product of any agreement between the United States and another country."[91] And even though the rule was "a small part of a broader program" to "help burnish the United States' reputation in countries all around the world," that did not suffice: "any speculative, indirect effect that program may have on the United States' diplomacy does not clear the high bar necessary to dispense with notice-and-comment rulemaking under the foreign affairs function exception."[92]

Notwithstanding their differences, courts generally approach application of the foreign affairs function exception to immigration rules skeptically, explaining that "[t]he dangers of an expansive reading of the … exception in that context are manifest."[93] While courts "[o]n occasion" have applied the "exception to immigration rules," it "'would become distended if applied to [immigration] actions generally, even though [they] typically implicate foreign affairs.'"[94] Nonetheless, in March 2025, the Secretary of State issued an order that purported to

[87] *Id.* at 65 (citing *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478 (D.C. Cir. 1994)).

[88] *Id.* (citing *City of New York*, 618 F.3d at 175).

[89] *Id.* at 67 (quotations omitted) (citing *City of New York*, 618 F.3d at 202; *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995); *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980); *Jean v. Nelson*, 711 F.2d 1455, 1478 (11th Cir. 1983)).

[90] *Id.* at 59–60.

[91] *Id.* at 66.

[92] *Id.* at 67.

[93] *City of New York*, 618 F.3d at 202 (citing *Yassini*, 618 F.2d at 1360 n.4); *see, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775–76 (9th Cir. 2018) (collecting cases).

[94] *Zhang*, 55 F.3d at 744 (quoting *Yassini*, 618 F.2d at 1360 n.4) (collecting cases).

> determine that all efforts, conducted by any agency of the federal government, to control the status, entry, and exit of people, and the transfer of goods, services, data, technology, and other items across the borders of the United States, constitute a foreign affairs function of the United States under the Administrative Procedure Act, 5 U.S.C. 553, 554.[95]

Set aside whether the Secretary of State has authority to make a "determin[ation]" for all "agenc[ies] of the federal government." If any agency rule relies on this determination to bypass notice and comment, litigants might bring successful challenges. It runs headlong into perhaps the one thing courts agree on in this context: the foreign affairs function does not apply categorically to all immigration rules.

VII. CONCLUSION

The Trump administration is poised to make policy through strained readings of notice-and-comment exceptions and may be further inclined to do so as it grapples with the effects of a significantly reduced federal workforce. But those exceptions are "narrowly construed and only reluctantly countenanced,"[96] and so litigants might carefully consider whether such actions should have been issued via notice and comment and therefore are subject to invalidation under the APA.

[95] 90 Fed. Reg. 12,200 (Mar. 14, 2025).

[96] *Am. Fed'n of Gov't Emp., AFL-CIO*, 655 F.2d at 1156 (quotation omitted).