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**From:** <JSL26@aol.com> *Lubbers*  
**To:** <GSM@nrc.gov> *GMizuno, OGC*  
**Date:** 7/17/03 6:34PM  
**Subject:** Re: Questions on Military and Foreign Affairs exception to APA Section 553

Hi Geary--You do have my correct number. I may be in my office in late morning, but if not Friday, then late morning Monday.

There is very little caselaw on the M/FA exemption. Of course it also overlaps with the "good cause" exemption--in this circumstance the "contrary to the public interest" prong. This may be because the relevant agencies don;t push the envelope too much and potential challengers are reluctant to go to court on these matters.

At first blush, it would seem that such "safeguards information" relating to homeland security would fit into the exemption. If the exemption is properly invoked than all of those possible approaches you outline would seem to be appropriate also. I don;t think the exemption only covers the DOD and State Department. On the other hand it doesn't cover any and every rule that DOD or State issues. The key is the "function" not the agency.

The seminal (but now rather dated article is Bonfield, Arthur E., "'Military and foreign affairs function' rulemaking under the APA." 71 MICH. L. REV. 221 (1972).

2. Can you provide us with contacts at Dept. of Justice and in one or more of the armed services who have experience > in invoking the military affairs > exception?

Not offhand. I doubt there is anyone in DOJ with a lot of experience--though you might want to check and see if the lawyer who > handled the DOE case is > still there. As for DOD, I would call DOD's General Counsel's Office and > ask for the deputy who handles administrative law matters.> You might also > check with the GC of the new Dep't of Homeland Security.

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